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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 Inter-carrier Compensation Regime,
CC Docket No. 01-92

Dear Ms. Dortch:

CenturyLink submits this *ex parte* in response to a recent filing by AT&T¹ regarding CenturyLink's 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.² Much of AT&T's filing treads familiar ground, fails to respond to CenturyLink's arguments, or both, and in any event calls for no response. Below, CenturyLink responds to a few of AT&T's points.

1. As CenturyLink has explained, a straightforward reading of the CenturyLink incumbent LEC tariff, as well as AT&T's and Verizon's own incumbent LEC tariffs, confirms that end office switching charges can apply to over-the-top VoIP calls.³ For an obvious example,

¹ Letter from James P. Young, counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed May 21, 2019) (*AT&T May 21 ex parte*).

² See Petition of CenturyLink for a Declaratory Ruling, WC Docket No. 10-90, et al. (filed May 11, 2018) (Petition).

³ See Letter from John T. Nakahata, counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al., at 11-13 (filed Mar. 4, 2019) (*CenturyLink Mar. 4 ex parte*).

just as end office switching charges apply⁴ when CenturyLink, as an incumbent LEC, delivers calls to an enterprise that has purchased Primary Rate Interface (PRI) service to connect its PBX to the PSTN, end office switching charges also apply when that enterprise, still using the same PRI service purchased from the LEC, replaces its PBX equipment with a VoIP server, which can support calls from remote employees accessing the VoIP server over an Internet connection (*i.e.*, over-the-top VoIP calls). Admittedly, it is not entirely clear whether AT&T concedes that such calls are, in fact, over-the-top calls,⁵ but it is undisputable that they are: the calls can travel over a broadband Internet connection to the employee at home, a branch office, or another remote location. It is also not clear whether AT&T concedes that end office switching charges apply to such over-the-top calls, but here, again, it is undisputable that they do under the plain terms of the tariffs and consistent with what appears to be uniform industry practice—including AT&T's own practice.

In any event, what is clear is that if, instead of selling services such as PRI service to an enterprise that uses those services to enable over-the-top VoIP, CenturyLink sells the same services to a VoIP provider, AT&T believes end office switching charges are not applicable. AT&T is incorrect. Again, focusing here just on the incumbent LEC tariffs and CenturyLink's own incumbent LEC operations for the sake of simplicity: there is nothing in the tariff that would treat an arrangement involving an enterprise that has purchased PRI service and uses it to enable over-the-top VoIP any differently from how it would an arrangement involving a VoIP provider that has purchased the same PRI service and uses it to enable over-the-top VoIP.

AT&T claims that LECs “do not supply a last-mile connection” on over-the-top VoIP calls.⁶ CenturyLink has already explained that there is no basis for this imaginary requirement.⁷ Moreover, although AT&T does not explain what it means by its use of the phrase “last-mile connection,” whatever AT&T might mean, it would provide no assistance to AT&T. That is, AT&T cannot mean a connection to the actual called or calling individual, because, in the context of enterprise services, no such connection to the individual is provided by a LEC: the LEC's trunking service connects to the PBX or VoIP server, while a separate connection links the PBX or VoIP server to the called or calling individual's device. Nevertheless, end office switching charges apply. If instead AT&T means the “last-mile” to the “end user” as defined in

⁴ More precisely, such charges applied, with respect to terminating traffic, prior to the transition to bill-and-keep for price cap carriers in 2017. See *Connect America Fund*, WC Docket No. 10-90, et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663, 17,935 Fig. 9 (2011) (*Transformation Order*). End office switching charges still apply to originating traffic.

⁵ See *AT&T May 21 ex parte* at 4 n.12 (“CenturyLink's arguments [analogizing to PBXes] are, at most, an argument about whether particular calls should be considered facilities-based or over-the-top.”).

⁶ *Id.* at 10. AT&T also asserts that LECs in over-the-top arrangements do not provide interconnection, *id.*; CenturyLink has already explained that AT&T is incorrect about what the term “interconnection” means. See *CenturyLink Mar. 4 ex parte* at 5-6; CenturyLink Reply in Support of Its Petition for a Declaratory Ruling, WC Docket No. 10-90, et al., at 9-11, 13-14 (filed July 3, 2018) (CenturyLink Reply).

⁷ See Petition at 21-22; CenturyLink Reply at 7-12; *CenturyLink Mar. 4 ex parte* at 4-8.

the LEC's tariff, then, at least in common arrangements where the VoIP provider has purchased services like a SIP trunk or PRI service from the LEC, the LEC *has* provided a last-mile connection to that end user customer—the VoIP provider.⁸

AT&T counters that “the VoIP partner is not the ‘end user’ on an over-the-top VoIP call.”⁹ As CenturyLink has explained, however, the relevant definition of “end user” is set forth the applicable tariffs, and non-carrier VoIP providers that purchase appropriate services, including PRI services and SIP trunks, from LECs fit that definition and therefore are end users.¹⁰ AT&T does not respond to that argument or address the fact that those tariff provisions not only comply with Commission rules but were deemed lawful decades ago. Ignoring all of that, AT&T asserts instead that the “end user” is the entity that places or receives an over-the-top VoIP call.¹¹ To be clear, if AT&T believes the “end user” is the person receiving or placing a call, then employees of enterprises would be end users, rather than the enterprises themselves. Not only is that contrary to what the tariffs actually say, it would mean that end office switching charges would essentially *never* apply to enterprise calls, because, as discussed just above, the LEC does not provide the connection to the called individual in the enterprise context. In short, contrary to AT&T's assertion, at least under the AT&T, Verizon, and CenturyLink tariffs, a non-

⁸ As CenturyLink has explained previously, *see CenturyLink Mar. 4 ex parte* at 11-12 & n.64, AT&T, Verizon, and CenturyLink's incumbent LEC tariffs all define the term “end user” using virtually identical language, and when a non-carrier customer, whether it is a VoIP provider or an enterprise, purchases interstate service, it fits that definition. *See CenturyLink Operating Cos. Tariff* FCC No. 1 § 2.6 at 2-66 (“The term ‘End User means any customer of an interstate or foreign telecommunications service that is not a carrier, except that a carrier other than a telephone company shall be deemed to be an ‘end user’ when such carrier uses a telecommunications service for administrative purposes, and a person or entity that offers telecommunications service exclusively as a reseller shall be deemed to be an ‘end user’ if all resale transmissions offered by such reseller originate on the premises of such reseller.”); *Southwestern Bell Tel. Co. Tariff* FCC No. 73 § 2.7 at 2-103 (The term End User “[d]enotes any customer of an interstate or foreign telecommunications service that is not a carrier, except that a carrier other than a Telephone Company shall be deemed to be an ‘end user’ when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an ‘end user’ if all resale transmissions offered by such reseller originate on the premises of such reseller.”); *Verizon Tariff* FCC No. 1 § 2.6 at 2-64 (“The term ‘End User’ denotes any customer of an interstate or foreign telecommunications service that is not a carrier, except that a carrier other than a telephone company shall be deemed to be an ‘end user’ when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an ‘end user’ if all resale transmission offered by such reseller originate on the premises of such reseller”).

⁹ *AT&T May 21 ex parte* at 10.

¹⁰ *See supra* note 8; *CenturyLink Mar. 4 ex parte* at 11-13.

¹¹ *See AT&T May 21 ex parte* at 10.

carrier entity purchasing interstate services from the LEC *is* an end user for the purposes of the tariff.¹²

AT&T’s fallback argument, that “even if the VoIP partner were an end user within the meaning of the tariff, CenturyLink’s tariff would still prohibit end office charges on over-the-top VoIP calls”¹³ is also unavailing. As CenturyLink has explained, CenturyLink has had both enterprise customers and VoIP provider customers that have purchased PRI services from its incumbent LEC affiliates. For both types of customers, CenturyLink has provided identical switching services and delivered calls over the same PRI facilities, and has charged end office switching in accordance with its tariff. AT&T asserts that when CenturyLink does so in connection with its VoIP provider customers, it has not provided any “end office switching ... functions” or “end user line termination.”¹⁴ It is not entirely clear what AT&T means by that, but whatever it means, AT&T has failed to explain how, under CenturyLink’s tariff, CenturyLink *does* provide those functions in the context of enterprise customers that enable over-the-top service for remote employees (whether at a branch office, travelling, or at home) but *does not* provide them in the context of VoIP provider customers, if, as AT&T concedes for the purposes of its fallback argument, the enterprise and the VoIP provider, both of which purchased identical services from the LEC, are both end users under the tariff.

2. CenturyLink has pointed out that the versions of the rules endorsed by AT&T and Verizon—to the extent one can ascertain how they are supposed to operate—appear to draw arbitrary, unjustifiable distinctions between calling arrangements in which LECs may assess end office switching charges and arrangements in which LECs may not.¹⁵ Although on this, too, AT&T is not entirely clear, AT&T appears to believe the Commission need not address CenturyLink’s arguments.¹⁶

¹² See *CenturyLink Mar. 4 ex parte* at 11-13. AT&T’s citation (at 10 n.35) of *Numbering Policies for Modern Communications*, 30 FCC Rcd 6839, 6852-55 ¶¶ 28, 30, 32 (2015), is also of no help to AT&T. In that order, the Commission declared, for the purposes of 47 C.F.R. § 52.15(f)(1)(iii), that telephone numbers provided by LECs to VoIP providers should be reported as “intermediate” rather than “assigned.” Section 52.15(f)(1)(iii) has nothing to do with access charges or tariffs, and the Commission’s explicitly narrow objective in that order, to ensure that it had clear information about the use to which telephone numbers were being put and that numbers-holders were reporting consistently, has no bearing on the issues in this proceeding.

¹³ *AT&T May 21 ex parte* at 11.

¹⁴ *Id.*

¹⁵ See Letter from John T. Nakahata, counsel to CenturyLink, WC Docket No. 10-90, et al. (filed Nov. 28, 2018); *CenturyLink Mar. 4 ex parte* at 2-4.

¹⁶ See *AT&T May 21 ex parte* at 4 n.12 (“CenturyLink’s arguments are, at most, an argument about whether particular calls should be considered facilities-based or over-the-top [T]he Commission at this juncture does not have to resolve more particularized disputes about whether specific types of calls are over-the-top.”).

The Commission may not side-step this issue as AT&T suggests. AT&T has asked the Commission to issue a declaratory ruling that end office switching charges may not be billed on over-the-top VoIP calls.¹⁷ Under the Administrative Procedure Act, however, the Commission cannot do so without providing a reasoned basis for *why* that is so.¹⁸ As CenturyLink has explained, the challenge for AT&T is that it is not possible for the Commission to provide the required reasoned basis for a decision in AT&T's favor. The Commission cannot, for example, explain why over-the-top calls in connection with services to enterprises are subject to end office switching charges, but over-the-top calls associated with VoIP providers that have purchased identical trunking services from the LEC, and for which the LEC provides identical switching services, are not subject to such charges. Nor may the Commission decline to address that issue by asserting that enterprise services are beyond the scope of this proceeding. CenturyLink has explained why the fact that end office switching charges apply to enterprise services means they must also apply to the "over the top" calls to which AT&T asserts they do not, and the Commission, under the Administrative Procedure Act, must address those arguments if it intends to issue the ruling AT&T seeks.¹⁹ In addition, the Commission must respond to CenturyLink's argument that the distinctions AT&T and Verizon's proposed rule would draw are arbitrary and unjustifiable.²⁰

AT&T's argument is flawed in an additional respect. As CenturyLink has explained, the Commission said, in adopting its VoIP-PSTN framework in the *Transformation Order*, that it was doing so to resolve disputes plaguing the industry regarding the compensation appropriate in connection with *all* types of VoIP calls.²¹ Adopting AT&T's proposed rule, however, would lead to many further disputes about whether a LEC may impose end office switching charges on particular calling arrangement.²² In other words, if AT&T is correct, the Commission's carefully

¹⁷ *Id.* at 12.

¹⁸ *See* 5 U.S.C. § 706(2).

¹⁹ *See AT&T v. FCC*, 86 F.3d 242, 247 (D.C. Cir. 1996) (vacating and remanding Commission decision because the Commission had failed to consider an argument raised in an *ex parte* letter). AT&T's assertion that "even assuming, *arguendo*, that CenturyLink were right about these specific types of business services, it does not follow that the 2011 rules could or should be construed to permit end office charges for any other types of over-the-top VoIP calls" would not suffice. *See AT&T May 21 ex parte* at 4 n.12. As CenturyLink has explained, it does indeed follow, and AT&T has not offered a lawful basis to distinguish those "other types" of over-the-top VoIP calls.

²⁰ *See, e.g., CenturyLink Mar. 4 ex parte* at 2-4.

²¹ *See id.* at 9-11; Letter from Joseph C. Cavender, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al., at 3-4 (filed May. 23, 2019) (*CenturyLink May 23 ex parte*) (quoting *Transformation Order*, 26 FCC Rcd at 18,014 ¶ 954 (citing a filing from over-the-top VoIP providers and observing that "intercarrier compensation disputes have tended to involve all forms of VoIP traffic" as a reason for establishing a broad rule that did not draw distinctions between different forms of VoIP traffic)).

²² AT&T implicitly acknowledges as much, even as it urges the Commission not to resolve those disputes or even provide guidance regarding them. *See AT&T May 21 ex parte* at 4 n.12 (urging the Commission not to resolve questions about "whether specific types of calls are over-the-top.")

crafted VoIP-PSTN rule was in fact a comical mess and utterly failed to do the one thing it was supposed to do. There is no basis, however, to support a conclusion that the Commission made such an obvious mistake.

AT&T's suggestion that carriers use factors to resolve disagreements about what compensation to apply to traffic—merely a “purported *practical* problem” in AT&T's view—and that the Commission need not concern itself with such issues, cannot rehabilitate its position, either.²³ For one thing, carriers cannot reasonably develop factors that estimate how much traffic is over-the-top VoIP if they do not even know what qualifies as over-the-top VoIP traffic in the first place. For another, as CenturyLink has explained, it is inconceivable that the Commission, which discussed at length the challenges of identifying VoIP-PSTN calls, endorsed the use of a VoIP-PSTN factor to ensure proper billing for such traffic, and established a safe harbor for LECs to use in determining their VoIP-PSTN factors, never mentioned the challenges that carriers would face to distinguish over-the-top VoIP traffic from facilities-based VoIP traffic, never discussed the use of an “over-the-top” factor for such traffic, and never established a safe harbor approach for it—and yet intended for carriers to apply different compensation to such traffic.²⁴ If carriers were supposed to use an “over-the-top” factor, the Commission would have said so. It did not.

3. Finally, AT&T's claim²⁵ that CenturyLink has not addressed the D.C. Circuit's decision in *AT&T v. FCC*²⁶ is not correct. The key issue identified by the D.C. Circuit in *AT&T* was that, according to the court, the Commission had not adequately distinguished the functions performed by the end office switch from the functions performed by a tandem switch,²⁷ which of course is precisely what CenturyLink did in its Petition and the accompanying technical declaration. AT&T's *ex parte* does not call out specific issues that CenturyLink allegedly has failed to discuss adequately; rather, AT&T cites its previous filings broadly, suggesting, for example, that CenturyLink has not adequately discussed certain of the Commission's precedents or responded to the claim that CenturyLink relies on a new concept of functional equivalence.²⁸ AT&T's assertions do not make a thing so. In any event, a straightforward declaratory ruling that distinguished the functions performed by a tandem switch from the functions performed by an

²³ See *id.* at 5 (emphasis in original).

²⁴ See *CenturyLink May 23 ex parte* at 3-4.

²⁵ See *AT&T May 21 ex parte* at 1-2.

²⁶ 841 F.3d 1047 (D.C. Cir. 2016).

²⁷ *Id.* at 1054 (holding that the Commission had not explained that the “services provided by over-the-top VoIP-LEC providers [] qualify as the functional equivalent of end-office switching and not tandem switching”).

²⁸ See *AT&T May 21 ex parte* (citing Reply Comments of AT&T, WC Docket No. 10-90, et al., at 2 (filed July 3, 2018)). But see Petition at 15-17, 20-23; CenturyLink Reply at 6-18; *CenturyLink Mar. 4 ex parte* at 4-11; *CenturyLink May 23 ex parte*.

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end office switch, as requested by CenturyLink in its Petition, would respond to the D.C. Circuit's decision.²⁹

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

²⁹ See Petition at 8-15 (discussing the different role an end office switch plays in setting up a call on the PSTN from the role a tandem switch plays).