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August 8, 2013

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: *Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45

Dear Ms. Dortch:

Level 3 Communications, LLC ("Level 3") and Bandwidth.com, Inc. ("Bandwidth"), submit this ex parte to reiterate their request that the Commission issue a declaratory ruling clarifying that Sections 51.903(d), 51.913(b), and 69.106 of the Commission's Rules permit CLECs to collect end office switching access charges for over-the-top ("OTT") VoIP calls when providing the functional equivalent of end office switching but not a physical loop. Such a clarification is supported by the Commission's transitional VoIP-PSTN access rules and policy objectives.

As a preliminary matter, Rule 1.2 provides that "[t]he Commission may . . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." Given the extensive record on this issue, and the lack of any need for further comment, the Commission should act expeditiously under that authority to promptly address the following existing and material controversy. Whether:

(1) When a CLEC and its over-the-top VoIP partner perform all the functions performed by a TDM end office switch, they perform the core functions of an end office switch and the CLEC is therefore entitled to charge a local switching access charge (Level 3 and Bandwidth's view); or

(2) A CLEC and its VoIP partner can *only* assess an end office local switching charge, even if they perform all of the core functions of an end office switch, if they *also* separately provide the physical loop used to reach the end user's customer's premises (AT&T and Verizon's view).

I. The Purpose and Structure of the *ICC Reform Order*'s VoIP-PSTN Provisions.

As part of its overhaul of the intercarrier compensation system in the *ICC Reform Order*,[1] the Commission adopted a "transitional framework" governing intercarrier compensation for VoIP-PSTN traffic. The Commission defined the key features of the framework as follows:

- "We bring all VoIP-PSTN traffic within the section 251(b)(5) framework;
- "Default intercarrier compensation rates for toll VoIP-PSTN traffic are equal to interstate access rates;
- "Default intercarrier compensation rates for other VoIP-PSTN traffic are the otherwise-applicable reciprocal compensation rates; and
- "Carriers may tariff these default charges for toll VoIP-PSTN traffic in the absence of an agreement for different intercarrier compensation."[2]

The Commission adopted this transitional framework, known as the VoIP Symmetry Rule, as a compromise solution to provide certainty and minimize future disputes. The Commission recognized that "the lack of clarity regarding the intercarrier compensation obligations for VoIP traffic has led to significant billing disputes and litigation," leading to myriad different, irreconcilable resolutions—and in some cases no resolution at all.[3] The Commission also acknowledged concerns relating to asymmetrical compensation in which one carrier collects intercarrier compensation but does not pay equivalent charges for the same traffic, which creates "marketplace distortions that give one category of providers an artificial regulatory advantage in costs and revenues relative to other market participants."[4] Moreover, the Commission explained, the existing uncertainty was "likely deterring innovation and introduction of new IP services to consumers."[5] "Against this backdrop," the Commission concluded, action by the Commission was necessary to foreclose such questions over future compensation for VoIP-PSTN traffic.[6]

The Commission's resolution to these problems was rooted in its determination to ensure competitive equality for those providers that had invested in modern IP networks, and not disadvantage them as compared to those providers that continued to offer circuit-switched services.[7] As the Commission explained, one of the concerns providers had expressed was that "absent Commission clarification, certain LECs that provide wholesale inputs to retail VoIP

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1 *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17663 (2011) ("*ICC Reform Order*").

2 *ICC Reform Order* ¶ 933.

3 *Id.* ¶ 937.

4 *Id.* ¶ 942.

5 *Id.* ¶ 939.

6 *Id.*

7 *See id.* ¶ 968.

services might not be able to collect all the same intercarrier compensation charges as LECs relying entirely on TDM networks."[8] Under such circumstances, providers would have had an incentive to refrain from investing in modern IP facilities. But that was the opposite of the Commission's goal. Rather, the Commission emphasized, "[o]ne of the goals of our reform is to promote investment in and deployment of IP networks."[9] "Consequently," the Commission concluded, "we allow providers that have undertaken or choose to undertake such deployment the same opportunity, during the transition, to collect intercarrier compensation under our prospective VoIP-PSTN intercarrier compensation regime as those providers that have not yet undertaken that network conversion."[10]

To further ensure competitive equality, the Commission clarified that its framework would apply symmetrically to *all* VoIP-PSTN traffic, whether the traffic originated in IP or terminated in IP.[11] That is, the Commission's framework not only removed any doubt that LECs supporting VoIP service could *collect* intercarrier compensation in connection with VoIP-PSTN traffic, which carriers previously had varying degrees of success in collecting, but also simultaneously established that those same LECs would be required to *pay* intercarrier compensation for VoIP-PSTN traffic, which some LECs had previously refused to pay.

The Commission's rules also took aim at disputes that had arisen because LECs would partner with separate retail VoIP service providers to offer VoIP service, rather than LECs offering such services themselves.[12] Though AT&T pressed the Commission to refuse to permit LECs to collect access charges for functions performed by a retail VoIP partner,[13] the Commission rejected that approach. Instead, in furtherance of its goals to ensure competitive equality and not discourage carriers from upgrading their networks or disadvantage those that already had, the Commission expressly permitted LECs to assess access charges for toll VoIP for functions performed either by the LEC or its VoIP partner.[14]

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8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.* ¶ 942.

12 *Id.* ¶ 968.

13 *See* Letter from Robert W. Quinn, Jr., AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135, GN Docket No. 09-51, at 2-3 & n.9 (filed Oct. 21, 2011) ("Oct. 21, 2011 AT&T Ex Parte"). *See also* Letter from Mary McManus, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337 & 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92 & 96-45, at Attachment (filed Oct. 5, 2011) (inviting the Commission to adopt rules to specify that LECs partnering with facilities-based VoIP providers would be permitted to charge intercarrier compensation).

14 *ICC Reform Order* ¶ 970.

As the Commission explained, LECs supporting VoIP service could collect compensation for VoIP-PSTN "regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture."[15] The only limitation to this broad rule, the Commission explained, was that the LEC could not charge for functions that neither it nor its retail VoIP partner performed.[16] Notably, despite AT&T's urging, the Commission declined to limit its rule to "only those situations where the CLEC delivers the call directly to an affiliated, facilities-based provider that directly serves the end user"—*i.e.*, to limit the rule to situations involving providers like cable operators, but to exclude arrangements involving OTT VoIP such as those at issue here.[17] Accordingly, as adopted, the Commission's transitional VoIP-PSTN framework, *Order*, and rules do not distinguish between IP network investments to support OTT VoIP and VoIP implementations in which the VoIP provider provides the subscriber's loop facilities. The rules apply equally to both situations.

II. Level 3 and Bandwidth's Reading of the VoIP Symmetry Rule Best Comports with the Commission's Policy Objectives.

Under Level 3/Bandwidth's reading, access charges are *symmetric* for OTT VoIP, loop-facilities-based VoIP, and TDM services, just as the Commission intended. All are compensated at interstate rate levels, with the only exception being that CLECs and their OTT VoIP partners cannot charge loop-based access charges (*i.e.*, CCL) for OTT VoIP, because the end user (through its purchase of ISP service), as opposed to either the CLEC or the OTT VoIP partner, provides the loop facility. As was the Commission's objective, this symmetrical framework avoids "marketplace distortions that give one category of providers an artificial regulatory advantage in costs and revenues relative to other market participants."[18] In contrast, under AT&T/Verizon's view, charges are always *asymmetric* in an OTT VoIP/PSTN traffic exchange, with CLECs serving OTT VoIP providers constantly at an artificial regulatory disadvantage respecting costs and revenues as compared to both TDM-based providers and facilities-based VoIP providers.

Level 3/Bandwidth's reading also results in greater simplicity in the transitional access charge system, achieving the Commission's objective of reducing disputes. Like uses of the same switching equipment for toll traffic assess like access charges, implementing the Commission-endorsed principle that "comparable uses of the network should be subject to comparable intercarrier compensation charges."[19] Likewise, OTT VoIP, cable-based VoIP, and TDM voice provisioned over the same Level 3 or Bandwidth infrastructure assess the same terminating local switching access charges. In contrast, under AT&T/Verizon's view, Level 3 and Bandwidth must track whether the call is bound for an OTT VoIP termination or a cable-

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15 *Id.*

16 *Id.*

17 *See* Oct. 21, 2011 AT&T Ex Parte, at 6 n.24.

18 *ICC Reform Order* ¶ 942.

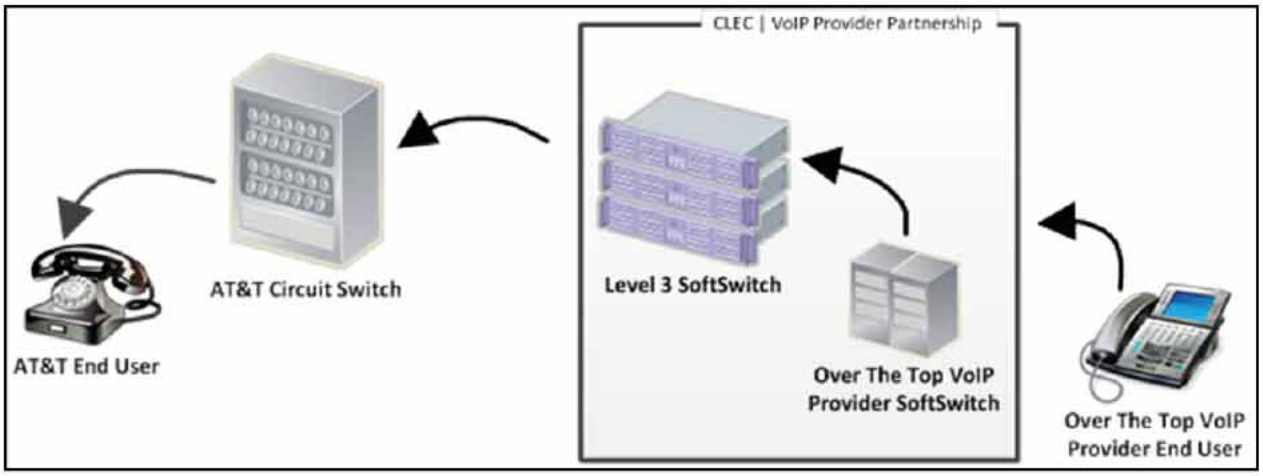
19 *Id.* ¶ 949.

based/TDM termination in order to know whether local switching charges apply—no in the former, yes in the latter—even though identical equipment performs identical functions in all cases. Aside from violating the principle that comparable network uses should be subject to comparable intercarrier compensation charges, the AT&T/Verizon view would also create a multiplicity of new disputes, where the Commission's goal was to reduce them.

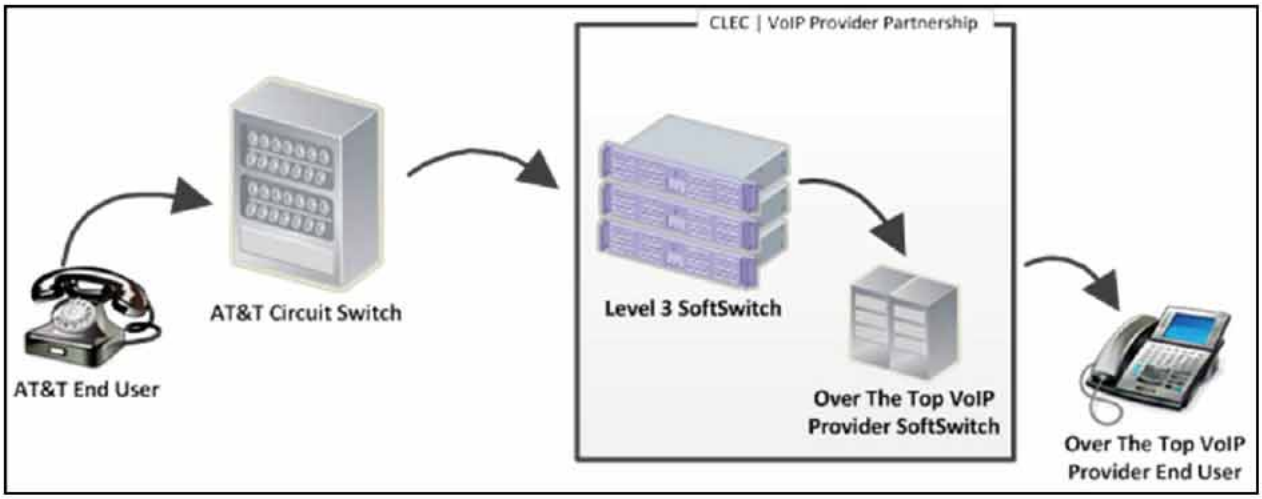
Level 3/Bandwidth's reading of the VoIP Symmetry Rule also removes access charges as a consideration in the transition of switching infrastructure to IP. All uses of the IP switching infrastructure are treated the same, irrespective of the facility (or type of facility) used to deliver a call to the called party. This encourages (or at least does not discourage) investment in and movement to IP switching infrastructures and innovation in over-the-top services, furthering the Commission's express goal to that effect.

III. The Practical Impact of AT&T/Verizon Position Is Asymmetric Compensation for VoIP-PSTN Calls.

AT&T and Verizon's view results in *asymmetric* compensation—exactly what the Commission was trying to avoid in the *ICC Reform Order*. Under AT&T and Verizon's view, for calls bound to AT&T/Verizon LEC-served end users, AT&T/Verizon would charge end office local switching to the LEC or its OTT VoIP partner at interstate rate levels:



At the same time, under AT&T/Verizon's view, for calls bound from AT&T/Verizon to a LEC and its OTT VoIP-served end user, neither the LEC nor the OTT VoIP partner could assess end office local switching, even though all the same call set-up, monitoring, take down, customer alerting and routing functions are being performed by both AT&T/Verizon LEC and the CLEC/OTT VoIP *except* for the direct connection to and transmission over the physical loop to the terminating end user's premises:



The result is directly contrary to the Commission's goals in adopting the VoIP Symmetry Rule. The Commission intended the transitional framework to apply to *all* VoIP-PSTN traffic, whether that traffic originated in IP or terminated in IP. Prohibiting assessment of local switching charges by the LEC or OTT VoIP provider for those calls depicted in the second figure above would create precisely the result the Commission sought to avoid—increased uncertainty as well as continuing disputes and litigation, with no industry-wide resolution.

IV. Level 3 and Bandwidth.com Provide the Functional Equivalent of End Office Local Switching, for Which ILECs Assess Charges Pursuant to Section 69.106.

The VoIP Symmetry Rule is, of course, not without limit—the Commission made clear that a LEC may not charge for functions neither it nor its OTT VoIP partner performs.[20] But no party disputes that "functional equivalence" is the applicable test in determining when a LEC performs functions for which it can assess access charges. Section 51.913(b) makes this explicit: "For purposes of this provision, functions provided by a LEC as part of transmitting telecommunications between designated points using, in whole or in part, technology other than TDM transmission in a manner that is comparable to a service offered by a local exchange carrier constitutes the functional equivalent of the incumbent local exchange carrier access service."[21] It is also made unambiguously clear in Section 51.903(d), which defines "End Office Access Service" as "Any functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier. . . . End Office Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access service."[22]

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[20] *Id.* ¶ 970.

[21] 47 C.F.R. § 51.913(b).

[22] 47 C.F.R. § 51.903(d)(3).

Level 3 and Bandwidth use the same switching plant to perform the same functions regardless of whether the call is sent to the called party over a TDM loop, a cable system owned by a loop-facilities-based VoIP partner, or an OTT VoIP partner. The only difference in each of these scenarios is the nature of the last mile transmission facility. Yet AT&T and Verizon insist that only the first two provide the functional equivalent of an ILEC end office.

The reality is that the infrastructure used to set up and route OTT VoIP calls is the same infrastructure used to route all other calls. It is not special-purpose infrastructure. In addition, the functions performed by the switching equipment are the same for OTT VoIP as for all other calls. Both OTT VoIP calls and all other calls require equipment that:

- determines when a call is being made to a subscriber,
- alerts the subscriber,
- determines whether the subscriber has answered the phone,
- monitors and signals when the call is terminated,
- determines to which subscriber the call must be delivered (i.e., providing the switching matrix for call interconnection), and
- directs coding the call for unique delivery to that subscriber (the called party).

All of these functions are performed by an ILEC end office switch and by Level 3 and Bandwidth and/or their VoIP partners, in the case of both loop facilities-based VoIP and OTT VoIP.

Neither AT&T nor Verizon identifies any function of an end office local switch covered by 47 C.F.R. § 69.106 that Level 3 and Bandwidth do not provide. The only function identified by AT&T and Verizon that Level 3 and Bandwidth and/or their OTT VoIP partners do not provide is the connection to a physical loop. Notably, however, the connection to a physical loop is ***NOT*** a function covered by the local switching charge pursuant to Section 69.106. The connection from the switch to a physical loop is not provided by the local switch, but by the line port. To the extent an access charge is assessed for the line port, it is the CCL, which ILECs assess pursuant to Section 69.154, not Section 69.106. Since 1997 for price cap LECs, and 2001 for rate-of-return LECs, the connection between the switch and the loop has been recovered through loop charges (EUCL, PICC and CCL)—not through end office local switching charges. It makes no sense to argue, as AT&T and Verizon apparently do, that because Level 3 and Bandwidth and/or their OTT VoIP partners are not providing line ports under Section 69.154, that they are necessarily not providing end office local switching under Section 69.106.

Revised Responsible Accounting Officer ("RAO") Letter 21[23] and the *RAO 21 Reconsideration Order*[24] lend further support to Level 3 and Bandwidth's reading of the VoIP

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[23] *See Classification of Remote Central Office Equipment for Accounting Purposes*, RAO Letter 21, 7 FCC Rcd. 6075 (Com.Car.Bur. 1992) ("Revised RAO 21").

[24] *Petitions for Reconsideration and Applications for Review of RAO 21*, Order on Reconsideration, 12 FCC Rcd. 10061 (1997) ("*RAO 21 Reconsideration Order*").

Symmetry Rule. In RAO 21, the Commission distinguished between remote switches and remote terminals for the purpose of classifying outside plant (and delineating the facilities eligible for High Cost Loop Support from those that were not). RAO 21 listed eight basic switching functions:

> 1) Attending - monitors for off-hook signals; 2) Control - determines call destination and assigns call to available line or trunk, 3) Busy testing - determines whether the called line/trunk is busy; 4) Information receiving - receives control and busy test results; 5) Information transmitting - transmits control and busy test results to tell the alerting and interconnection functions whether to complete the call; 6) Interconnection - connects subscriber line to subscriber line or subscriber line to trunk; 7) Alerting - rings the called subscriber's line or other signalling [sic] means if the call is destined for another exchange; 8) Supervising-monitors for call termination so the line can be released.[25]

There is no real dispute that a CLEC and its OTT VoIP partner perform Attending, Busy Testing, Information receiving, Information transmitting, Alerting and Supervising. AT&T and Verizon argue that a CLEC and its VoIP partner do not perform "Interconnection" because there is no connection to the "subscriber line." But that is incorrect. The CLEC/OTT VoIP partner connects to the functional equivalent of the "subscriber line," which is IP delivery to the OTT VoIP subscriber's ISP. And even if that point were ever open to question, the issue was put to rest more than 15 years ago, when the *RAO 21 Reconsideration Order* made clear that what the Commission was focusing on with "Interconnection" was "the switching matrix required for call interconnection," not the connection to the loop itself.[26]

Similarly AT&T misapplies "Control" in the context of an OTT VoIP service. The CLEC and its OTT VoIP partner determine call destination and directly code the call for the unique receipt and decoding by the called party. In the context of OTT VoIP—as well as in the context of cable VoIP service or fixed wireless service—this is the functional equivalent of placing a call on a specific twisted pair loop that runs to only one customer's premise. No other point in the network that AT&T and Verizon variously assert constitutes the "end office" performs these functions for the OTT VoIP call. The called party's ISP does not perform any of these functions for an OTT VoIP call, and thus cannot be said, by analogy, to be performing basic switching functions.

V. The Commission Can and Should Issue a Declaratory Ruling Terminating this Controversy.

AT&T failed to persuade the Commission not to adopt the VoIP Symmetry Rule as it was eventually adopted. It failed to persuade the Commission to disallow compensation for functions performed by a LEC's VoIP partner. And it failed to persuade the Commission to limit compensation to situations where the VoIP provider owned the physical facilities connecting to the retail subscriber. That should have been the end of the dispute—certainly the Commission

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[25] Revised RAO 21 at n.1.

[26] *RAO 21 Reconsideration Order* ¶ 11.

must have thought it was when it adopted its rules aimed at resolving just such disputes. Yet now AT&T claims that even though the Commission declined to adopt the rule AT&T proposed on this very point, it is not required to pay (and is currently withholding) end office switching charges to LECs when the LEC and its retail VoIP partner perform all the functions of an end office switch, if they do not also control the physical connection to the end user. AT&T is apparently betting that the Commission will not stand by its rules and that the costs and uncertainties of litigating technical matters in court will leave it in a better position than simply accepting that it fought this battle and lost almost two years ago.

The extensive record here is complete. The Commission does not need to ask for additional comment—indeed, doing so would only compound the disruption in the market. Resolution of this issue must be a priority so that all parties can move forward with certainty. The Commission has authority under Section 1.2 to issue a declaratory ruling interpreting its rules, terminating this controversy, and ending uncertainty. The disputes surrounding the VoIP Symmetry Rule are precisely the kind of controversy contemplated by that section, particularly given that the VoIP Symmetry Rule is not an ancient rule with a long history of agency interpretation, but rather a rule of recent vintage still being implemented. Furthermore, the Commission, and not district courts around the country, should be the arbiter of what its rules mean and how they apply. Clarification by the Commission on this issue will reduce litigation costs, consistent with the purposes of the Commission's VoIP-PSTN Transitional Access rules.

Sincerely,

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