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May 23, 2019

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CenturyLink Petition for a Declaratory Ruling, Connect America Fund, WC Docket No. 10-90; Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92

Dear Ms. Dortch:

CenturyLink submits this *ex parte* in further support of its petition for a declaratory ruling that "over the top" VoIP providers and their LEC partners perform the functional equivalent of end office switching and, accordingly, may collect end office local switching access reciprocal compensation under the Commission's rules.[1] As CenturyLink has explained, the Commission intended in the *Transformation Order*[2] for its new VoIP-PSTN framework to encompass both fixed (facilities-based) and nomadic (over-the-top) VoIP.[3] This filing provides further support for that point; specifically, in adopting rules implementing the VoIP-PSTN framework, the Commission adopted a safe harbor for carriers to determine the amount of traffic that would be subject to it, including end office charges under that framework—and the safe harbor definitively included over-the-top traffic.

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1 *See* Petition of CenturyLink for a Declaratory Ruling, WC Docket No. 10-90, et al. (filed May 11, 2018).

2 *Connect America Fund*, WC Docket No. 10-90, et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663 (2011) (*Transformation Order*).

3 *See, e.g.*, Letter from John T. Nakahata, counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al., (filed Mar. 4, 2019) (*CenturyLink Mar. 4 ex parte*).

Under the new VoIP-PSTN framework adopted in the *Transformation Order*, intercarrier compensation rates, including end office charges, for all "toll" traffic were set equal to the rates for traditional TDM PSTN interstate access charges.[4] LECs therefore needed to distinguish traffic subject to the new VoIP-PSTN framework from other traffic, because, for intrastate toll traffic, different rates typically applied.[5] Recognizing this, and recognizing the potential difficulties with distinguishing VoIP-PSTN traffic from TDM traffic, the Commission provided LECs with an option to use a safe harbor: LECs could specify that the "default percentage of traffic subject to the VoIP-PSTN framework is equal to the percentage of VoIP subscribers in the state based on the Local Competition Report."[6] "In particular," the Commission explained, that percentage "would be the total number of incumbent LEC and non-incumbent LEC VoIP subscriptions in a state divided by the sum of those reported VoIP subscriptions plus incumbent LEC and non-incumbent LEC switched access lines."[7]

The "total number of … LEC VoIP subscriptions," as reported in the Local Competition Report (including the specific edition of the report cited by the Commission in the footnote detailing how to compute the safe harbor), included over-the-top VoIP subscriptions.[8] Moreover, the table in the Local Competition Report the Commission directed LECs to use, Table 8, distinguished "standalone" VoIP service from VoIP service "bundled with Internet" service, and the Commission's safe harbor calculation included both. Elsewhere in the same Local Competition Report, the Commission reported that more than ten percent of all interconnected VoIP—and the majority of standalone VoIP—was nomadic, over-the-top VoIP.[9] Had the Commission wanted to, it could have separately reported state-by-state statistics for nomadic VoIP and fixed VoIP—and designed a safe harbor using them—because, as the Commission observed, the Form 477 on which the Local Competition Report was based collected that data separately.[10] The Commission's own safe harbor thus required LECs to include over-the-top traffic in calculating the percentage of traffic that would be subject to each end office rate, even though it could have just as easily established a safe harbor that did not include over-the-top traffic, and even though the Commission had already observed that more than half of the standalone VoIP subscriptions it included in the safe harbor were for over-the-top traffic. That the Commission had data on over-the-top VoIP, and never suggested that the safe harbor—which determined the end office rate that applied to all traffic—should account for over-the-top VoIP any differently, further confirms that the Commission never believed a LEC would charge an IXC any differently for over-the-top traffic than for facilities-based VoIP.

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4 *Transformation Order*, 26 FCC Rcd at 18,008 ¶ 944.

5 *Id*. at 18,020-21 ¶ 963 & n.1989.

6 *Id*. at 18,021 ¶ 963.

7 *Id*. at 18,021 ¶ 963 n.1993.

8 Federal Communications Commission, IATD, Wireline Competition Bureau, Local Telephone Competition: Status as of December 31, 2010, at 19 Table 8 (rel. Oct. 2011).

9 *Id*. at 7, Figure 5.

10 *See id*. at 6.

The safe harbor is also relevant because of how a LEC would use it. Again, a LEC using the safe harbor was required to assess an IXC on all traffic using the two different end office rates in the percentages specified by the safe harbor. A LEC using the safe harbor was not required or even permitted to do anything else—such as determine whether any traffic was over-the-top or facilities-based—in order to charge the full relevant intrastate end office rates on all traffic in those percentages. To the contrary, to the extent an IXC believed the mix of VoIP-TDM traffic it exchanged with a LEC was different from the safe harbor, it was the IXC's burden to demonstrate so.[11] Doing so would not, however, under any circumstances have meant that end office charges would not apply to any such traffic; it would have merely affected the percentage of traffic subject to each of the two different end office rates.

In contrast to the *Transformation Order*'s detailed discussion of the importance of distinguishing VoIP traffic from TDM traffic and the challenges with doing so, as well as the development of a safe harbor for that purpose, the order never suggested applying different compensation for over-the-top VoIP traffic, never discussed the need to distinguish over-the-top VoIP traffic from facilities-based VoIP traffic, never mentioned the challenges of doing so or possible approaches for solving those challenges, and never contemplated the possibility of developing a safe harbor only for facilities-based VoIP traffic. Over-the-top VoIP was, of course, a singularly important driver for the Commission's development of a regulatory framework for VoIP and had been for many years.[12] The only explanation for what would otherwise be an enormous and glaring oversight is that the Commission intended for over-the-top VoIP traffic to be subject to the same end office charges as facilities-based traffic.

To state the obvious: none of the Commission's discussion about the safe harbor in the *Transformation Order* makes sense if, as AT&T and Verizon claim, over-the-top VoIP traffic is not subject to end office access charges. They posit that the Commission adopted a different compensation framework for over-the-top VoIP traffic despite not ever saying so; despite the Commission's rejection of AT&T's call to impose such a differentiated rate;[13] despite the fact that the Commission's safe harbor included over-the-top traffic; despite the fact that LECs using the safe harbor are required to charge full end office charges for *all* traffic, including over-the-top traffic; despite the fact that the Commission did not discuss a methodology for determining what was over-the-top traffic or establish a safe harbor for calculating it; and despite the fact that elsewhere, the Commission, citing a filing from over-the-top providers including Google, Skype, and Vonage who were arguing that the wide variety of VoIP services available (including over-the-top VoIP) meant that access charges should not apply to any services, stated that "because

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11 *Transformation Order*, 26 FCC Rcd at 18,021-22 ¶ 963 & n.1994.

12 *See, e.g.*, *Vonage Holdings Corp. Petition for Declaratory Ruling*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22,404 (2004) (preempting state regulations for Vonage's over-the-top Digital Voice service); *IP-Enabled Services*, WC Docket No. 04-36, et al., First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10,245, 10,259 ¶ 25 & nn.80-81 (2005) (requiring interconnected VoIP providers to support 9-1-1 service, and discussing the challenges for nomadic service to support 9-1-1).

13 *See CenturyLink Mar. 4 ex parte* at 10-11.

intercarrier compensation disputes have tended to involve all forms of VoIP traffic, we are not persuaded that the Commission should draw additional distinctions among traffic associated with different types of VoIP services" in adopting its new framework, requiring only that VoIP-PSTN traffic be exchanged between carriers to be covered.[14] In sum, the only plausible interpretation of the VoIP-PSTN framework adopted in the *Transformation Order* is that LECs may assess end office charges for over-the-top traffic equal to the charges assessed for facilities-based VoIP traffic.

Please contact me if you have any questions regarding this matter.

Respectfully submitted,

Joseph C. Cavender

cc: Aaron Garza
Lisa Hone
Rhonda Lien
Gil Strobel

[14] *Transformation Order*, 26 FCC Rcd at 18,014 ¶ 954 & n.1942 (citing Letter from Donna N. Lampert, Counsel for Google, Skype, Sprint, and Vonage, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al., Attach. at 4-6).