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Ms. Marlene Dortch
Secretary
Federal Communications Commission
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July 2, 2019

***Ex Parte* Submission**

Re: *CenturyLink Petition for Declaratory Ruling, WC Docket No. 10-90, CC Docket No. 01-92*

I write on behalf of AT&T Services, Inc. ("AT&T") to address two additional *ex parte* filings submitted by CenturyLink in this docket.[1] CenturyLink's filings largely re-hash the same meritless arguments that it has been making for several years. Its arguments are inconsistent with the Commission's rules and precedents, and its principal claims have already been rejected by the D.C. Circuit.[2] The Commission should deny CenturyLink's Petition for Declaratory Ruling, and confirm that end office switching charges are prohibited on over-the-top VoIP calls.

CenturyLink's most recent *ex parte* purports to answer a filing by AT&T,[3] but CenturyLink has no credible responses. In particular, CenturyLink once again fails to poke any holes in the straightforward reading of the VoIP rules presented by Chairman Pai, Commissioner O'Reilly, AT&T, and Verizon: the text of the Commission's rules allow VoIP-LEC partnerships to assess either end office or tandem charges, based on whether they provide services that are the "functional equivalent" of either ILEC end office switching or ILEC tandem switching.[4] Under

[1] Letter from Joseph C. Cavender, CenturyLink, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 *et al*., dated May 23, 2019 ("CenturyLink 5/23/19 *Ex Parte*"); Letter from Joseph C. Cavender, CenturyLink, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 *et al*., dated June 13, 2019 ("CenturyLink 6/13/19 *Ex Parte*").

[2] *AT&T Corp. v. FCC*, 841 F.3d 1047 (D.C. Cir. 2016) ("*AT&T*"), *vacating and remanding*, Declaratory Ruling, *Connect America Fund*, 30 FCC Rcd. 1587 (2015) ("*Declaratory Ruling*").

[3] Letter of J. Young, Counsel for AT&T, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 *et al*., dated May 21, 2019 ("AT&T 5/21/19 *Ex Parte*").

[4] 47 C.F.R. § 51.903(d), (i). *See also, e.g.*, *AT&T*, 841 F.3d at 1048-56; AT&T 5/21/19 *Ex Parte* at 3; Comments of AT&T on CenturyLink Pet., WC Docket No. 10-90, at 1-2 (June 18, 2018) ("AT&T Comments"); Dissenting Statement of Commissioner Ajit Pai, *Connect America Fund*, 30 FCC Rcd. 1587, 1615 (2015) ("Pai Dissent"); Dissenting Statement of Commissioner Michael O'Rielly, *Connect America Fund*, 30 FCC Rcd. 1587, 1620-21 (2015) ("O'Rielly Dissent"); Verizon Comments at 1-5.

decades of precedent, the core function of an end office switch is "interconnection," which has uniformly been defined (including in the tariffs of CenturyLink and other ILECs) as the actual connection of trunks to end user-subscriber lines.[5] On over-the-top VoIP calls, VoIP-LEC partnerships switch calls to and from the public Internet, not onto subscriber lines—and thus they perform neither interconnection nor the functional equivalent of end office switching. CenturyLink has no effective response to these fundamental points, and the arguments it does make are meritless.

1. First, CenturyLink claims that the switching of calls to or from a "last-mile connection" is an "imaginary requirement" for proper billing of end office charges. CenturyLink 6/13/19 *Ex Parte* at 3. This is nonsense. Indeed, one of the primary reasons that the Commission's 2015 *Declaratory Ruling* was found arbitrary was that the Commission, while "acknowledg[ing] that VoIP providers *do not supply a last-mile connection*," improperly ignored a number of precedents holding that end office switching "suppl[ies] actual or physical interconnection" to and from subscribers' last-mile facilities.[6] CenturyLink's arguments that the Commission could again ignore these precedents are wrong and flout the decision in *AT&T*.[7]

2. Second, CenturyLink claims that it is "not possible" to draw a "[]justifiable distinction" between the routing functions performed by (i) VoIP-LECs on over-the-top VoIP

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[5] *RAO Letter 21*, 7 FCC Rcd. 5205 (1992); *RAO 21 Recon. Order*, 12 FCC Rcd. 10061, ¶ 11 (1997); *AT&T*, 841 F.3d 1051; Pai Dissent, 30 FCC Rcd. at 1615 ("So what is the IP equivalent of end office switching? Our precedent makes clear that it is the interconnection of calls with last-mile facilities."); O'Rielly Dissent, 30 FCC Rcd. at 1620; AT&T 5/21/19 *Ex Parte* at 3, 9-10 & Att. B; Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, FCC, at 6-8 & nn.11, 12, 13, 14, WC Docket No. 10-90 et al., dated January 17, 2013 ("AT&T 1/17/13 *Ex Parte*"); *AT&T Corp. v. YMax Commc'ns*, 26 FCC Rcd. 5742 (2011) ("*YMax Order*"); *Transformation Order*, 26 FCC Rcd. 17663, ¶¶ 969-70 (2011).

[6] *AT&T*, 841 F.3d at 1054, 1056 (emphasis added); *id*. at 1051 (the Commission's precedents are that interconnection is "the *sine qua non* of end-office switching"); *id.* at 1053 (the Commission failed to explain its holding that "'call control' was the essential, defining purpose of end-office switching while 'interconnection' was not"). Contrary to its claims, CenturyLink 6/13/19 *Ex Parte* at 2 n.6, nothing in CenturyLink's Petition or its many *ex parte* filings offers a reasonable explanation of how VoIP-LECs provide interconnection functions on over-the-top calls; instead, it merely re-argues the call control theory rejected in *AT&T*. *See* AT&T Comments at 6-11.

[7] CenturyLink's effort to re-argue (6/13/19 *Ex Parte* at 3) that its VoIP partners are "end users" for purposes of the Commission's VoIP rules is baseless. *See* AT&T 5/21/19 *Ex Parte* at 10; Letter of A. Buzacott, Verizon, to Marlene H. Dortch, FCC, at 4, WC Docket Nos. 10-90 *et al*., dated May 20, 2019. CenturyLink's claim is inconsistent with Commission precedent and the common sense understanding of an "end user"—*i.e.*, a customer that receives and *pays* a carrier for telecommunications service. *Qwest Commc'ns v. No. Valley*, 26 FCC Rcd. 8332, ¶ 9 (2011). Under CenturyLink's misguided view, a VoIP provider can be an end user and *collect* fees from a carrier. This is backwards.

calls (for which no end office charges are appropriate) and (ii) LECs on calls to enterprise customers using PBXs or other complex customer premises equipment (for which end office charges are assessed).[8] As Verizon has explained, this argument is meritless, and there are clear differences between these scenarios.[9]

In the latter case, the LECs invest in and deploy end office switches, and then connect those switches to last-mile loop facilities that extend to the enterprise customer's premises and connect to the customer's CPE.[10] When the LECs route calls to and from the enterprise customers, these LECs perform interconnection: the LECs take calls from trunks and place them on the loop facility to the customer and its PBX or other CPE (and vice-versa). By contrast, on over-the-top VoIP calls, VoIP-LECs do not make comparable investments to extend loop facilities to the caller's CPE—instead, they require the caller separately to obtain broadband services and facilities from a third party. And, in routing the VoIP calls, the VoIP-LECs do not perform interconnection in any sense: they simply route calls in bulk onto (and from) the public Internet, where other unaffiliated providers then handle the call before it is delivered to the caller. To the extent this is an access function at all, it resembles tandem switching, not end office switching.

CenturyLink has not come close to establishing that it would be arbitrary for the Commission to distinguish between these two different scenarios. *See* Pai Dissent at 1618-19 (it is "no surprise that VoIP providers performing differing functions would entitle LECs to differing intercarrier compensation, nor that a VoIP provider that interconnects a call with a customer's last-mile facility performs the function of end office switching whereas a VoIP provider that transmits calls to an unaffiliated ISP for routing over the Internet does not.").[11]

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[8] *See, e.g.*, CenturyLink 6/13/19 *Ex Parte* at 2-3 (arguing that switching calls to or from a last-mile connection is not required to bill end office switching, because, according to CenturyLink, when ILECs route calls to an enterprise customer's PBX, they "do not provide the [last mile] connection to the called individual," and instead a "separate connection" links to the caller's "individual device.").

[9] Letter of A. Buzacott, Verizon, to Marlene H. Dortch, FCC, at 2-3, WC Docket Nos. 10-90 *et al*., dated Feb. 7, 2019 ("Verizon 2/7/19 *Ex Parte*"); *see also* AT&T 5/21/19 *Ex Parte*, nn.12, 30.

[10] These LECs thus make "the substantial investment required to construct the tangible connections between themselves and their customers throughout their service territory." *YMax Order*, ¶ 40.

[11] Nor does it change things, for purposes of determining appropriate intercarrier compensation, when the customer's PBX takes a call and then sends it to or among the various individual stations connected to the PBX. A PBX is a type of customer premises equipment, and as Verizon explains, any "routing" performed by the customer and its PBX (even to stations located distantly from the PBX) does not influence the proper type of access charges that LECs can bill when routing calls to the PBX. Verizon 2/7/19 *Ex Parte* at 2-3.

3. CenturyLink's remaining responses to AT&T's filings are equally as flimsy. In answering AT&T's showing that factors or other proxies could be used to bill over-the-top traffic in any cases where it may not be easy to distinguish such traffic, AT&T 5/21/19 *Ex Parte* at 3-6, CenturyLink's flippant claim is that carriers cannot use such factors if they "do not even know what qualifies as over-the-top traffic." CenturyLink 6/13/19 *Ex Parte* at 3. This is clear hyperbole. Notably, neither the Court in *AT&T* nor the Commission in the *Declaratory Ruling* had any difficulty in distinguishing between over-the-top and facilities-based VoIP calling.[12]

Nor, as CenturyLink claims (6/13/19 *Ex Parte* at 6), is it "inconceivable" that the Commission prohibited end office charges on over-the-top VoIP calling in its rules without explicitly discussing, in the text of the *Transformation Order*, the use of factors or other proxies to identify over-the-top VoIP traffic. This argument overlooks that the Commission did expressly discuss the use of factors or proxies in distinguishing between other types of VoIP traffic (*e.g.*, *Transformation Order*, ¶¶ 962-63).

CenturyLink's related contention that the text of the *Transformation Order* is silent on how over-the-top VoIP calls are to be treated fails to address both (i) the passages of the *Order* that the D.C. Circuit said "on their face . . . seem to deny an over-the-top provider authority to charge end-office switching rates" (*AT&T*, 841 F.3d at 1054) and (ii) the text of the rules, where the Commission used terms like "functional equivalent," "end office," and "tandem switch," all of which have established meanings that, when properly applied, prohibit end office switching charges on over-the-top VoIP services. AT&T Comments at 4-15.[13]

4. Although most of what CenturyLink says is not new at all (and has already been shown to lack merit), in its May *ex parte* filing, CenturyLink makes the novel and remarkable

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[12] *See AT&T*, 841 F.3d at 1051-52 (facilities-based service "occurs when a VoIP provider . . . owns or leases the physical infrastructure connecting directly to subscribers' homes and offices and thus completes the 'last-mile' of the call. . . . Over-the-top VoIP providers do not connect directly to the last mile transmission network. They require the end user to obtain broadband transmission from a third party provider") (citation and quotation omitted); *Declaratory Ruling*, ¶ 11 n.35 (same, and noting that the Commission has made these distinctions since at least 2005).

[13] Notably, the first two subsections of the definition of "End Office Access Service" apply to the use of a switch to "deliver[]" or "rout[e]" traffic from or "to the called party's premises." 47 C.F.R. § 51.903(d)(1)-(2). The third subsection includes "any functional equivalent" of the ILEC's access service. *Id.* § 51.903(d)(3). Under "the established interpretive canon of *ejusdem generis*, where general words follow specific words, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Cement Kiln Recycling v. EPA*, 493 F.3d 207, 221 (D.C. Cir. 2007). Accordingly, the phrase "any functionally equivalent" ILEC access service refers to other similar ILEC access services that switch calls so that they are delivered or routed to or from "the called party's premises"—and VoIP-LECs do not perform any such service.

claim that the answer to the D.C. Circuit's remand is "obvious."[14] According to CenturyLink, the Commission's endorsement of a default "safe harbor"—as one of a number of possible methods needed temporarily to distinguish "intrastate toll VoIP-PSTN traffic" from intrastate TDM traffic (*Transformation Order*, ¶ 963 & n.1989)—provides clear proof that "the Commission never believed a LEC would charge an IXC any differently for over-the-top traffic than for facilities-based VoIP." CenturyLink 5/23/19 *Ex Parte*, at 2. CenturyLink's newly minted argument is meritless, and it treats the safe harbor as definitive evidence, when in fact it is irrelevant to the issue here, which is the appropriate rate (tandem or end office) for over-the-top VoIP long distance calls.

In its VoIP rules, the Commission determined that default rates for long distance (or "toll") VoIP traffic—whether intrastate or interstate—would be equal to "interstate access rates." *See Transformation Order*, ¶ 944. However, under the transition plan, intrastate access rates were not required to be in parity with interstate rates until July 1, 2013, *see id.* ¶ 801, and thus for about 18 months, carriers in some states could opt to bill intrastate toll VoIP traffic at interstate rates and intrastate toll TDM traffic at intrastate rates. *See id.* n.1989. The Commission noted several methods for carriers to make this distinction, including by agreement, tariff provisions using factors, or a default safe harbor. *Id.* ¶ 963.

The purpose of the default safe harbor discussed by CenturyLink was thus to provide LECs with one possible way to distinguish intrastate toll VoIP traffic from intrastate toll TDM traffic, in order to decide whether the default rates would be equal to interstate access (for intrastate toll VoIP) or intrastate access (for intrastate toll TDM). *Id.* ¶¶ 944, 963. Once traffic was placed in the intrastate toll VoIP category (whether using the default safe harbor or some other method), then a carrier could bill that traffic at rates equal to interstate access—but *only* according to the functions it or a VoIP partner provides; a carrier that used the safe harbor (or any other method) is "not permit[ted]" to charge for "functions not performed."[15]

Contrary to CenturyLink's claim, the default safe harbor did not say *anything* about what interstate access rates (*i.e.*, tandem or end office) apply to toll VoIP traffic. Rather, and as

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[14] CenturyLink 5/23/19 *Ex Parte* at 3. CenturyLink does not explain how this aspect of the *Transformation Order* provides "obvious" support for its position, even though CenturyLink failed to raise it previously in any of the many filings and briefs on this issue.

[15] *See* 47 C.F.R. § 51.913(b) ("Notwithstanding any other provision of the Commission's rules," a LEC may collect the charges "for the access services defined in § 51.903" (which includes the "functional equivalent" requirement), but . . . . [t]his rule does not permit a local exchange carrier to charge for functions not performed by the local exchange carrier itself or the affiliated or unaffiliated provider of interconnected VoIP service or non-interconnected VoIP service"); *Transformation Order*, ¶ 970 ("we also make clear that our rules do not permit a LEC to charge for functions performed neither by itself or its retail service provider partner").

AT&T has repeatedly explained, what rates apply to toll VoIP traffic is determined by the text of the 2011 rules, the *Transformation Order* (*e.g.*, ¶¶ 969-70), and the Commission's precedents, which require carriers to charge according to the functions provided on the calls.[16]

Further, CenturyLink overlooks that the safe harbor—which was necessary until July 1, 2013—was just one of a number of methods that carriers could use to distinguish toll VoIP traffic, and that the safe harbor is merely a default. Contrary to CenturyLink's claims that the default safe harbor "requires" inclusion of over-the-top VoIP traffic in billing of end office charges, CenturyLink 5/23/19 *Ex Parte*, at 2, this default method does not "require" anything—let alone require billing of end office switching on over-the-top VoIP calls without regard to the functions being provided. *See* 47 C.F.R. § 51.913(b) (no charges for "functions not performed").

For these reasons, CenturyLink's reliance on this temporary default safe harbor falls far short of meeting the Commission's task on remand, which is—among other things—to "point to [some]thing in the *Transformation Order* from which a reader would understand that [the Commission] meant for specific services provided by over-the-top VoIP-LEC providers to qualify as the functional equivalent of end-office switching and not tandem switching." *AT&T*, 841 F.3d at 1054. Nothing about the default safe harbor (or anything else in CenturyLink's filings) responds to this issue—to the contrary, the safe harbor says nothing about the type of interstate rate applicable to "toll" VoIP traffic.

Sincerely,

/s/ James P. Young

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James P. Young
Attorney for AT&T Services, Inc.

[16] CenturyLink places far too much weight on a single table in the Local Competition Report, which (according to CenturyLink) does not distinguish between facilities-based and over-the-top traffic, whereas other tables do make such a distinction. Again, the table is used only to distinguish between VoIP and TDM traffic for purposes of billing intrastate service—and exclusion of toll over-the-top VoIP traffic from the safe harbor (ultimately, billed at tandem rates) would understate a carrier's proportion of VoIP traffic. Nothing in the table tells a carrier using the safe harbor whether to bill its toll VoIP traffic at tandem or end office rates—that depends on the "functional equivalent" of the services being provided on the long distance/toll VoIP traffic. 47 C.F.R. §§ 51.903(d), (i), 51.913(b).