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

In the Matter of	
Connect America Fund	WC Docket No. 10-90
Developing a Unified Intercarrier Compensation Regime	CC Docket No. 01-92

COMMENTS OF VERIZON ON PETITION OF CENTURYLINK FOR A DECLARATORY RULING

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The Commission should deny CenturyLink's petition, consistent with its longstanding prohibition against LECs collecting access charges for functions they do not provide. Despite that clear rule, some competitive LECs and their over-the-top VoIP provider partners have engaged in arbitrage and double billing by claiming that placing traffic on the Internet to be routed to customers anywhere in the country (or the world) is the functional equivalent of end office switching. Beyond that, some competitive LECs are increasingly purchasing toll-free traffic — often fraudulently generated — from over-the-top VoIP providers to exploit the still high originating end office switched access rates, as well as routing IP traffic through multiple competitive LECs to generate duplicative billing. The petition, if granted, would give license to those arbitrage schemes.

The Commission erred in 2015 when it deviated without justification from this policy — and from its 2012 *YMax Order*[1] — and held that an over-the-top VoIP provider and its competitive LEC partner perform the functional equivalent of end office switching when they route traffic to or from customers over the Internet.[2] The D.C. Circuit found, however, that the "Commission's muddled treatment of functional equivalence" in the *VoIP Declaratory Ruling* "require[d] vacatur and remand."[3] The court noted the Commission's prior decisions — many contemporaneous with the *Transformation Order*[4] — setting forth its "understanding of the

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[1] Order, *Connect America Fund*, 27 FCC Rcd 2142, ¶ 4 (Wireline Comp. Bur. 2012) ("*YMax Order*") (rejecting YMax's assertion that, in light of the VoIP Symmetry Rule, it could bill end office switched access charges "regardless of how or by whom the last-mile transmission is provided").

[2] *See* Declaratory Ruling, *Connect America Fund*, 30 FCC Rcd 1587, ¶¶ 26-31 (2015) ("*VoIP Declaratory Ruling*").

[3] *AT&T Corp. v. FCC*, 841 F.3d 1047, 1054 (D.C. Cir. 2016).

[4] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*Transformation Order*").

commonly understood meaning[ ] of end-office switching" is that it "suppl[ies] actual or physical interconnection" to the end-user customer.[5]

The Commission should decline CenturyLink's invitation to repeat the mistakes made in the *VoIP Declaratory Ruling*. Instead, it should confirm that physical interconnection is a critical component of end office switching and, therefore, that a competitive LEC cannot charge its tariffed end office switching rates when it routes traffic over the Internet in conjunction with an over-the-top VoIP provider partner. The contrary ruling would provide a windfall to competitive LECs that incur none of the actual costs that end office switching rates were intended to recover. That is particularly so in the context of originating switched access rates, which the Commission has not yet reduced. At a minimum, the Commission should limit any functional equivalence ruling to terminating traffic, to avoid encouraging the further proliferation of 8YY originating arbitrage schemes that the Commission seeks to end in its newly opened rulemaking, including schemes based on flooding 8YY numbers with robocalls.[6]

I. THE COMMISSION SHOULD RECONFIRM THAT COMPETITIVE LECS PARTNERED WITH OVER-THE-TOP VOIP PROVIDERS DO NOT PERFORM THE FUNCTIONAL EQUIVALENT OF END OFFICE SWITCHING

A. The Physical Connection to the End User Is the Critical Distinguishing Feature of End Office Switching

When the Commission adopted the VoIP Symmetry Rule — which allows a LEC to collect access charges for "functions performed by it and/or by its retail VoIP partner" — as an exception to its longstanding "historical approach" that LECs may only "charge access charges to the extent that they are providing the functions at issue," the Commission sought to "reduce

[5] *AT&T Corp.*, 841 F.3d at 1056 (first alteration in original).

[6] Further Notice of Proposed Rulemaking, *8YY Access Charge Reform*, WC Docket No. 18-156, FCC 18-76 (rel. June 8, 2018) ("*8YY FNPRM*").

uncertainty and litigation" and to protect against "double billing" and "arbitrage."[7] The Commission permitted LECs to assess switched access charges "regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture," but only if the LEC and/or its VoIP partner actually performed the functions for which the LEC billed.[8] The Commission repeatedly stressed that the VoIP Symmetry Rule does "not permit a LEC to charge for functions" that "neither" performed.[9] Therefore, in order to charge end office switching access rates, the LEC and its VoIP partner must perform *all* the functions of a traditional TDM end office switch.

In the *VoIP Declaratory Ruling*, the Commission recognized that, "[i]n a circuit-switched network the connection of trunks to lines" — that is, of the switch to the end-user customer — is "critical" and "fundamental to end office switching."[10] That is reflected in the Commission's rules, which define "End Office Access Service" to include not only "switching" but also "the delivery . . . of such traffic" to or from the end user's "premises."[11]

For a competitive LEC and a VoIP provider partner to provide, collectively, the functional equivalent of end office switching, therefore, those entities must not only switch the traffic but also provide the delivery of the traffic to or from the end user. There is no dispute that, when a facilities-based VoIP provider works with a competitive LEC to complete a VoIP-PSTN call, those two entities provide that connection — via the facilities-based carrier's network

[7] *Transformation Order* ¶¶ 968, 970 & n.2027.

[8] *Id.* ¶ 970.

[9] *Id.* ¶¶ 968, 970; *accord id.* ¶ 970 n.2028 ("[T]he right to charge does not extend to functions not performed by the LEC or its retail VoIP service provider partner.").

[10] *VoIP Declaratory Ruling* ¶ 30.

[11] 47 C.F.R. § 51.903(d)(1).

— to the end-user customer. There is also no dispute that, when a competitive LEC works instead with an over-the-top VoIP provider, neither provides the connection to the end-user customer. That connection is, instead, provided by many different entities: the broadband Internet access provider that connects the VoIP provider's server to the Internet, the broadband Internet access provider that separately sells service to the end-user customer, and any other Internet backbone providers that carry the voice packets as they are routed between those two broadband Internet access providers' networks.

That key distinction means that, in the latter case, the work the over-the-top VoIP provider and competitive LEC perform together is *not* the functional equivalent of end office switching; instead, a much broader group of companies, including the broadband Internet access providers and Internet backbone providers, are performing those functions.[12] The VoIP Symmetry Rule only allows a competitive LEC to charge "for functions performed by it and/or by its retail VoIP partner," however, and does "not permit a LEC to charge for functions performed neither by itself or its retail service provider partner."[13] Therefore, the Commission should declare that a competitive LEC cannot charge its end office switched access rates when it sends traffic to, or receives traffic from, over-the-top VoIP providers' customers.

That result is compelled not only by the fact that neither the competitive LEC nor its over-the-top VoIP provider partner performs the fundamental and critical task of getting the call onto (or taking it from) its end-user customer's line, but also by the purpose of end office

[12] Although the Commission's rules define end office access service to include delivery to the end user's "premises . . . via contractual or other arrangements with an affiliated or unaffiliated entity," 47 C.F.R. § 51.903(d)(2), neither the competitive LEC nor the over-the-top VoIP provider has a contract or arrangement of any type with the Internet backbone providers or the broadband Internet access provider serving the end-user customer.

[13] *Transformation Order* ¶ 970.

switched access charges themselves. As the Commission explained, "[e]nd office switching charges were and are authorized by law to allow local exchange carriers to recover the substantial investment required to construct the tangible connections between themselves and their customers throughout their service territory."[14] That is why historically "end office switching rates [we]re among the highest recurring intercarrier compensation charges"[15] — something that remains true today for originating switched access charges. As the D.C. Circuit noted, this is a "remarkably clear, even emphatic . . . statement about" the "commonly understood meaning[ ] of end-office switching around the time of the *Transformation Order*."[16] Nothing in the *Transformation Order* suggests that the Commission intended to depart from that commonly understood meaning or to allow competitive LECs to charge for the work performed by third-party broadband Internet access and Internet backbone providers rather than by themselves. Those third-party companies actually made the substantial investment required to construct the tangible connections to the customers throughout their services territory. The Commission should not read the VoIP Symmetry Rule — a limited exception to the general rule that a LEC can only charge for the work it performs — to allow competitive LECs to profit from the investments those unrelated third parties made in deploying broadband networks.

B. CenturyLink's Functional Equivalence Arguments Lack Merit

CenturyLink does not offer a valid reason for the Commission to reinstate its flawed *VoIP Declaratory Ruling*.

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[14] Memorandum Opinion and Order, *AT&T Corp. v. YMax Communications Corp.*, 26 FCC Rcd 5742, ¶ 40 (2011) ("*AT&T v. YMax Order*").

[15] *Id.*

[16] *AT&T Corp.*, 841 F.3d at 1056 (alteration in original).

First, CenturyLink relies on — but draws the wrong lessons from — the Commission's purposes in adopting the VoIP Symmetry Rule.[17] CenturyLink points to the Commission's preference for structural symmetry, but that preference supports *differentiating* facilities-based and over-the-top VoIP providers, because the former have made the kind of substantial investments in deploying tangible connections that the latter have not. CenturyLink next notes that the *Transformation Order* broke from the prior rules. But, like the Commission in the *VoIP Declaratory Ruling*, it ignores the Commission's "remarkably clear, even emphatic," and contemporaneous description of the common understanding of end office switching charges as "authorized by law to allow local exchange carriers to recover the substantial investment required to construct the tangible connections between themselves and their customers throughout their service territory."[18] CenturyLink's failure to grapple with this statement presents the same "problem with the . . . attempted application of the . . . functional equivalence standard" that the D.C. Circuit identified in the *VoIP Declaratory Ruling*.[19] Finally, CenturyLink notes the Commission's intent to adopt a technologically neutral approach. But distinguishing between facilities-based and over-the-top VoIP providers is technology-neutral — the different treatment has nothing to do with the providers' choice of technology (both use IP), but with the fact that the former are doing work that the latter are not.

Second, CenturyLink argues that, because a competitive LEC partnered with an over-the-top VoIP provider performs call set-up and termination functions, the two are doing something

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[17] *See* Pet. at 5-8.

[18] *AT&T Corp.*, 841 F.3d at 1056; *AT&T v. YMax Order* ¶ 40.

[19] *AT&T Corp.*, 841 F.3d at 1056. CenturyLink continues to fail to grapple with this clear and emphatic statement in the section of its petition arguing about the Commission's Part 69 rules. *See* Pet. at 20-23.

more than tandem switches or SS7 signaling points and, therefore, must be performing the functional equivalent of end office switching.[20] But the question that the VoIP Symmetry Rule poses is *not* whether the "functions performed by [the competitive LEC] and/or by its retail VoIP partner" differ in some identifiable way from tandem switching and SS7 signaling.[21] Instead, it is whether those functions are the functional equivalent of end office switching. CenturyLink's focus on call set-up and termination ignores the separate functions required for call delivery to or from an end-user customer — functions that are "critical" and "fundamental to end office switching"[22] and that are part of the Commission's definition of End Office Access Service.[23] In the context of over-the-top VoIP traffic, those delivery functions are "performed neither by [the competitive LEC] or its retail [VoIP] service provider partner."[24]

Third, CenturyLink derides the focus on the connection of trunks to loops as "incorrect and entirely circular."[25] Yet even in the *VoIP Declaratory Ruling*, the Commission acknowledged that "the connection of trunks to lines" is "critical" and "fundamental to end office switching" in a "circuit-switched network."[26] To avoid this, CenturyLink asserts that the traditional identification of a loop as the "connection between the end user premises and the ILEC central office" does not work in "a modern network."[27] That assertion ignores the fact that, even in modern wireline networks, it remains absolutely straightforward to identify the end

[20] *See* Pet. at 8-17.

[21] *Transformation Order* ¶ 970.

[22] *VoIP Declaratory Ruling* ¶ 30.

[23] 47 C.F.R. § 51.903(d)(1).

[24] *Transformation Order* ¶ 970.

[25] Pet. at 17-20.

[26] *VoIP Declaratory Ruling* ¶ 30.

[27] Pet. at 19.

user's loop: it is the wire or cable that connects to that end user's premises and performs the delivery of traffic. That "delivery" of traffic also remains part of the Commission's definition of End Office Access Service.[28] There is nothing incorrect or circular about continuing to require that either the LEC or its VoIP provider partner perform that delivery function in order to be deemed to be providing the functional equivalent of end office switching. Instead, CenturyLink urges the Commission to treat the "entire worldwide Internet" as though it were a "virtual loop[ ]" — of "indeterminate length and configuration" — connecting the VoIP provider's server to the end user's premises for which the competitive LEC and VoIP provider can take credit under the VoIP Symmetry Rule.[29] As the Commission explained in rejecting that same argument — and applying the "commonly understood meaning[ ]" of loop — if "this exchange of packets over the Internet is a 'virtual loop,' then . . . the term 'loop' has lost all meaning."[30]

II. AT A MINIMUM, THE COMMISSION SHOULD LIMIT ANY FUNCTIONAL EQUIVALENCE FINDING TO TERMINATING TRAFFIC

As CenturyLink notes,[31] because the Commission has transitioned most terminating switched access charges to bill-and-keep, the question CenturyLink poses in its petition is of largely historical importance in the context of terminating traffic. A new declaratory ruling will not affect the incentives of most competitive LECs and their VoIP provider partners to engage in arbitrage to collect end office switched access charges on terminating traffic when those rates are at $0.

[28] 47 C.F.R. § 51.903(d)(1).

[29] *AT&T v. YMax Order* ¶ 44.

[30] *Id.* ¶¶ 43-44.

[31] *See* Pet. at 3.

But the Commission has not yet reduced originating switched access rates, and, as the Commission recently noted, the "current intercarrier compensation system for telephone calls made to toll free (8YY) numbers is rife with opportunities for arbitrage and fraud."[32] Specifically, the availability of high originating switched access charges creates substantial incentives for carriers to "artificially inflate access charges billed to the interexchange carriers (IXCs) that provide 8YY services" and for parties fraudulently to "flood 8YY numbers with robocalls."[33]

Indeed, competitive LECs are *purchasing* 8YY calls from their ostensible wholesale customers in order to exploit arbitrage opportunities. For example, Teliax's "wholesale customer[s do not] make any payment to Teliax . . . for 8YY originating" traffic; instead, "[t]hey get paid by Teliax to send us their traffic."[34] Core Communications, which the Commission long ago identified as the "the poster boy of [intercarrier] compensation gamesmanship,"[35] also is pursuing this arbitrage opportunity. Indeed, Core recently asserted that "a *purchase* of X number of [originating switched access] minutes for $100,000 . . . generates multiples of the $100,000 in [originating switched access charge] revenues."[36] The Commission has previously acted to stop similar arbitrage opportunities that "made it possible for LECs . . . to afford to pay their own

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[32] *8YY FNPRM* ¶ 1.

[33] *Id.*

[34] Excerpt of Deposition of Teliax President David Aldworth at 61:18-62:5, *Teliax, Inc. v. AT&T Corp.*, No. 1:15-cv-01472-RBJ, Dkt. No. 68-1 (D. Colo. filed Oct. 21, 2016), https://bit.ly/2sOWzAx.

[35] Resp. of FCC to Emergency Mot. for Stay at 14, *WorldCom, Inc. v. FCC*, Nos. 01-1218 *et al.* (D.C. Cir. filed June 12, 2001).

[36] Debtor's Post-Hearing Mem. at 9, *In re CoreTel Virginia, LLC*, No. 15-16717-RAG, Dkt. No. 238 (Bankr. D. Md. June 6, 2018) (emphasis added), https://bit.ly/2xRaFam.

customers to use their services," which "provide[s] an inducement to fraudulent schemes to generate . . . minutes."[37]

The Commission has recently initiated an effort to "reduce or eliminate incentives for parties to engage in the[se] types of abuse" involving 8YY traffic.[38] We support the Commission's effort, as it has seen its 8YY customers face an increasing number of fraudulent 8YY calls from increasingly sophisticated robocallers. These callers are no longer simply autodialing consecutive 8YY numbers and immediately hanging up to generate one minute of switched access revenue and one or more database dip fees. They are now shaping their fraudulent traffic to mirror normal calling patterns and times; distributing their autodialed calls across multiple providers; and playing audio files to prolong those calls.[39] This traffic shaping makes it far harder for the carriers offering terminating 8YY service to detect these fraudulent calls, which "are only controllable from the originating point."[40] That difficulty in detection, in turn, makes these 8YY calls that much more valuable to the scammers that dial them — and to the competitive LECs and over-the-top VoIP providers that purchase these calls in order to "generate[ ] multiples" of the purchase price in switched access revenue.

Denying CenturyLink's petition and declaring instead that competitive LECs cannot charge end office switched access rates for any over-the-top VoIP traffic would be a good first step in curbing 8YY traffic arbitrage. But if the Commission were to grant CenturyLink's

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[37] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151, ¶¶ 21, 70 (2001) ("*ISP Remand Order*").

[38] *8YY FNRPM* ¶ 4; *see also id.* ¶¶ 23-28 (describing record evidence).

[39] *See, e.g., The Case of the Phantom Caller,* Reply All (No. 104) (Sept. 7, 2017), https://bit.ly/2sPc7UW.

[40] *8YY FNPRM* ¶ 32.

petition, it should limit that ruling to terminating traffic, so as not to fuel growth in the very 8YY traffic arbitrage that the Commission is now working to eliminate. While the Commission declined to so limit the *VoIP Declaratory Ruling*, it found at that time that there was no "persuasive evidence" that such arbitrage was "prevalent or will somehow proliferate."[41] Yet that is exactly what has happened in the three-and-a-half years since that ruling, as the Commission recognized in its *8YY FNPRM*. And, although the Commission suggested in the *VoIP Declaratory Ruling* that its access stimulation rules would likely be effective at preventing such arbitrage,[42] that has not proven to be the case. For example, Core Communications already mirrors Verizon's originating end office switched access rates — which are the lowest price-cap LEC rates in the states in which Core operates and are among the lowest such rates nationwide — and yet its president testified that those rates are more than sufficient to fuel his latest arbitrage scheme.[43]

Alternatively, the Commission could avoid fueling 8YY traffic arbitrage by answering a question it expressly left open in the *VoIP Declaratory Ruling*: whether the VoIP Symmetry Rule applies only where the competitive "LEC seeking to assess end office access charges also assigned the calling party telephone number as reflected in the database of the Number Portability Administration Center (NPAC)."[44] The Commission could dramatically reduce

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[41] *VoIP Declaratory Ruling* ¶ 25.

[42] *See id.*

[43] Tr. of Hr'g at 34:16-35:2, *In re CoreTel Virginia, LLC*, No. 15-16717-RAG (Bankr. D. Md. May 23, 2018) (Bret Mingo, CoreTel Virginia president, explaining that Verizon's tariffs for originating switched access charges are "pretty good," such that "8YY minutes are going to naturally find themselves . . . to carriers in the Mid-Atlantic, and I would like to be one of them").

[44] *VoIP Declaratory Ruling* ¶ 3 n.7 (expressly "not address[ing] the interpretation or application of [the]VoIP symmetry rule in cases where the LEC seeking to charge end office access charges does not assign the calling party telephone number").

arbitrage opportunities by limiting the availability of end office switched access charges for 8YY traffic to the competitive LEC that assigns the telephone number that the VoIP provider's customer uses and, therefore, is also responsible for terminating calls to that customer. That would substantially curtail, if not eliminate, the market that has developed in which competitive LECs compete for VoIP providers' 8YY traffic "not on the basis of the quality and efficiency of the services they provide, but on the basis of their ability to shift costs to other carriers."[45] Competitive LECs would have less ability to purchase traffic from VoIP providers if they could not charge the higher end office switched access rates for such traffic, reducing the payment stream that induces the generation of fraudulent calls in the first place.

Such a limitation is wholly consistent with the Commission's existing rules. At the same time it adopted the VoIP Symmetry Rule, the Commission "revised section 61.26(f) to . . . implement the VoIP symmetry rule" and, in 2012, it further amended § 61.26(f) to "include an express cross reference to section 51.913(b)" — which contains the VoIP Symmetry Rule.[46] As a result of those amendments, § 61.26(f) now states:

> If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, *except if the CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may*, to the extent permitted by § 51.913(b) of this chapter, assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.[47]

[45] *ISP Remand Order* ¶ 71.

[46] *YMax Order* ¶¶ 4-5.

[47] 47 C.F.R. § 61.26(f) (emphasis added).

Section 61.26(f) thus makes clear that the VoIP Symmetry Rule (§ 51.913(b)) is available only to those competitive LECs that are "listed in the database of the [NPAC] as providing the calling party . . . number." Other competitive LECs are instead limited to charging for the work they actually perform themselves, which has long been the rule for all LECs for switched access charges. Limiting the VoIP Symmetry Rule in this way ensures that the competitive LEC benefiting from the VoIP Symmetry Rule has *some* connection to the customer originating the call and has not paid the VoIP provider to divert that customer's outbound 8YY traffic as part of an arbitrage scheme.

CONCLUSION

The Commission should deny CenturyLink's petition and declare that the VoIP Symmetry Rule does not permit a competitive LEC to bill and collect its tariffed end office switched access charges for over-the-top VoIP traffic. In the alternative, the Commission should guard against arbitrage by declaring that competitive LECs cannot bill or collect their tariffed originating end office switched access charges for 8YY traffic, including by enforcing the limitation in 47 C.F.R. § 61.26(f).

Respectfully submitted,

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