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September 7, 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 Reply Brief in the above referenced docket. Also enclosed is a 3 ½" diskette with the document on it in MS Word 2000 format.

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

FRS/amb
Enclosures
cc: Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint against KMC Telecom III LLC, KMC V, Inc., and KMC Data LLC for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs and for alleged violation of Section 364.16(3)(a), F.S., by Sprint-Florida, Incorporated.	DOCKET NO. 041144-TP

POST-HEARING REPLY BRIEF OF KMC TELECOM III LLC, KMC V, INC., AND KMC DATA LLC.

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KMC Telecom III LLC ("KMC III"), KMC V, Inc. ("KMC V"), and KMC Data LLC. (collectively "KMC") through undersigned counsel, submit this post-hearing reply brief in the above-styled docket involving KMC and Sprint-Florida Incorporated ("Sprint").

In its Brief ("Sprint Brief" or "Spr. Br."), Sprint mischaracterizes the record evidence and regulatory precedent and attempts to distract the Commission, by resorting to *ad hominem* attacks against KMC's expert, (Spr. Br., 21), and dwelling on trivialities such as a name change of PointOne. No amount of argument justifies overlooking Sprint's failure to meet *its* burden of proof. Sprint's perceptions and positions are not the measure by which the Commission should determine this matter or judge KMC's service. Behind Sprint's bluster is a void left by a lack of investigation of the facts. The PSC must not speculate what the evidence may have been had Sprint prosecuted its claims thoroughly, but focus on *Sprint's failure to show* KMC was wrong to treat PointOne as an enhanced service provider ("ESP") and an end user customer, *Sprint's failure to show* the traffic in question was interexchange traffic subject to access charges, *Sprint's failure to show* KMC *knowingly* delivered to Sprint interexchange traffic subject to access charges over local trunks violating state law, Sprint's tariff, and the interconnection agreements, and *Sprint's failure to support* the damages it seeks by a preponderance of the evidence, withholding data that would permit independent evaluation of the same.

In this Reply Brief, space allows KMC to focus only on the most serious shortcomings of Sprint's arguments. KMC rests on its opening brief on Issues 3, 9, and 10, in their entirety, and in repsonse to those arguments from the Sprint Brief not addressed here.

ISSUE 1: THE PUBLIC SERVICE COMMISSION'S JURISDICTION TO ADDRESS THE CLAIMS

In its discussion under Issue No. 1, Sprint's claim that the Commission has jurisdiction over this matter overlooks the most significant detail: the traffic at issue is almost exclusively that of a single end user customer who sent IP-enabled services traffic over local PRIs for

termination in the Ft. Myers and Tallahassee markets. KMC Br. 9, 24-25. KMC demonstrated that the FCC long ago held that IP-enabled enhanced services traffic is *by nature* inherently *interstate*,[1] and more recently reserved to itself the determination whether and how specific IP-enabled services, such as the VoIP traffic of KMC's customer PointOne, should be classified and regulated. *See* KMC Br. 5-7. Last year, *after* Sprint filed its Complaint, the FCC explained that "this Commission [the FCC], *not the state commissions*, has the responsibility and obligation to decide whether certain regulations apply to other IP-enabled services . . .." *Vonage Declaratory Ruling*, 19 FCC Rcd. 22404, ¶ 1 (2004)(emphasis added). To date, the FCC, exerting its jurisdiction over IP-enabled traffic, has declined to extend access charges generally to any class of such services, *e.g.,* VoIP, instead issuing narrow decisions that focus on the regulatory status and treatment of specific IP-enabled services. Ironically, Sprint itself underscores the jurisdiction of the FCC to determine the regulatory treatment of IP-enabled services and, thus, the compensation issues raised by the Complaint, by relying heavily upon the FCC's two AT&T declaratory rulings. Sprint cites this order on *no fewer than* 36% of its pages dealing with the critical Issues Nos. 1 and 4 through 6. *See e.g.* Spr. Br. 7-8, 16, 24, 29-31, 35-37.

Currently, the FCC has pending a major rulemaking proceeding addressing the regulatory treatment of IP-enabled services, including VoIP. *IP-Enabled Services*, 19 FCC Rcd. at 4904, ¶¶ 61-62 (soliciting comment on whether VoIP should be subject to access charges). Failure to recognize the FCC's primary jurisdiction to determine the proper regulatory treatment of PointOne's traffic presents significant risk of conflicting rulings from this Commission and the FCC and disparate, irreconcilable policies: a risk that will be avoided if the PSC declines to exercise jurisdiction here and dismisses the Complaint. Just in the past month, two federal courts presented with this very same question recognized the risk of conflicting holdings and the

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[1] *See, e.g., MTS and WATS Market Structure*, 97 FCC2d 682, 715 ¶ 83; *ESP Exemption,* 3 FCC Rcd. 2631, 2631, ¶ 2. See the attached Appendix identifying the full citations for the shorts forms used.

importance of FCC review whether specific IP-enabled services are subject to access charges, deferring to the FCC's jurisdiction. *Frontier Telephone* at 10-11 (attached hereto as Exhibit "A"); *Southwestern Bell* at 8 (noting that "[t]he FCC's ongoing Rulemaking proceedings concerning VoIP and other IP-enabled services make deferral particularly appropriate in this instance," dismissing a much-publicized SBC complaint against PointOne for access charges); (attached hereto as Exhibit "B"). This Commission, too, should recognize the FCC's jurisdiction over the issues Sprint's Complaint raises, avoid the risk of irreconcilable holdings and policies, and dismiss the Complaint without prejudice for lack of jurisdiction.

ISSUE 2: WHETHER KMC DATA LLC AND KMC V, INC. ARE PROPERLY PARTIES

Sprint concedes the primary basis for naming KMC Data and KMC V in the Complaint is that they are certificated in Florida and parties to interconnections agreements. Spr. Br. 9. The flaws in Sprint's "logic" are monumental. Moreover, Sprint has mustered no evidence that would make either party even potentially liable. The claims against them should be dismissed.

Simply being a party to an interconnection agreement is neither an element of nor particularly relevant to any of Sprint's claims. Underscoring the point, neither KMC Data's nor KMC V's initial agreement with Sprint was in effect until *after* PointOne migrated its business from KMC in June 2004, as the Commission's own records reveal. *See* Commission Clerk Document No. 03491 (Apr. 8, 2005); Document No. 03490 (Apr. 8, 2005).

After full opportunity to conduct discovery, Sprint cites to *no* evidence tying KMC Data or KMC V to actions making either party liable under the three counts of the Complaint. Sprint admits that it "has no evidence [KMC Data provides service to customers in Florida], but still includes KMC Data as a party *because it has entered into a Florida interconnection agreement with Sprint*." Spr. Br. 9-10 (emphasis added). It is amazing that Sprint refuses to voluntarily dismiss KMC Data after conceding that KMC Data did not have any customers and did not

exchange traffic with Sprint in Florida. As to KMC V, in addition to KMC V's after-the-fact interconnection agreement, Sprint relies on the ownership of the numbers assigned to the PointOne PRIs and the use of KMC V's OCNs when KMC III ordered interconnection trunks. *Id.*, 10-11. But Sprint has not demonstrated such allegations incriminate KMC V. These facts do not amount to the sending of traffic to Sprint, which is fundamental to *each of* Sprint's claims. Given Sprint's failure to demonstrate that KMC Data and KMC V sent traffic to Sprint (leaving aside the other details of Sprint's claims), its claims, by definition, have no merit against either of these two carriers. They should be summarily rejected.[2]

ISSUE 4: DETERMINING JURISDICTIONAL NATURE AND COMPENSATION OF TRAFFIC

End Points Do Not Definitively Determine Jurisdiction and Compensation. Sprint's simple maxim — a call's jurisdiction is dictated by the endpoints, and the jurisdiction determines compensation – cannot be universally and uncritically applied. *See* Spr. Br.15-18. Unreflective application of this test fails to mirror today's regulatory landscape because all IP-enabled enhanced services traffic, regardless of the endpoints, is jurisdictionally interstate, *i.e.*, subject to the FCC's regulatory jurisdiction, as discussed under Issue 1, *supra. See also* KMC Br. 5-8.

Significantly, compensation for traffic – a separate question from jurisdiction *per se* – is subject to a similar outcome: regardless of the end points of the communications, an ESP is

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[2] Sprint also asserts, generally, that KMC's statements should not be believed because KMC went so far as to argue that KMC III was not a proper party. Spr. Br.11. This is a complete fabrication. KMC *never* claimed that KMC III should not be named. Rather, KMC's witness observed that if the Commission took Sprint's flawed argument to its logical conclusion, then even KMC III would not be a proper party. *See* Tr. 178; Johnson Rebuttal at 19. Notably, preceding the cited observation is the "the bottom line" assertion that "KMC III is the only proper party ..." Sprint is overreaching in the hope of defending its unsupportable decision to not drop KMC V and KMC Data as defendants. Now that the record is closed –and the lack evidence on this particular issue is plain – Sprint's shot-in-the-dark claims against KMC V and KMC Data have been revealed as baseless.

More specifically, Sprint challenges KMC's credibility by suggesting that KMC has "changed its story" with respect to KMC V. Spr. Br. 11. KMC has explained that Sprint's apparent confusion on this matter is attributable to KMC's reorganization *of which Sprint was informed* at the time, a fact which Sprint continually neglects to mention. *See* Tr. 137, Johnson Direct at 6, l. 15 to p. 7, l. 7; Exh. 26, Johnson Dep. at 24-28. Sprint was notified that it was dealing with KMC III dealing for services and billing purposes. Tr. 138, Johnson Direct at 7, ll. 3-7. There was no attempt to mislead Sprint. Such attempts to question KMC's veracity underscores Sprint's reliance upon unsupported innuendo rather than the record.

entitled to access the public switched telephone network ("PSTN"), *whether for termination or origination*, by purchasing local services. *See* KMC Br. 6-8, 17-19. *See also* Issue No. 5, *infra; ESP Exemption NPRM*, 2 FCC Rcd 4305, ¶9 (1987) (FCC considered lifting ESP access charge exemption in view of lesser risk of 'rate shock' since both *terminating and originating* access charges had decreased.); *AT&T Declaratory Ruling,* 19 FCC Rcd. at 7464-65, ¶¶ 11-13 (determining whether, for purposes of *terminating* access charges, specific service was a telecommunications or information service, and therefore subject to ESP exception). When an ESP obtains access to the PSTN through local services, the communications services supporting its enhanced services traffic are entitled to local treatment,[3] demonstrating that the "end points" of traffic are not the "be all and end all" for compensation purposes. *Cf. Bell Atlantic,* 206 F.3d at 5-7 (questioning blind application of end point analysis for compensation purposes in the context of ISP-bound traffic). If Sprint's test universally applied for compensation purposes, there would be no access charge exemption.

Here, jurisdiction and compensation for the traffic in question – the PointOne traffic making up the overwhelming majority – should be dictated by the fact that PointOne represented itself as an ESP supporting VoIP applications, and KMC had no reason not to rely on that self-certification. KMC Br. 8-11, 25-28. Consequently, pursuant to FCC policies regarding enhanced and IP-enabled services, KMC properly provided PointOne local service. Thus, the traffic should be treated as local for compensation purposes subject only to the reciprocal compensation KMC has already paid. *See id.*., 25-28, 39-40; Issue Nos. 1, *supra*, and 5, *infra.*[4]

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[3] The FCC has consistently and repeatedly held that enhanced services traffic, which VoIP has historically been treated as, in most of its forms, is exempt from access charges and thus may be treated as local in nature. *Id.*; *Non-Accounting Safeguards*, 11 FCC Rcd. at 21905, 21955-58; *see also Report to Congress*, 13 FCC Rcd. at 11507-08, 11516-17, *Intercarrier Compensation*, 16 FCC Rcd at 9613.

[4] Treating PointOne as an end user customer per the exemption but allowing Sprint to charge KMC access charges would undermine the exemption because KMC would be entitled and expected to pass through the costs to its customers, such as PointOne. Sprint's argument to the contrary, Spr. Br., 33-36, is baseless and would represent unsound public policy.

VoIP and Enhanced Services Are Not Mutually Exclusive Categories. Begrudgingly, if silently, acknowledging that the access charge exemption is an exception to its end points approach, Sprint argues that VoIP traffic categorically is *not* enhanced services traffic. Spr. Br. 19. Significantly, Sprint cites to no support for this assertion, not surprising since this is an inaccurate assessment of FCC statements. While not comprehensively deciding whether every form of VoIP is exempt from access charges under the ESP exception, the FCC's prior holdings and statements make clear that the vast majority of IP-enabled services, including VoIP, have been treated as subject to the exemption. In opening the pending *Intercarrier Compensation* docket, the FCC noted: "long-distance calls handled by ISPs [Information Service Providers[5]] using IP telephony *are generally exempt from access charges* under the enhanced service provider exemption." *Intercarrier Compensation,* 16 FCC Rcd. at 9657, ¶ 6 (emphasis added).[6]

The FCC's statements are germane because the traffic at issue is VoIP, a form of IP-enabled service generally overlapping with IP telephony. Rather than being mutually exclusive categories as Sprint argues, all three of these "categories" can be enhanced or information services to which the exemption applies.[7] IP-enabled services include "services and applications relying on the Internet Protocol family" which "could include digital communications capabilities of increasingly higher speeds, which use a number a transmission network technologies, and which generally have in common the use of the Internet Protocol." *IP-Enabled Services,* 19 FCC Rcd. at 4863, n.1. The FCC, although not adopting a formal definition, considers as VoIP "any *IP-enabled* services offering real-time, multidirectional functionality,

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[5] The statutory "information service" is essentially synonymous with the definition of *enhanced* service. *Non-Accounting Safeguards*, 11 FCC Rcd at 21905, 21955-58; *Report to Congress,* 13 FCC Rcd. at 11507-08, 11516-17.

[6] The FCC has also stated that IP telephony "threatens to erode access revenues for LECs *because it is exempt from the access charges* that traditional long-distance carriers must pay." *Intercarrier Compensation.,* 16 FCC Rcd. at 9657, ¶ 133 (emphasis added).

[7] 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. *Computer II Inquiry*, 77 FCC 2d at 419-22; *Third Computer Inquiry,* 2 FCC Rcd at 3081-82, ¶¶ 64-71.

including, but not limited to, services that *mimic traditional telephony*." *Id.* at n.7; *IP-Enabled Services E911 Order and NPRM*, FCC 05-116, ¶ 24 (same definition). Furthermore, as used in the FCC's *Report to Congress,* "IP-telephony" includes both broadly described computer-to-computer IP telephony and the even more broadly delineated phone-to-phone IP-telephony, with the Commission recognizing that neither category is homogeneous. *Report to Congress,* 13 FCC Rcd. at 11507-08, 11516-17. Accordingly, the various terms "VoIP," "IP-enabled services," and "IP telephony" are not circumscribed and distinct as Sprint would have the Commission conclude. In short, Sprint hopes to have this agency overlook its failure to rebut PointOne's representation as an ESP providing VoIP services. In response, the Commission should make Sprint suffer the consequences of failing to investigate the nature of PointOne's services more deeply in light of that representation, or to name them as a defendant in this case, as SBC did in the Eastern District of Missouri. *See Southwestern Bell, supra.*

As discussed above, the FCC's statements make clear that VoIP, (1) can be a form of enhanced services, (2) is a form of IP- telephony, which is generally exempt from access charges, and (3) includes at least some forms of IP-telephony, some of which are information services exempt from access charges. Significantly, in the very proceeding considering new rules on intercarrier compensation, the FCC stated that IP-telephony, including most VoIP, *currently* are exempt from access charges. The traffic here, on the record assembled, should be deemed exempted from access charges. Sprint has not met its burden of proof, in light of PointOne's consistent representations that it was a provider of VoIP services which were *not* substantially similar to those at issue in the AT&T petition. *See, e.g.,* KMC Br. 8-11, 22, 25-26; Exh. 61 PointOne FCC Comments). *See also* Exhs. 8, 60 (excerpts from www.pointone.com); Tr. 181-183 (Menier Rebuttal at 3-4); Tr. 151-52 (Johnson Direct at 20-21); Exh. 30 (Calabro

Dep. at p. 12, ll. 11-17; 13, l. 11 to p. 14, l. 3). Sprint's glib dismissal of the applicability of the ESP exemption is inadequate and unsupported by the FCC's policies and rulings.

Sprint Misnterprets the AT&T Declaratory Ruling. Instead of addressing as a whole the body of FCC rulings discussed above and in KMC's Brief, Sprint primarily relies on a misreading of the *AT&T Declaratory Ruling* for the proposition that the VoIP at issue here is not exempt from access charges. The *AT&T Declaratory Ruling*, however, is very narrow and made on a clear record of the type of traffic at issue. *AT&T Declaratory Ruling*, 19 FCC Rcd. 7457, 7464-65 ¶¶ 11-12. The *AT&T Declaratory Ruling* involved 1+ calls where there was no net protocol conversion and no enhanced features or functions and the question of applying access charges to the IXC. The traffic at issue there was not synonymous with VoIP in general. VoIP includes services that, despite mimicking traditional telephony in many ways – for example, through origination and/or termination over the PSTN through presubscribed or dial-around carriers – augment the basic service component with some degree of data processing or give an end user the ability to change the form or content of the transmitted information, which was not true for AT&T's service. As Mr. Calabro explained, the aspects of a service that make it enhanced need not be obvious from the way the communication is originated or terminated but may include capabilities available to a customer while connected through a circuit switched connection. Exh. 30, Calabro Dep. p. 15, ll. 3-10. PointOne's website explains that the enhanced capabilities offered by PointOne to its customers are accessible because the traffic is routed through its network, *en route* to another end user. *Id.* p.13, ll. 11-15, 22-25; p. 14, ll. 1-3; p. 30, l. 24 to p. 31, l. 10; p. 93, ll. 15-19; KMC's Response to Staff's 2nd Set of Interr., Interr. 21. This occurs in that very zone between the originating IXC and KMC that Agilent's Sam Miller acknowledged the methodology as set forth in the Agilent study could not address. Exhs. 23-24, Miller Dep. at 36, ll. 2-14; 37, ll. 9-10; 40, ll. 15-24; 41, ll. 15-17.

Sprint Mischaracterizes KMC Position. Sprint completely misrepresents KMC as claiming that all service purchased by an ESP is local for all purposes. *See* Spr. Br. 19. To the contrary, KMC contends that, following FCC precedent, *if an ESP purchases local services, they are local for termination purposes and carrier compensation.* KMC Br. 6-8, 17-19.

In conclusion, Sprint's advocacy of a simplistic end points analysis ignores the ESP exemption, especially ramifications for the issue of whether *KMC* should pay access charges in *this case. If* the Commission finds it has jurisdiction over Sprint's claims, rather than reward Sprint's obfuscation, the Commission should find KMC properly sold local services to PointOne and is not subject to access charges. No additional compensation from KMC is appropriate.

ISSUE 5: WHETHER KMC VIOLATED SECTION 364.16(3)(A), FLORIDA STATUTES

When one looks behind the rhetoric, Sprint's Brief highlights that it failed to meet its burden of proof that KMC violated Section 364.16(3)(a), F.S., and therefore owes access charges. To prevail on its claim and prayer for relief, Sprint must prove that KMC (1) sent interexchange traffic subject to access charges over the local interconnection trunks, (2) that it did so knowingly, (3) that the remedy for such violation is for KMC to pay access charges, and (4) the amount of access charges that are owed. Sprint's factual and legal arguments all fall short, as explained below.

First, Sprint failed to meet its burden to show that KMC sent interexchange traffic subject to access charges over local trunks. Sprint relies heavily on so-called "correlated call records," which provide some information about how a very small percentage of the traffic at issue was originated, to show the calls were "plain old long distance" service subject to access charges. Spr. Br. 22. Relying on correlated call records alone is like calling a painting of someone's head a full-body portrait. Not only are the correlated calls only about 2.5% of the calls in question, Exhs. 17 and 33 (Wiley Dep., WLW-2 at 8), Sprint has offered precious little

evidence about them, certainly not enough in today's complex telecommunications environment to conclude that the calls are "plain old long distance" subject to intrastate access charges. Moreover, the Agilent focus on correlated calls makes clear that Sprint knows nothing about the communications once they are handed off by Sprint local, other than the identity of the IXC entity to which the traffic was directly delivered. *Id.* at 3, 8, 10-14; Miller Dep. at 36, ll. 2-14; 37, ll. 9-10; 40, ll. 15-24; 41, ll. 15-17. Of course, it is within Sprint's "zone of ignorance" that the entity representing itself as an ESP handled the traffic. Further, all but one of the correlated calls that Sprint examined in detail in its rebuttal testimony and discovery responses are dial-around calls. Exh. 41 (Burt Rebuttal JRB-2). As such, these calls were directed to a platform. Thus, one cannot conclude with any certainty in light of the other evidence KMC proffered that this is simply plain old telephone service. As KMC made clear in discovery, various VoIP services can be reached through dial-up connections. Exh. 6, KMC's Response to Staff's 2nd Set of Interr., Interr. 21. Merely looking at the origin of a communication (whether direct dial or dial-around) cannot dictate what the proper regulatory classification and treatment of that communication is.

The significance of Sprint's gap in knowledge is magnified because of the representations of PointOne, which Sprint chose to leave unrebutted. The unchallenged testimony of Chris Menier – Sprint chose not to depose him – is that PointOne came to KMC as an ESP provider of VoIP, seeking local PRIs in order to access the local markets in Ft. Myers and Tallahassee. *See generally* Menier Rebuttal. Sprint does not question that an ESP could obtain local services for this purpose. *The critical question before this Commission, therefore, is whether KMC was justified in relying upon PointOne's representation or had reason to believe it was false.*

Sprint seizes upon one phrase within a series of e-mails between Mr. Menier and PointOne at the time the PRIs were being established as supposed evidence that PointOne sought

to evade access charges that Sprint believes otherwise would be due for the traffic PointOne generated over the PRIs. Spr. Br. 41. However, as Mr. Menier explained, he was not making any attempt to avoid legally applicable access charges but rather that he understood that access charges did not apply to PointOne's enhanced services traffic, while ILECs like Sprint, for obvious reasons, would take the position that access charges to applied to enhanced services. Tr. 183-185, Menier Rebuttal, at 4, ll. 15-18; 5, ll. 9-18; 6, ll. 7-17. He was correct because Sprint's Brief twice accuses KMC, *not* of knowingly sending access traffic to Sprint over local trunks, *but knowing that Sprint would perceive the traffic to be access traffic.* Spr. Br. 41. However, the Menier-PointOne e-mail was merely proof of KMC's knowledge that Sprint likely *would not* afford PointOne the treatment under the ESP exemption to which it was entitled, whereas *KMC would*, a Sprint position that was confirmed in Mr. Burt's deposition. Exh. 18, Burt Depo. at 69. KMC's foreknowledge of Sprint's probable perception neither violates Florida law nor triggers an obligation to investigate its own customer further. The existence or potential for accusations and perceptions by Sprint are not the standard by which PointOne's actions or representations, or KMC's acceptance of those representations, are to be judged.

Sensing that PointOne's representations to KMC might justify KMC's position, Sprint tries to characterize them as belated attempts by two "conspirators" to cover their tracks. Spr. Br. 24. Sprint claims no mention was made of PointOne's services being enhanced until 2004, after Sprint made its demand for payment and around the time of the FCC's *AT&T Declaratory Ruling*. Spr. Br. 29. However, Sprint conveniently but unforgivably overlooks that, before the PRIs were even in place, PointOne had represented the nature of its services as VoIP. Tr. 183-184, Menier Rebuttal at 4, ll. 8-10; 5, ll. 1-3; Exh. 7 (KMC's POD 15, emails). As explained above, VoIP largely falls within the scope of IP-telephony services, which historically have been

exempt from access charges. Nor is VoIP mutually excluded from categorization as enhanced services, *id.*, as Sprint contends. *See e.g.* Spr. Br. 34.[8]

Sprint's high cards were all played out after its initial parlay describing the correlated call records to which KMC has more than responded, as recapped above, by demonstrating persistent and self-willed gaps in Sprint's knowledge about the traffic, the diversity of methods by which enhanced and IP-enabled services are offered and originated today, and PointOne's representations regarding its business which KMC reasonably accepted.[9] However, Sprint makes an abrupt about-face regarding the endpoints of the communications and plays its deuce: regardless of where the communications originated, the traffic was interexchange because one end of PointOne's PRI lines was in Orlando. Spr. Br.19-20.[10] KMC has demonstrated at length that the PRIs were, without any qualification, associated in all material respects solely with the Ft. Myers and Tallahassee local calling areas, KMC Br.19-21, 24-25, which even Sprint's Access Tariff bears out. Sprint Florida Access Service Tariff, Section E2.6 ("Local Calling Area" is defined as "a geographical area, as defined in the Company's General Subscriber Service Tariff, in which an End User (Exchange Service Subscriber) *may complete a call without incurring MTS charges.*" (emphasis added)) The absurdity of Sprint's argument – that the physical location of the end user customer dictates the type of service rather than operational realities – is borne out

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[8] The absence of subsequent contemporaneous communications between KMC and PointOne regarding the nature of the latter's services is totally understandable. Once PointOne's local services were set up, why would one expect, as a matter of day-to-day operations absent some external event (such as a change in the regulatory environment), carrier and customer repeatedly go over settled ground? The fact that KMC made further inquiries in early 2004, after Sprint demanded that KMC pay access charges for the PointOne traffic, as explained by KMC witness Johnson, was merely prudent in the circumstances, just as it was prudent to inquire after the AT&T ruling, even though PointOne had already migrated the bulk of its traffic off of the PRIs. *See* KMC Br. 9-10. This is especially the case because KMC did not know, when Sprint first demanded payment in late 2003, of the paucity of Sprint's evidence against KMC. It was conceivable at the time that Sprint had knowledge about PointOne that KMC was not privy to, a conjecture that would have been proven false by the quality of Sprint's prosecution of this matter.

[9] Sprint's testimony and discovery responses made clear it does not behave materially different than KMC did in this case when a self-certifying ESP approaches Sprint requesting local service. KMC Br. 26-27. Sprint's opening Brief does not raise any new arguments or point to evidence requiring further discussion of the point here.

[10] This argument a last ditch effort for Sprint because the PSC has need to reach this argument only after concluding that KMC relied reasonably on PointOne's representations.

by the "solution" that Sprint's argument allows, namely, make the PRI loop shorter, *i.e.,* require PointOne to bring the traffic itself to Ft. Myers or Tallahassee before sending it over KMC's PRI loops. That "solution" would not change the communication end points or the network realities that the only switching or routing that KMC performed was in the local Ft. Myers and Tallahassee markets, that the only local calls PointOne could complete were to the Ft. Myers and Tallahassee local calling areas, and that anyone dialing the PointOne numbers from the putative local market of Orlando would have to dial 1+ to make the attempt.[11] *Id.*

Second, Sprint Failed to Show That KMC Acted "Knowingly." As explained in the preceding paragraphs (*see also* KMC Br. 8-11, 25-28), KMC reasonably relied upon PointOne's representations that it was an ESP eligible for local PRI lines. KMC's Brief anticipated most of Sprint's arguments in this regard, and those rebuttals will not be repeated here. *Id.* In its Brief, Sprint suggests for the first time that the fact that PointOne's PRIs were configured for outbound calling only is further evidence that KMC should not have ignored that PointOne was not what it represented itself to be. Spr. Br. 23. Rather than having the sinister significance with which Sprint would invest in it, this merely reflects that PointOne had a need to terminate its enhanced VoIP traffic in the Ft. Myers and Tallahassee markets. It is a neutral fact vis-à-vis Sprint's claims, and it is not inconsistent with KMC's understanding or PointOne's representations to KMC. Sprint's real motive for mentioning this is its argument that the FCC's exemption applies only to traffic from the local PSTN *bound for ESP*. Spr. Br. 40. Sprint builds this argument on an isolated reference in an FCC rulemaking notice 20 years after the agency adopted the enhanced services exemption. *Id.* If one reviews the FCC's cases establishing and reiterating the exemption, whether in 1983, 1988, 1997 or later, including the one cited by the FCC when it

[11] As KMC witness Twine made clear, the numbers that appeared as charge party numbers for the PRI trunks, which Sprint tried to call and found were non-working, were the billing telephone numbers and used for no other reason. Moreover, PointOne only required the ability to send its services *to* the two markets. Exh. 27, Twine Dep. at 45, ll. 9-25; 46, ll. 1-25; 47, l. 1; 48, ll. 4-25; 49, ll. 1-2.

stated that originating access charges are exempt, the FCC *never* mentions that the exemption applies only to ESP-bound traffic. Indeed, even in the notice cited by Sprint, the FCC does not say that the exemption is inapplicable to outward-bound traffic. Instead, the FCC has always plainly stated that ESPs can access the local market through local services for use of which they cannot be assessed access charges. KMC Br., *see e.g. ONA NPRM, supra., MTS and WATS Market Structure, supra. ESP Exemption, supra., AT&T Declaratory Ruling, supra.* If Sprint were correct, one certainly would have expected the FCC to have made it explicit when it was first adopted by requiring ESPs to qualify for the exemption *by ordering inbound service only.* The FCC, as Sprint knows, has never said this.

Further, if the exemption was limited to ESP-bound traffic, the *AT&T Declaratory Ruling* petition could have been resolved instantly. In its petition in that case, AT&T stated plainly that it was paying originating access charges voluntarily, asking only whether terminating access charges applied. *AT&T Declaratory Ruling,* 19 FCC Rcd. at 7464-65, ¶¶11-13. If Sprint was correct, the Commission would not have engaged in its analysis of whether AT&T's service was telecommunications or information service, but would have disposed of the petition by reminding AT&T and the industry that the exemption applied only to originating access charges. The FCC did not do this.

Third, Sprint Has Failed to Show That Its Remedy, If KMC Is Found to Have Violated the Statute Is for KMC to Pay Access Charges. In its opening Brief, KMC fully explained why, if access charges are due for the traffic, they are due from the IXCs to whom the traffic was sent, or from PointOne (or intermediate IXCs, if any), although adjustments to KMC's reciprocal compensation would be required. KMC Br. 14, 30-31, 40, 42. *See also* Issue No. 7, *infra.* Sprint's Brief simply assumes that the remedy for any statutory violation is for KMC to pay access charges. In short, Sprint failed to even address its burden on this point.

Finally, Sprint Has Failed Its Burden of Proof Regarding the Amount of Access Charges to Which It Would Be Entitled. Assuming *arguendo* that Sprint proved that KMC violated Section 364.16(3)(a), and that KMC was obligated to pay Sprint access charges on such traffic, Sprint has failed to substantiate its damage calculation. Sprint's apparent inability to render a bill does *not absolve Sprint of billing accountability.* Despite numerous criticisms of its damages calculations in the record, Sprint failed to address the lack of sufficient data in some months, the inexplicable four month spike in rates during the peak traffic periods, and several other anomalies removing any confidence in its calculations. *See discussion at* KMC Br. 30-36. Sprint carries the burden of rendering a verifiable and justifiable bill, and has not met it.

Ignoring that the record has been closed, Sprint's Brief offered two alternate calculations in the space of four sentences as supposed independent verification of its calculation after having denied KMC and the Commission access to the underlying data. Spr. Br. 27-28. Sprint offered no support in the form of affidavit or explanatory exhibit.[12] As an initial matter, these alternate calculations should simply be stricken from the record. Moreover, these alternatives show a variation in Sprint's calculations of *several hundred thousand dollars*, hardly a trivial amount and creating more doubt about Sprint's original numbers. Further, these alternatives do not

[12] Unlike Sprint's earlier calculations, where KMC could at least confirm some of the arithmetic, these alternatives leave many questions as to even the simple math since Sprint, guilty of many an elementary school math teacher's refrain, did not show its work. Regarding the first alternative, was the supposed average PIU weighted or not, and why? Was an average determined for each market or not, and why? Moreover, by simply averaging the PIUs, and then applying that average to each month over the month in question, Sprint was simply presenting a rough order approximation of its original calculations, so the small variation of about 1 % is not all that surprising. As for the second alternative calculation, the use of the one day a month sample as an independent check (albeit off by 6%) is highly suspect. Not only are the calculations Sprint engaged in totally opaque to KMC and the Commission, Sprint's witness Ritu Aggarwal made perfectly clear that one could not get to the numbers Sprint actually used in its calculations using the one-day-a-month sample, discrediting the second alternative as having no rigor before it was even conceived. Exh.22 (Aggarwal Dep. at 100, l. 22 to p. 101, l. 12; 103, l. 23 to p. 104 l. 3. Further, Sprint has stated that it did not provide that sample to allow KMC to recreate the damages calculations. *Id.* at 101, ll. 5-9. Without seeing Sprint's actual calculations or work papers, and knowing the assumptions it made, one cannot determine decisively confirm the alternatives were fortuitous results for Sprint, or results that lends any real credence to the original numbers (or were simply two alternatives selected out of some larger number of alternative calculations Sprint performed because they most closely approximated the original calculations offered with Ms. Aggarwal's testimony). In short, rather than lend support for the original numbers, the alternatives Sprint offers in its Brief confirm the need for an accounting, in the event the Commission finds that KMC has any liability for access charges in this case.

account for the quantitative deficiencies detailed by KMC. The range of results stemming from Sprint's "alternatives" further underscores the need for a review of the underlying data – *not to determine liability* (the lack of evidence in the record for liability speaks for itself) – but to determine the relief Sprint would be entitled if liability exists. Sprint acknowledges that its calculations started from these underlying records, Spr. Br. 2, 25, and the Commission, under Section 364.16(s)(b), is to have access to all relevant customer records and accounts.[13]

The very fact that Sprint presented its alternatives, while they do not address the deficiencies identified by KMC, reveals the lack of comfort Sprint had in its numbers and makes clear the need for an accounting.

ISSUE 6: WHETHER THE TRAFFIC WAS ENHANCED SERVICES TRAFFIC

As discussed above in Issue 5, Sprint bears the burden of demonstrating that the traffic in question the traffic in question was subject to access charges. While Sprint asserts, based on the review of Agilent-system-generated CDRs that the traffic in question is indistinguishable from interexchange traffic (Spr. Br. 29), Sprint has also admitted that it cannot differentiate between access and enhanced traffic using the methods that it chose. *See* KMC Br. 16, 26, 27. As such, Sprint's assertion of indistinguishability is not probative.

The principal stumbling block in Sprint's way, and the one it cannot overcome given its decision to proceed solely against another LEC, is that PointOne has always represented itself

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13 Nor, as Sprint suggests, Br. 27-28, are the Agilent study numbers a reliable verification of Sprint's calculations. Extrapolating Agilent's seven day analysis from September 2003 to that entire month yields results markedly different, and even more overstated, than Sprint proffered with Ms. Aggarwal's testimony. For example, Agilent's percentage of intrastate access traffic for the seven days ranges from 48-74% depending on the trunk, Exh. 33 (Wiley Direct., WLW-2 at 13), whereas the Sprint numbers for the months of September are 37 and 38% for the two markets. Exhs. 21-22 (Aggarwal Depo at 84, 95 and Depo Exhs. 3-4). Further, Agilent estimated "lost access revenues" of approximately $29,174 for the seven days, which translates (multiply by 30/7) to almost $130,000 for the month, whereas Sprint reported an adjustment of $190,000 for that month. *Id.* Accordingly, even a cursory comparison of Sprint's numbers with the Agilent study highlights that Sprint's results are markedly different than the Agilent study and are not confirmed by it.

not only to KMC, but to the public, as an ESP. KMC responds to those arguments in Issue No. 4, p. 5, and Issue No. 5, p. 10-12, *supra.*

Second, Sprint claims that, because PointOne at one point began using "enhanced services" in the company name, this implicates PointOne in a cover-up. Spr. Br. 24. This lacks logic. Before motives can be attributed to this alleged name change – for which there could be a hundred explanations – Sprint should bring PointOne in as a party or at least depose its representatives. This argument, while it merits no rebuttal, highlights how Sprint is grasping at straws to overcome its failure to develop a record to meet its burden of proof.

Third, Sprint seizes on a rhetorical flourish, averring that IP-enabled traffic cannot, by "any stretch of the imagination," be classified as information or enhanced services. Spr. Br. 30. If that were true, how does Sprint explain, to name just a few examples, (1) the pending FCC *IP-Enabled Services* docket in which this is one of the primary issues under consideration, (2) two federal courts recently deferred to the FCC's primary jurisdiction to determine whether VoIP providers are subject to access charges, (3) a federal bankruptcy court decision earlier this year found an entity roughly sitting in PointOne's position not subject to access charges under existing precedent, Exh. 62 (*Transcom Enhanced Services*), (4) that the FCC took pains to describe the decision in the first *AT&T Declaratory Ruling* very narrowly and note the decision was subject to change, 19 FCC Rcd. at 7457-58, and (5) the FCC itself has never even found that all traffic with IP-in-the-middle is subject to access charges, as manifested by its second *AT&T Declaratory Ruling*. KMC Br. 7-8. Sprint's compulsion to ignore current FCC policy and expand the scope of the FCC's limited actions on the subject of IP-enabled services as though broad principles had been established merely reveals the lack of support for Sprint's claims.

Fourth, Sprint argues that KMC did not treat PointOne as an ESP end user customer because it did not assess a surcharge which Sprint alleges applies to enhanced services traffic in

lieu of access charges. Spr. Br. 32, 33. This is a gross misreading of the FCC's decisions that places under suspicion Sprint's entire discussion of regulatory decisions purportedly applicable to this case. The surcharge which Sprint refers to was designed to address the so-called "leaky PBX" situation and applies only to interstate private lines, whereas the ESP exemption was truly an exemption. The FCC has always made the distinctions clear, although both the ESP exemption and the "leaky PBX" surcharge were adopted in the FCC's 1983 *MTS and WATS Market Structure*, 97 FCC 2d 682, ¶¶ 80-83.

> [T]he policy problems underlying the ESP exemption and the rules for the leaky PBX traffic are different. The former is based on concerns about rate shock on ESPs from the application of access charges; the latter is based on the inability to distinguish leaked interstate traffic from ordinary local calling over certain end user lines. *Thus, the ESP exemption represents an affirmative decision to provide ESPs with special treatment; the leaky PBX rules are not really an "exemption" at all (in the sense of an affirmative policy determination that leaked traffic should receive special treatment), but a pragmatic accommodation to measurement difficulties.*

ONA NPRM, 4 FCC Rcd 3983, ¶ 41 (emphasis added). KMC recognizes that ESPs may theoretically purchase interstate special access services subject to the surcharge in some such circumstances, specifically, where a special access service between customer locations ends in a PBX that is capable of leaking interexchange traffic into the PSTN. However, KMC's PRI services were not special access services between customer locations – rather they were local services utilizing long loops to give PointOne access to KMC's switches in Tallahassee and Ft. Myers, and thus designed for placing calls within the local calling areas. PointOne's PRIs did not end in a PBX in either market, from which traffic could be leaked, and the FCC has never assessed a special access surcharge on local services, including local PRIs.

Finally, Sprint cites statements from *IP-Enabled Services* to the effect that VoIP traffic should be subject to the same compensation regime as other traffic. Spr. Br. 36. There, the FCC was speaking prospectively about possible policy changes. This case is not a proper forum to

articulate and apply policy; Sprint's claims must be resolved on the facts and under current law. When that law is applied to the record Sprint has developed and those agreements are interpreted, as discussed herein, there is no additional compensation due for the traffic at issue.

ISSUE 7: WHETHER KMC VIOLATED SPRINT'S ACCESS TARIFF

Sprint is bound by the terms and conditions of its access tariff on file with the PSC whenever it seeks to assess access charges, KMC Br. 39, which applies to all three of Sprint's claims. Sprint, revealingly, never cites the tariff sections KMC allegedly violated nor explains how assessing access charges against KMC would be consistent with its tariff. Spr. Br. 38-39 (Issue No. 7, discussion). As explained in Issue 5, the traffic was not interexchange traffic. *See also* KMC Br. 22-25. Rather, the traffic should be treated as local traffic given the nature of KMC's customer. Further, KMC itself did not act as an IXC, but as a local carrier, providing local PRIs to PointOne. *See* Issue No. 6, *supra*; KMC Br. 22-25, 38. Under Sprint's tariff, it may assess access charges only against end user customers and IXCs for the origination or termination of interexchange traffic. Section 6 of that tariff, which governs the switched access services at issue, makes clear that "Switched Access Service, . . . is available to *customers for their use in furnishing their services to end users* . . .." Sprint Florida Access Tariff, Section E6.1. In short, the switched access services are designed to be assessed against a carrier customer whose end user customer pays for the interexchange call. KMC did not act in such a capacity vis-à-vis the calling parties who originated the communications. Even if KMC did have liability for access charges under Sprint's tariffs, Sprint's calculations must be subject to an accounting. *See* Issue No. 5, *supra*; KMC Br. 14-15, 30-36.

ISSUE 8: WHETHER KMC VIOLATED ITS INTERCONNECTION AGREEMENTS WITH SPRINT

KMC rebutted Sprint's arguments that KMC sent Sprint interexchange traffic over local trunks and did so knowingly. *See* Issue No. 5, *supra;* KMC Br. 22-30. That rebuttal applies

equally applicable to Issue No. 8, and is incorporated herein by reference. Even assuming for the sake of argument that KMC did knowingly send interexchange traffic over local interconnection trunks, that does not mean that KMC is liable for access charges. The interconnection agreements provide that access charges, if they are owed, are governed by the parties' tariffs. As discussed in Issue No. 7 above, access charges apply only to IXCs and end users. Therefore, under the agreements themselves, the only relief, if KMC violated the agreements, is for an adjustment to reciprocal compensation payments KMC and Sprint have already made.

ISSUE 11: APPROPRIATE PAYMENT ARRANGEMENTS IF COMMISSION FINDS A VIOLATION

If this Commission finds that KMC owes Sprint additional compensation for the terminated traffic, the applicable interest rate would be the statutorily determined rate of 0.0058% per month (or 0.0001918% per day) and not the 1.5% per month claimed by Sprint in its Brief. *Compare* Fl. Stat. § 55.03; 2005 Rates from the Fl. Dept. of Financial Svcs., http://www.fldfs.com/ofr/baking/interest.htm , *with* Spr. Br. 45-46. As Sprint notes in its Brief, under *all three* agreements between the parties, the applicable interest charges are the *lesser* of the maximum rate set by law or 1.5%. *See* Spr. Br. 45, n. 14. Therefore, the statutorily set rate of 0.0058% per month (or 0.0001918% per day) is applicable.

Respectfully submitted,

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APPENDIX

GUIDE TO SHORT FORM CITES USED IN KMC REPLY BRIEF

***AT&T Declaratory Ruling*:**	*In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004)
***Bell Atlantic*:**	*Bell Atlantic Companies v. FCC*, 206 F.3d 1 (D.C. Cir. 2000)
***Computer II Inquiry*:**	*Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384 (1980)
***ESP Exemption*:**	*Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631 (1988)
***ESP Exemption NPRM*:**	*Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Notice of Proposed Rulemaking, 2 FCC Rcd 4305 (1987)
***Frontier Telephone*:**	*Frontier Telephone of Rochester, Inc. v. USA Datanet Corp.*, Memorandum and Opinion, 05-6056, (August 8, 2005) (W.D.N.Y.)
***Intercarrier Compensation*:**	*Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001)
***IP-Enabled Services*:**	*In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004)
***IP-Enabled Services E911 Order and NPRM*:**	*In the Matter of IP-Enabled Services E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116 (June 3, 2005).
***MTS and WATS Market Structure*:**	*MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682 (1983)
***Non-Accounting Safeguards*:**	*Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996)

***ONA NPRM*:**	*Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, Notice of Proposed Rulemaking, 4 FCC Rcd 3983 (1989)
***Report to Congress*:**	*Federal-State Joint Board of Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998)
***Southwestern Bell*:**	*Southwestern Bell Telephone v. Vartec Telecom, Inc.*, Memorandum and Opinion, 04-01303 (August 23, 2005) (E.D. Mo.)
***Third Computer Inquiry*:**	*Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 2 FCC Rcd 3072 (1987)
***Transcom Enhanced Services*:**	*Transcom Enhanced Services, LLC*, Case No. 05-31929-HDH-1, U.S. Bankruptcy Court for the Northern District of Texas (April 28, 2005)
***Vonage Declaratory Ruling*:**	*Vonage Holdings Corp.*, Memorandum Opinion and Order, 19 CC Rcd 22404 (2004)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FRONTIER TELEPHONE OF ROCHESTER, INC.,

Plaintiff

DECISION AND ORDER

-vs-

05-CV-6056 CJS

USA DATANET CORP.,

Defendant.

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INTRODUCTION

This is an action in which Frontier Telephone of Rochester, Inc. ("Frontier"), a provider of telephone exchange access service, is suing USA Datanet Corp.

EXHIBIT "A"

("Datanet"), a provider of voice over internet protocol ("VoIP") voice communication services, to collect interstate originating switched access charges. Now before the Court is Datanet's motion to dismiss the complaint on the grounds of "primary jurisdiction," and alternatively, for failure to state a claim. For the reasons that follow defendant's application is denied. However, the Court will stay this matter pending the issuance of rules by the Federal Communications Commission ("FCC") that ought to resolve the central issue in this case, which is whether and to what extent VoIP voice communication providers such as Datanet are liable to pay access charges to local exchange carriers ("LECs") such as Frontier that handle the VoIP provider's traffic.

BACKGROUND

USA Datanet is a provider of VoIP long distance telephone service. VoIP technology converts the contents of a particular communication into digital packets of information, which it then sends over private networks or over the internet to an end user. These separate packets of information run through various computers, routers, and switches anywhere in the world, and are then "reconstituted" at the destination. Information that has been digitized and packetized in this manner may also be "enhanced" in various ways, which the Court will discuss further below.

As the name implies, VoIP communications are sent at least partially over the internet. However, where the call is being made and/or received by someone using ordinary customer premises equipment ("CPE"), that is, a traditional telephone, VoIP traffic must also travel through the "public switched telephone network" ("PSTN"), where it is handled by LECs such as Frontier, who control the so-called "last mile" to the end-user's phone. Here, according to Frontier, "Datanet's network does not extend the so-

called "last mile" to an end-user customer's home or business. Instead, [LECs], including plaintiff, own, lease and/or resell extensive local telephone networks that extend the last mile to reach the end-user customers." Complaint ¶ 12. In short, Frontier and other LECs "provide the connection between local and long-distance networks for USA Datanet." *Id.* at ¶ 15.

In this regard, Frontier provides two types of "switched access service": "originating access service" an "terminating access service."

> 'Originating access service' occurs when a call originates on a LEC's network and is routed to USA Datanet for completion in another locality. 'Terminating access service' occurs when USA Datanet routes a long-distance call over USA Datanet's network to a local network or through a LEC for completion to an end-user customer in the local area served by the plaintiff.

Complaint ¶ 17. Frontier imposes charges for these services at rates set forth in "tariffs" that it has filed with the FCC. In this case, Frontier is seeking to collect originating access charges from Datanet.

Datanet, however, is not directly "interconnected" with Frontier. Rather, in order to provide VoIP telephone service to its customers, Datanet purchases "originating telecommunication services" from a third-party LEC, PaeTec.[1] Datanet is thus directly "interconnected" with Pae Tec, and PaeTec, in turn, is "interconnected" with Frontier. PaeTec is a signatory to an interconnection agreement "ICA" with Frontier, but there is

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[1]PaeTec is a Competitive Local Exchange Carrier ("CLEC"), while Frontier is an Incumbent Local Exchange Carrier ("ILEC"). For a brief discussion of the difference between an ILEC and a CLEC, see *Competitive Telecommunications Ass'n v. F.C.C.*, 309 F.3d 8, 10 (D.C. Cir. 2002). In short, ILECs are former Bell Operating Companies, who inherited AT&T's local exchange facilities after the breakup of AT&T. The Act requires ILECs to lease certain network elements to their competitors, the CLECs, who in turn provide services to third parties. *Id.*

no such agreement between Datanet and Frontier. Nonetheless, Frontier contends that Datanet owes it access charges from 1999 onward, in the amount of $679,066.20, plus late fees totaling $251,457.50.

Datanet has moved to dismiss this action, pursuant to the doctrine of "primary jurisdiction." Datanet contends that the parties' dispute should be addressed by the FCC, rather than this Court, since this case involves the issue of "originating switched access charges on VoIP traffic," which is an unsettled area of law that is presently being examined by the FCC. More specifically, Datanet contends that the issues in this case include: 1) whether VoIP providers are required to pay access charges at all; that is, whether the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, ("the Act"), allows LECs to impose "originating access charges" on VoIP traffic; and 2) if so, whether Frontier's "tariff schedule" applies to Datanet, since Datanet does not exchange traffic directly with Frontier, but only does so indirectly through Pae Tec. Datanet contends that these very issues are now being considered by the FCC. *See*, Datanet Memo of Law [#8], p.23.

In this regard, Datanet cites two matters that are currently pending before the FCC. The first is a "Notice of Proposed Rulemaking" issued by the FCC on March 10, 2004. *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28, 2004 WL 439260 (F.C.C.), 19 F.C.C.R. 4863. The proposed rulemaking involves "issues relating to services and applications making use of Internet Protocol (IP), including but not limited to voice over IP (VoIP) services (collectively, "IP-enabled services")." In the Notice, the FCC states that it is in the process of drafting rules pertaining to VoIP, including rules concerning "economic regulation." Specifically,

the Notice asks for comments as to whether VoIP providers should be subject to "access charges." In a section entitled "Carrier Compensation," the Notice states:

> The Commission seeks comment on the extent to which access charges should apply to VoIP or other IP-enabled services. If providers of these services are not classified as interexchange carriers, or these services are not classified as telecommunications services, should providers nonetheless pay for use of the LEC's switching facilities? As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways. Given this, under what authority could the Commission require payment for these services?
>
> ***
>
> By seeking comment on whether access charges should apply to the various categories of service identified by the commenters, we are not addressing whether charges apply or do not apply under existing law.
>
> If, on the other hand, VoIP or other IP-enabled services are classified as telecommunications services, should the Commission forbear from applying access charges to these services, or impose access charges different from those paid by non-IP-enabled telecommunications service providers? If so, how should different charges be computed and assessed? If commenters believe charges should be assessed, must carriers pay access charges, or should they instead pay compensation under section 251(b)(5) of the Act? Would assessment of rates lower than access charge rates require increases in universal service support or end-user charges? If no access charges, or different charges, are assessed for VoIP and IP-enabled service providers' use of the PSTN, would identification of this traffic result in significant additional incremental costs?

Id. at 4904-5.

The second matter now before the FCC is a petition for a declaratory ruling that was filed on August 20, 2004, entitled, *In the Matter of Petition for Declaratory Ruling that VarTec Telecom, Inc. is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced*

Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination ("*Vartec*"). This petition was filed by VarTec, a VoIP provider, because an LEC, Southwestern Bell, was threatening to collect "access charges" from VarTec even though VarTec was not a customer of Southwestern Bell, in the sense that it has no contractual relationship with Southwestern Bell. Instead, VarTec contracted with various enhanced service providers, who in turn had contracts with Southwestern Bell.

Alternatively, Datanet contends that the complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim, since there is currently no legal basis for Frontier to impose access charges on Datanet. In that regard, Datanet maintains that Frontier's only plausible theory of recovery is that Datanet "constructively ordered" Frontier's services, and is therefore liable to Frontier based upon Frontier's tariff. However, Datanet contends that, as a matter of law, it has not constructively ordered services from Frontier, because it is directly interconnected with PaeTec, not Frontier. Datanet further contends that it does not in fact receive any services from Frontier to which Frontier's tariff would apply.

Frontier, on the other hand, maintains that the FCC has already determined that the type of service provided by Datanet is subject to interstate access charges. In this regard, Frontier cites the FCC's decision "*In the Matter of Petition for Declaratory Ruling that AT&T's Phone-To-Phone IP Telephony Services Are Exempt From Access Charges*," FCC-04-97, 19 F.C.C.R. 7457, 2004 WL 856557 (Apr. 21, 2004). In that decision, the FCC described AT&T's service as follows:

> The service at issue . . . consists of an interexchange call that is initiated in the same manner as traditional interexchange calls – by an end user who dials 1+ the called number from a regular telephone. When the call reaches AT&T's network, AT&T converts it from its existing format into an IP format and transports it over AT&T's internet backbone. AT&T then converts the call back from the IP format and delivers it to the called party through local exchange carrier (LEC) local business lines.

Id., 19 F.C.C.R. at 7457. The FCC concluded that AT&T's service was subject to access charges, noting, "We emphasize that our decision is limited to the type of service described by AT&T in this proceeding," namely, that which "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.*, 19 F.C.C.R. at 7457-58. The FCC further stated that, "generally, services that result in a protocol conversion are enhanced services, while services that result in no net protocol conversion to the end user are basic services." *Id.* at 7459. As to that, the FCC noted that "the protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service's classification, under the Commission's current approach, because it results in no net protocol conversion to the end user." *Id.* at 7461. The FCC found that AT&T's service involved no net protocol conversion, and was therefore not enhanced, because "AT&T does not offer these customers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." *Id.* at 7465; *see also, Id.* at 7468 ("AT&T merely uses the Internet as a transmission medium without harnessing the Internet's broader capabilities."). The FCC summarized its

ruling by noting:

> [W]e clarify that AT&T's specific service is subject to interstate access charges. End users place calls using the same method, 1+ dialing, that they use for calls on AT&T's circuit-switched long-distance network. Customer's of AT&T's specific service receive no enhanced functionality by using the service. AT&T obtains the same circuit-switched interstate access for its specific service as obtained by other interexchange carriers, and, therefore, AT&T's specific service imposes the same burdens on the local exchange as do circuit-switched interexchange calls. It is reasonable that AT&T pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN, pending resolution of these issues in the Intercarrier Compensation and IP-Enabled Services rulemaking proceedings.

Id. at 7466-67. Here, Frontier contends that Datanet's telephone service falls under the *AT&T* decision, since it is essentially "1+" voice calling, with no enhanced functionalities and no net protocol conversion. Frontier Opposition Memo of Law [#13], pp. 11-12; *see also*, Sayre Affidavit [#14], ¶ 6 ("There are no enhanced functionalities, and USA Datanet's use of internet protocol to transmit the call is only incident to its own private network, and does not result in any net protocol conversion to its customers.").[2] As for defendant's 12(b)(6) motion, Frontier further contends that it's complaint adequately states a claim that Datanet constructively ordered Frontier's services.

Datanet maintains, however, that the *AT&T* decision does not apply to its phone service, since Datanet's service does not squarely fall within the three criteria set forth

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[2]Frontier also urges the Court to follow a 2002 ruling by the New York State Public Service Commission, which found that Datanet was required to pay access charges to Frontier. *See, Frontier Telephone of Rochester v. USA Datanet Corp.*, N.Y.P.S.C., 2002 WL 31630846 (May 31, 2002). However, the Court declines to do so for two reasons. First, it is unclear whether the case is on point, since the dispute in that case was over intrastate, not interstate, access charges, and moreover, the PSC based its ruling in part on a finding that Datanet was not providing an enhanced service, while Datanet contends that the service at issue here is enhanced. Moreover, it appears that the ruling by the New York State Public Service Commission is preempted. *See, Vonage Holdings Corp. v. Ney York State Public Service Com'n*, No. 04 Civ. 4306 (DFE), 2004 WL 3398572 at *1 (S.D.N.Y. Jul. 16, 2004).

in the *AT&T* decision. For example, Datanet contends that its customers do not use true "1+" calling, but instead use a different type of dialing that involves dialing a seven-digit local number, entering a PIN number, and then dialing the actual number to be called.

Counsel for the parties appeared before the undersigned on July 21, 2005 for oral argument of the motion. The Court has thoroughly considered the parties' submissions and the arguments of counsel.

ANALYSIS

Datanet contends that the Court should dismiss the complaint pursuant to the doctrine of primary jurisdiction. The Court declines to dismiss the action, but agrees that the doctrine of primary jurisdiction applies.

> The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the conventional experiences of judges or falling within the realm of administrative discretion to an administrative agency with more specialized experience, expertise, and insight. Specifically, courts apply primary jurisdiction to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency. No fixed formula has been established for determining whether an agency has primary jurisdiction.

National Communications Ass'n, Inc. v. American Tel. and Tel. Co., 46 F.3d 220, 222 -223 (Second Cir. 1995) (citations and internal quotation marks omitted). However, courts generally consider the following four factors:

> (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
> (2) whether the question at issue is particularly within the agency's discretion;
> (3) whether there exists a substantial danger of inconsistent rulings; and
> (4) whether a prior application to the agency has been made.

Id. at 222. Additionally, "[t]he court must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings." *Id.* at 223.

As to the first two factors set forth above, the Court finds that the question at issue in this case involves technical and policy considerations that are particularly within the FCC's area of expertise and that are within its discretion. For example, the parties dispute whether or not Datanet's service provides "enhanced functionality" – an issue of obvious importance in this case, in light of the *AT&T* ruling discussed above. The FCC differentiates between "basic" service and "enhanced" service as follows:

> "basic" service is a service offering transmission capacity for the delivery of information without net change in form or content. . . . . By contrast, an "enhanced" service contains a basic service component but also employs computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

In the Matter of IP-Enabled Services, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28, 2004 WL 439260 (F.C.C.), 19 F.C.C.R. 4863, 4879-80. Enhanced services include services such as "voicemail, electronic mail, facsimile store-and-forward, interactive voice response, protocol processing, gateway, and audiotext information services." *Id.* at 4881, n. 94 (*Citing* 47 C.F.R. § 64.702(a)). On the other hand, the FCC, for policy reasons, has declined to regard as enhanced some services that arguably fit within this definition. *See*, John T. Nakahata, "Regulating Information Platforms: The Challenge of Rewriting Communications Regulation From The Bottom Up," 1 J. Telecomm. & High Tech. L 95, 108 n. 52 (2002) (Noting that the FCC has

classified services such as "speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller ID, call tracing, call blocking, call return, repeat dialing and call tracking" as "adjunct-to-basic" service.). As to whether or not Datanet's VoIP telephone service provides "enhanced functionality,"[3] the Court believes that this inquiry involves technical and policy considerations that are particularly within the expertise of the FCC. *See, Richard S. Whitt*, "A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model,", 56 Fed. Comm. L. J. 587, 652 (May 2004) ("[I]t is obvious from continuing debates over the proper classification of broadband and VoIP services that the purported "bright line" [between basic and enhanced services] that once separated these two classes of service increasingly is becoming blurred and subject to confusion.").

As for the third factor, there is clearly a substantial risk of inconsistent rulings here, since the Court cannot say how the FCC will address the issues before it. Although the FCC's ruling in the *AT&T* decision is very close to being dispositive in this case, the parties agree that it is not entirely on point. Most significantly, Frontier agrees that Datanet's customers use a different dialing method than that discussed in the *AT&T* decision. Although Frontier contends that the difference is insignificant, the FCC expressly and repeatedly stated that its decision in the *AT&T* case pertained to IP

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[3] *See*, Kathleen Q. Abernathy [FCC Commissioner],"Overview of the Road to Convergence: New Realities Collide With Old Rules," 12 CommLaw Conspectus 133, 133("VoIP allows anyone with a broadband connection to enjoy a full suite of voice services, *often with greatly enhanced functionalities* and at a lower cost than traditional circuit-switched telephony.") (Emphasis added); Cherie R. Kiser, et al., "Regulatory Considerations For Cable-Provided Voice Over Internet Protocol Services," 819 PLI/Pat 341, 347 (2005 Practicing Law Institute) ("Over the past year, service providers and equipment vendors have focused their attention on developing VoIP services and products that can provide consumers innovative voice offerings that include local, long distance, and international calling, *as well as many enhanced applications that are integrated with the voice application*.") (Emphasis added).

phone service that involved "1+" dialing. On the other hand, to access its long distance network, Datanet's customers must "dial a local 7-digit number, wait for a second dial tone, input a PIN if the system does not recognize the user's Caller ID information, and dial the called number." Sayre Aff. [#14], ¶ 6. Frontier states that, once Datanet's customers dial the initial 7-digit number and then input the PIN number, "from *that* point, the call is no different from any other "1+" voice call." *Id.* (emphasis added). The Court suspects that the FCC will ultimately agree with that argument, however, the fact remains that Datanet's dialing system is different from AT&T's.[4] As mentioned earlier, there is also the possibility of inconsistent rulings as to whether or not Datanet's service provides "enhanced functionality," within the meaning of the *AT&T* decision.

As for the fourth factor, whether a prior application has been made to the FCC, it is undisputed that the FCC has been seeking comments on these very issues since March 2004, and intends to issue a comprehensive set of rules concerning VoIP, including ones pertaining to carrier compensation. *See,* "Notice of Proposed Rulemaking," 19 F.C.C.R. at 4867-68 ("[T]his Notice asks broad questions covering a wide range of services and applications, and a wide assortment of regulatory requirements and benefits, to ensure the development of a full and complete record upon which we can arrive at sound legal and policy conclusions regarding whether and how to differentiate between IP-enabled services and traditional voice legacy services, and how to differentiate among IP-enabled services themselves."). Moreover, the FCC

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[4]The Court has little doubt that Datanet will ultimately be required to compensate Frontier in some way. Regardless of how its service is classified, Datanet directly or indirectly benefits from the PSTN. And as discussed above, the FCC obviously intends to require those who use the PSTN to pay for the privilege.

is particularly concerned with the issue of whether, and to what extent, VoIP providers should have to pay access charges. Additionally, the *VarTec* matter that is now pending before the FCC also raises an issue that is almost identical to the one being raised in the instant case.[5]

Finally, the Court has weighed "the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings." In that regard, it is uncertain how long it will take the FCC to address this issue. Some analysts do not expect the FCC to issue a decision in 2005. *See*, "Level 3 Withdraws Access Charge Petition," Communications Daily, 2005 WLNR 4532580 (Mar. 23, 2005) ("Legg Mason said the FCC is likely to deal with the [issue of VoIP access charges] in the broader context of the intercarrier compensation proceeding, not expected to reach completion before year's end."). Nonetheless, the FCC has been actively considering the issue for more than a year, and it appears that a decision will be forthcoming in a matter of months, as opposed to years. In any event, it does not appear that some additional delay will harm Frontier, since Frontier is only now pursuing claims that date back to 1999. Accordingly, based upon all of the factors discussed above, the Court finds that it would be prudent to stay the instant case until such time as the FCC resolves the issue of whether or not VoIP providers such as Datanet are liable for access charges.

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[5] The issue is not identical, since *Vartec* involves terminating access service, as opposed to originating access service.

CONCLUSION

Defendant's motion to dismiss [#5] is DENIED. However, the Court will stay the subject action pending a determination by the FCC regarding the applicability of access charges to VoIP providers such as defendant.

SO ORDERED.

Dated: Rochester, New York
August 2, 2005

ENTER:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge

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

[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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served upon the following parties by Hand Delivery (*) and electronic mail this 7th day of September, 2005.

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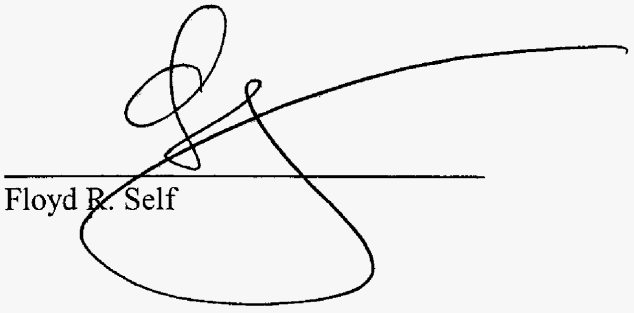

Floyd R. Self