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

REPLY COMMENTS OF VERIZON ON PETITION OF CENTURYLINK FOR A DECLARATORY RULING

The comments confirm that the Commission should deny CenturyLink's petition and reaffirm that a LEC cannot assess tariffed end office switching charges on over-the-top VoIP traffic. In that scenario, it is undisputed that neither the LEC nor its VoIP provider partner performs interconnection with the end user's line, which the Commission has long held to be a critical end office function. Because these LECs do not perform that function, they do not perform end office switching. And, as the Commission has consistently held, a LEC cannot assess tariffed charges for a function it does not provide.

Notably, the *only* commenters supporting CenturyLink's petition are LECs in the business of acquiring 8YY traffic from over-the-top VoIP providers. Granting the petition would legitimate their arbitrage, in which they charge long-distance carriers the still high originating end office switched access rates for that purchased traffic. Much of that traffic consists of robocalls. The Commission should take no action that would exacerbate that arbitrage and the

robocalling to toll-free customers that the Commission is in the process of ending through a separate rulemaking.[1]

Finally, the Commission should reaffirm its position, held over decades, that a carrier-customer cannot violate the Communications Act by disputing and refusing to pay charges that the carrier-customer contends were billed in violation of a carrier's tariff. Two recent court decisions involving so-called "self-help" have misinterpreted the Commission's consistent holdings on this issue, which several commenters invite the Commission to address. The Commission should make clear that those decisions flout the Commission's unbroken line of precedent and confirm that a carrier-customer cannot violate the Communications Act.

I. OVER-THE-TOP VOIP PROVIDERS DO NOT PERFORM END OFFICE SWITCHING OR ITS FUNCTIONAL EQUIVALENT

Placing calls onto — or the receiving calls from — an end user's line has always been understood to be a core feature of end office switches. Before the *Transformation Order*,[2] the Commission repeatedly recognized that "interconnection, i.e., the actual connection of lines and trunks, is the characteristic that distinguishes switches from other central office equipment."[3] Courts and carriers also used this well-established understanding.[4] And just months before issuing the *Transformation Order*, the Commission applied end office switching's "common

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

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

[3] Order on Reconsideration, *Petitions for Reconsideration and Applications for Review of RAO 21*, 12 FCC Rcd 10061, ¶ 11 (1997); *see* AT&T Comments at 6.

[4] *See* AT&T Comments at 7.

meaning in the industry" to hold that an over-the-top VoIP provider did not perform end office switching.[5]

The Commission's rules still define "End Office Access Service" to include "the delivery . . . of such traffic" to or from the end user's "premises."[6] In the *VoIP Declaratory Ruling* itself, the Commission explained that in the traditional TDM context "the connection of trunks to lines," or the connection of the switch to the end user, is "critical" and fundamental to end office switching."[7] When a competitive LEC works with an over-the-top VoIP provider, neither provides the connection to the end-user customer. Instead, separate broadband Internet access and Internet backbone providers provide the connection.[8]

Three commenters, like CenturyLink, urge the Commission to repeat the mistakes made in the *VoIP Declaratory Ruling* and to conclude that call control and setup are the only important functions an end office switch performs. But the D.C. Circuit already vacated and remanded the *VoIP Declaratory Ruling* based on the "Commission's muddled treatment of functional equivalence" as being limited to those functions.[9] If the Commission were to focus again solely on "call control" functions, it would repeat that same "muddled treatment." As AT&T explained, all switches send and receive call setup messages in conjunction with the SS7 network.[10]

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[5] Memorandum Opinion and Order, *AT&T Corp. v. YMax Communications Corp.*, 26 FCC Rcd 5742, ¶¶ 14, 37-38 (2011) ("*AT&T v. YMax Order*").

[6] 47 C.F.R. § 51.903(d)(1).

[7] Declaratory Ruling, *Connect America Fund*, 30 FCC Rcd 1587, ¶ 30 (2015) ("*VoIP Declaratory Ruling*").

[8] *See* Verizon Comments at 3-4.

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

[10] *See* AT&T Comments at 22.

O1 and Peerless also claim that competitive LECs partnered with over-the-top VoIP providers provide "interconnection" because the LEC's "switch fabric establishes a call path from the ingress line/trunk to the egress line/trunk and maintains this path for the duration of the call."[11] That is not the functional equivalent of the interconnection a traditional end office switch provides. All circuit switches establish and maintain a connection between the line or trunk coming into the switch and the line or trunk leaving the switch. That is the essence of circuit switching. The interconnection an end office switch provides is unique because the egress line (for terminating calls) or ingress line (for originating calls) is the *end user's* line. Recovering for the "substantial investment" required to build these "tangible connections between themselves and their customers throughout their service territory" is why, historically, "end office switching rates [we]re among the highest recurring intercarrier compensation charges."[12] Therefore, despite whatever limited interconnection function O1 and Peerless claim to provide, it is not end office interconnection, and it is not a basis for distinguishing between an end office switch and a tandem switch.

Nor do all competitive LECs partnering with VoIP providers even perform that limited function. Teliax has admitted that it has set up what is, in effect, an Internet router that receives the 8YY calls it purchases in IP packets over the Internet[13] and sends them on in IP packets over the Internet to another LEC that converts them to TDM for delivery to the long-distance carrier

[11] O1/Peerless Comments at 9.

[12] *AT&T v. YMax Order* ¶ 40.

[13] Excerpt of Deposition of Teliax President David Aldworth at 45:24-46:17, *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 (agreeing that "8YY traffic from Teliax's wholsale customers comes into Teliax's network in IP format . . . over the public Internet").

— services for which that LEC bills its own tariffed switched access charges.[14] Teliax is thus claiming the right to charge end office switched access rates for inserting its IP routers in the flow of IP voice packets across the Internet. Teliax, O1, and Peerless would all receive an unjustified windfall and further distort the market if the Commission permits them to charge tariffed end office switching rates without performing the functional equivalent of end office switching, particularly as these LECs acquire over-the-top VoIP calls for the purposes of assessing these charges. The Commission should deny CenturyLink's petition and put an end to these arbitrage schemes.

II. THE COMMENTS CONFIRM THE NEED FOR THE COMMISSION TO ENSURE THAT IT DOES NOT FACILITATE 8YY ARBITRAGE

The only commenters supporting CenturyLink are entities that acquire 8YY traffic from over-the-top VoIP providers so they can reap profits from high originating end office switching access charges. For example, Teliax has admitted that its so-called "wholesale customer[s do not] make any payment to Teliax . . . for 8YY originating" traffic; instead, "[t]hey get paid by Teliax to send [Teliax] their traffic."[15]

The participation by these commenters confirms what Verizon explained in its opening comments: the Commission must ensure that, in ruling on CenturyLink's petition, it does not facilitate the arbitrage opportunities it seeks to prevent in its recently opened *8YY FNPRM*. The best way to avoid doing so is to deny CenturyLink's petition. At a minimum, the Commission should limit any decision granting that petition to terminating switched access charges or should

[14] *Id.* at 54:2-4 (agreeing that traffic is "sent to the tandem provider in IP format"); *id.* at 56:21-23, 58:10-14 (stating that traffic goes to HyperCube, a tandem provider, over the public Internet).

[15] *Id.* at 61:18-62:5.

enforce 47 C.F.R. § 61.26(f) by allowing only the LEC that assigned the originating caller's telephone number to bill originating end office switched access charges.[16]

Finally, the Commission should reject Teliax's assertion that long-distance carriers have the responsibility to identify individual fraudulent calls and "contact[ ]" Teliax to provide "information needed for Teliax to . . . block those 'bad' calls."[17] As the Commission has recognized, such fraudulent calls — which have only grown in sophistication in recent years[18] — "are only controllable from the originating point."[19] The Commission should reaffirm that is the responsibility of companies like Teliax to ensure that they do not purchase, transmit, and bill long-distance carriers for robocalls and other fraudulent 8YY traffic.

III. THE COMMISSION SHOULD RECONFIRM THAT A CARRIER-CUSTOMER DOES NOT VIOLATE THE COMMUNICATIONS ACT WHEN IT DISPUTES AND WITHHOLDS PAYMENT OF TARIFFED CHARGES

In a further effort to justify their improper billing of end office charges for 8YY calls acquired from over-the-top VoIP providers, Teliax, O1, and Peerless urge the Commission to endorse two recent, erroneous federal court rulings: *CenturyTel of Chatham, LLC v. Sprint Communications Co.*[20] and *Peerless Network, Inc. v. MCI Communications Services, Inc.*[21] The Commission should take up their invitation to address those cases — and it should explain that both were wrongly decided and are inconsistent with decades of Commission precedent holding

[16] *See* Verizon Comments at 10-13.

[17] Teliax Comments at 14.

[18] *See* Verizon Comments at 10 & n.39.

[19] *8YY FNPRM* ¶ 32.

[20] 861 F.3d 566 (5th Cir. 2017).

[21] 2018 WL 1378347 (N.D. Ill. Mar. 16, 2018).

that a customer failing to pay charges allegedly due under a carrier's tariff does not violate the Communications Act.

In *CenturyTel*, the Fifth Circuit held that, by withholding payments based on its newly raised disputes about tariffed switched access charges it had previously paid to CenturyLink, Sprint violated not only CenturyLink's tariff — because the Fifth Circuit concluded the disputed amounts were actually due — but also the Communications Act.[22] That ruling was incorrect. Only a common carrier can violate the Communications Act,[23] and the Act provides that a company "shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services."[24] The Commission has squarely held that, when it purchases tariffed services from another carrier, a carrier-customer is acting "in its role as a customer" — and not as a carrier.[25] This is why, in an unbroken line of precedent dating back to 1989, the "Commission has never held that a failure to pay tariffed charges violates the Act itself."[26]

The Fifth Circuit did not address 47 U.S.C. § 153(51) or the Commission's holding that a long-distance carrier purchasing tariffed services acts "in its role as a customer" and, therefore, cannot violate the Act. Instead, the court thought it was relevant that Sprint was withholding payments based on disputes of amounts that it had previously paid rather than only newly billed amounts.[27] That is a distinction without a difference. Regardless of its reason for not paying

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[22] *See CenturyTel*, 861 F.3d at 576-77.

[23] 47 U.S.C. §§ 206-208.

[24] *Id.* § 153(51).

[25] Memorandum Opinion and Order, *All Am. Tel. Co. v. AT&T Corp.*, 26 FCC Rcd 723, ¶ 12 (2011) ("*All American*").

[26] *Id.* ¶ 13.

[27] *CenturyTel*, 861 F.3d at 576-77

CenturyLink's tariffed switched access invoices, Sprint was acting "in its role as a customer" and, therefore, could violate CenturyLink's tariff but not the Communications Act. In addition, a carrier that bills switched access charges in violation of its tariff violates the Communications Act[28] and, therefore, has no right to keep amounts it improperly billed.[29] A customer does not engage in improper conduct when it raises a dispute about previously paid charges and withholds those amounts. Customers withhold payment at their own risk. If the customer loses on its dispute, it will owe both withheld amounts and late payment charges, which often are as high as 18% per year. The cost of withholding payment based on a non-meritorious dispute is substantial.

Peerless is equally wrong insofar as it went beyond *CenturyTel* and suggested that the filed-rate doctrine means a customer has no right to dispute and withhold even currently billed amounts where it claims that a carrier has violated its tariff.[30] There is no support for that position. As a threshold matter, tariffs normally allow customers to withhold amounts in exactly that situation, as the Commission has recognized.[31] The filed-rate doctrine enforces those provisions that authorize the disputing and withholding of tariffed charges. Nor has the Commission ever suggested that such withholding violates the Communications Act. The Commission in *All American* suggested only that it did not endorse "withholding . . . *outside* the

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[28] *AT&T v. YMax Order* ¶ 34 & n.105.

[29] *MCI WorldCom Network Servs., Inc. v. PAETEC Communications, Inc.*, 2005 WL 2145499, at *5 (E.D. Va. Aug. 31, 2005), *aff'd*, 204 F. App'x 271 (4th Cir. 2006) (per curiam).

[30] *Peerless*, 2018 WL 1378347, at *16-17.

[31] *See AT&T v. YMax Order* ¶ 48 n.134 ("YMax's Tariff expressly contemplates that a customer may withhold payment of disputed charges while YMax pursues resolution."); *see also* Peerless Network, Inc., Access Service Tariff, FCC Tariff No. 4, § 3.6.3(C)(1) (authorizing customer to "withh[o]ld payment of the disputed amount pending resolution of the disputed bill"); Teliax Colorado, LLC, Interstate Access Service, Tariff FCC No. 1, § 2.10.1 (similar); O1 Communications, Access Services Tariff, FCC Tariff No. 4, § 2.10.4 (similar).

context of any applicable tariffed dispute resolution provisions."[32] Disputing and withholding payment of end office charges on the ground that billing those charges for over-the-top VoIP traffic violates the LEC's tariff falls squarely within those applicable dispute provisions.[33]

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). The Commission should further take this opportunity to clarify that the *CenturyTel* and *Peerless* courts erred insofar as they held that the Communications Act prohibits a carrier-customer from disputing and withholding payment of tariffed charges on the ground that the carrier has billed in violation of its tariff.

[32] *All American* ¶ 13 (emphasis added).

[33] Insofar as *Peerless* suggests a carrier-customer's ability to withhold differs when its basis for dispute is not that the billing carrier violated its tariff but that the tariff itself is illegal, *see* 2018 WL 1378347, at *17-18, that question is not presented in this context. No LEC has filed a tariff that purports to authorize it to bill switched access charges for work that neither it nor its VoIP provider partner performed.

Respectfully submitted,

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