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July 31, 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 filing to address another submission from AT&T in these dockets.[1] Although once again much of AT&T's filing retreads arguments CenturyLink has already responded to or otherwise calls for no response, CenturyLink responds to a few of AT&T's points below.

1. It is undisputed that it has always been true that, when a LEC delivered a long-distance call over a trunk purchased by an enterprise end user to that enterprise's PBX, the LEC was entitled to charge end office access charges, even if the individual receiving the call was in a remote location, and regardless of how the individual was connected to the PBX.[2] That is so because switched access charges applied for the switching functions the LEC performed in connection with the transmission of calls to "end users" and the "end user" that had purchased

[1] Letter from James P. Young, counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al. (filed July 2, 2019) (*AT&T July 2 ex parte*).

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

the trunking service was the enterprise itself.[3] Accordingly, when the LEC switched the call for transmission to where the enterprise requested—the PBX—the LEC's task was done, and it was entitled to assess access charges.[4] It is also undisputed that the same analysis applies if the enterprise replaces its PBX with a VoIP server that enables over-the-top traffic. Notably, in such arrangements, it does not matter whether, as AT&T argues, the LEC must provide the last-mile connection to the end user in order to be able to assess end office access charges or whether, as CenturyLink has argued, there is no such requirement—because the LEC has, in fact, provided the last-mile connection to the end user in the form of the purchased trunking solution.

CenturyLink has explained that, under a straightforward application of the language of every incumbent LEC tariff, the same analysis applies when a VoIP provider purchases the same trunking services from the LEC: the VoIP provider likewise satisfies the definition of an "end user" set forth in the tariffs and must be treated the same as an enterprise that purchases those same services.[5] Accordingly, in this situation as well, it does not matter whether AT&T's core argument in this proceeding—that a LEC must provide the last-mile connection to the end user to be entitled to assess end office charges—is correct or not. End office charges apply either way.

AT&T disagrees. It asserts:

> CenturyLink's efforts to re-argue that its VoIP partners are "end users" for purposes of the Commission's VoIP rules is baseless. 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. Under CenturyLink's misguided view, a VoIP provider can be an end user and *collect* fees from a carrier. This is backwards.[6]

AT&T's counterargument takes on a strawman. CenturyLink has not argued that a VoIP provider that does not pay for service from the LEC qualifies as an "end user" under a traditional incumbent LEC tariff. Instead, CenturyLink has said that when a non-carrier VoIP provider *purchases appropriate services from the LEC*, such as PRI service or its modern replacement, SIP trunking service, it qualifies as an end user under the definitions set forth in the incumbent LEC tariffs of CenturyLink, AT&T, Verizon, and other incumbent LECs.[7] AT&T has no response.

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[3] *Id*.

[4] *Id*. at 12.

[5] *See, e.g.*, *id.* at 12-13; Letter from Joseph C. Cavender, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al., at 2-3 (filed June 13, 2019) (*CenturyLink June 13 ex parte*).

[6] *AT&T July 2 ex parte* at 2 n.7 (citations omitted, emphasis in original).

[7] *See, e.g.*, *CenturyLink June 13 ex parte* at 3; *CenturyLink Mar. 4 ex parte* at 12.

2. In its previous filing, CenturyLink explained that AT&T's suggestion that carriers use factors to resolve disagreements about what compensation should apply to traffic was of no help to AT&T's position, because (1) carriers cannot develop factors to estimate how much traffic is over-the-top VoIP if they do not know what traffic qualifies as over-the-top VoIP under AT&T's purported rule in the first place; and (2) it is inconceivable that the Commission, which discussed at length the challenges of identifying VoIP-PSTN calls to comply with its new intercarrier compensation framework, endorsed the use of a factor for such traffic, and established a safe harbor methodology for LECs to use in setting that factor, never discussed the need to distinguish "over-the-top" traffic from other VoIP-PSTN traffic, never discussed the challenges of distinguishing such traffic, never discussed the use of a factor for such traffic, and never designed a safe harbor for use in establishing such a factor—and yet nevertheless intended for carriers to apply different compensation to over-the-top traffic using factors.[8]

With respect to the second point, AT&T admits the substance of CenturyLink's argument, but insists that it is not inconceivable that the Commission would do such a thing.[9] AT&T's citation on this point, however, is not to a situation where the Commission expected carriers to use factors *without* having discussed the need for them, but rather, as AT&T admits, to where the Commission *did* expressly discuss factors, which for that reason provides no support to AT&T.[10]

AT&T's response to the first point is to call it a "flippant claim" and "clear hyperbole."[11] "Notably," AT&T goes on to say, "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]

AT&T's response is unavailing. At bottom, what AT&T wants is a declaration that LECs may not assess end office access charges on what it calls over-the-top VoIP but may do so on facilities-based VoIP. However, as CenturyLink has explained, while it is clear which category AT&T believes *some* arrangements fit into, AT&T has not provided a reliable means to determine which category other arrangements fall into. For carriers to bill correctly or develop factors for billing, however, the Commission must provide clarity. AT&T's citations of the *Declaratory Ruling* and *AT&T* are not responsive on this point. Indeed, the relevant passages in the *Declaratory Ruling* and *AT&T* (which restated what the *Declaratory Ruling* had said) were

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8 *CenturyLink June 13 ex parte* at 6.

9 *AT&T July 2 ex parte* at 4.

10 *Id*. (citing *Connect America Fund*, WC Docket No. 10-90, et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663, 18,020-21 ¶¶ 962-63 (2011)).

11 *AT&T July 2 ex parte* at 4. AT&T also calls it "flimsy." *Id*.

12 *Id*. (citing *Connect America Fund*, WC Docket No. 10-90, et al., Declaratory Ruling, 30 FCC Rcd 1587, 1592 ¶ 11 n.35 (2015) ("*Declaratory Ruling*"); *AT&T v. FCC*, 841 F.3d 1047, 1051-52 (D.C. Cir. 2016)).

simply part of the discussion setting out the nature of the disagreement.[13] That the Commission illustrated AT&T's position in a manner similar to how AT&T itself does before rejecting AT&T's position does not mean that the Commission rejected the argument CenturyLink has made here or that the Commission could do so. Nor do the 2005 merger orders cited in the *Declaratory Ruling* and invoked by AT&T support AT&T. There, the Commission discussed which services should be considered as part of the same "local service" product market, which expressly was a discussion solely about mass market services, not enterprise services.[14] CenturyLink's argument, which is focused on the need for clarity on enterprise call flows and for a reasoned basis for any distinctions drawn in that arena, addresses arrangements that were not considered in those discussions.[15]

As CenturyLink has observed, AT&T and Verizon cannot provide a justification for why a LEC's ability to charge end office switching on a particular call should depend on whether a remote employee has keyed in a VPN code, or should depend on the name of the company that sends an enterprise the bill for the same access facility, both outcomes that seem to flow from their rule.[16] They also do not seem capable of explaining how their rule even applies if an enterprise decides to relocate its VoIP server from its headquarters building to a data center; or whether it matters if the enterprise leases, instead of purchases, its VoIP server; or if the enterprise runs a separate instance of a VoIP server on someone else's hardware; or if the enterprise simply purchases those services from another provider rather than taking responsibility for some of those server management functions itself; or if any of this depends on

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13 *See Declaratory Ruling*, 30 FCC Rcd at 1592 ¶ 11 & nn.35-36 (stating that "some parties have asserted that a competitive LEC partnering with an over-the-top VoIP provider cannot deliver the functional equivalent of end office switching" and then explaining, in the footnote cited by AT&T, that in 2005 the Commission had, in a pair of merger orders, found it useful to distinguish between over-the-top and facilities-based VoIP providers; the footnotes making clear that the "some parties" the Commission referred to were AT&T and Verizon); *AT&T*, 841 F.3d at 1050-52.

14 *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18,290, 18,335, 18,337-40 ¶¶ 81, 85-88 (2005); *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18,433 18,477, 18,479-81 ¶¶ 82, 86-89 (2005).

15 *See* Letter from John T. Nakahata, counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et al., (filed Nov. 28, 2018); *CenturyLink Mar. 4 ex parte* at 2-4. Notably, if the Commission were to examine the market for enterprise voice offerings, it would almost certainly not divide the arrangements CenturyLink has raised into markets for "over-the-top" or "facilities-based" services and would instead conclude that all were part of the same product market, because they are clearly substitutes. This of course is because the Internet service enterprises use to access VoIP services differs from 2005's consumer Internet service. Moreover, none of the discussion about product market definitions and the differences between enterprise and consumer Internet service has anything to do with the classification of the switching functionality performed by the LEC on any particular call depending on the specific path that call took—but that is what AT&T's argument is at least ostensibly about.

16 *See CenturyLink Mar. 4 ex parte* at 3-4.

the details of the connections between the enterprise's network, the VoIP server, and the enterprise's Internet service at the data center (or elsewhere). These questions must be answered, however, and not just because carriers would need to know what access charges to apply in these different configurations. They must also be answered because a key argument CenturyLink has raised is that it is impossible to implement any version of AT&T and Verizon's rule without drawing such distinctions in an arbitrary, unlawful way, necessarily distinguishing between various call flows on bases not to be found in the tariffs or the law—and the Commission must respond to that argument if it wishes to adopt the rule AT&T or Verizon propose.[17]

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

[17] *See CenturyLink June 13 ex parte* at 5.