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February 21, 2014

VIA ELECTRONIC SUBMISSION

Notice of Ex Parte Presentation

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208

Dear Ms. Dortch:

On February 19, 2014, Robert Quinn, Hank Hultquist and I (of AT&T), as well as David Lawson of Sidley Austin LLP (counsel for AT&T), met with Daniel Alvarez, Legal Advisor to Chairman Wheeler, regarding the above-referenced proceeding. In the meeting, AT&T addressed arguments in the record by Level 3 and Bandwidth.com ("CLECs"), among others, that the Commission's access charge rules permit CLECs to assess local end office switching charges for their limited role in partnering with various "over-the-top" VoIP providers to route to the public Internet calls to the VoIP providers' end users.

AT&T explained that where a CLEC has lawfully tariffed charges for access functions provided by it or its retail VoIP partner, AT&T pays those charges without dispute. Here, however, the CLECs have billed AT&T substantial charges for end office switching services that neither they nor their over-the-top VoIP partners provide, in clear violation of the Commission's rules and the "long standing policy" that LECs "should charge only for those services that they provide"[1]—a policy the Commission expressly reaffirmed when it recently amended its access charge rules.[2] We noted that the limited functionality provided by the CLECs in the middle of those over-the-top VoIP calls more

[1] *Connect America Fund et al.*, 26 FCC Rcd 17663, 18026, n.2020 (2011) ("*Connect America Order*"), quoting *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc. for Temporary Waiver of Commission Rule 61.26(d) To Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, CC Docket No.96-262, CCB/CPD File No. 01-19, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9118-19, ¶ 21 (2004).

[2] *Connect America Order*, 26 FCC Rcd at 18026, ¶ 970.

closely resembles tandem switching, and we emphasized that AT&T is and has been paying the CLECs for this traffic at the tandem switching rate.

Level 3 and Bandwidth.com attempt to argue that they, along with their over-the-top VoIP partners, actually do perform end office switching functionality, pointing to various signaling and call setup functions that switches (and some non-switches) may perform. But for decades it has been established in courts, in the industry, and at the Commission—*including in the very proceeding relied on by the CLECs*—that the defining characteristic of an end office switch and "what distinguishes" it from other network functionalities is "interconnection, *i.e.*, actual connection of [subscriber] lines and trunks."[3] What these CLECs actually do is deliver calls in an undifferentiated stream onto the public Internet, over which the calls may travel for hundreds or even thousands of miles over the facilities of multiple Internet backbone providers and ISPs and through any number of packet switches (which are the true successors to the PSTN's circuit switches),[4] before their ultimate delivery to the premises (or mobile device) where the over-the-top VoIP application is being used. The CLECs and their VoIP partners are thus providing end office switching only if placing calls destined for multiple users and locations in a single undifferentiated stream onto the public Internet could be deemed to involve the same functions and work as using local switches to separate and place calls onto individual subscriber lines. But as the full Commission confirmed in granting a formal complaint challenging YMax's end office switching charges for its limited role in the routing of over-the-top VoIP traffic, the Internet is *not* equivalent to a subscriber line, and the "exchange of packets over the Internet" does not entitle a carrier to assess end office switching charges.[5] As the Commission put it, "[i]f this exchange of packets over the Internet is a 'virtual loop,' then so too is the entire public switched telephone network – and the term 'loop' has lost all meaning."[6]

Moreover, there can be no credible argument that the *Connect America Order* narrowed the *YMax Order* precedent to cases of double billing only. To be sure, the Commission addressed concerns about double billing in its reasoning for adopting the symmetry rule. But it then went on to include in the symmetry rule the well-established principle that a LEC may not charge for a function it does not provide—albeit now extended to include the retail VoIP partner—citing the *Ymax Order* for that proposition.[7] As the Commission explained, "our rules include measures to protect against double billing, *and 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."[8] The Order in no way acknowledges a

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[3] *Petitions for Reconsideration and Applications for Review of RAO 21*, 12 FCC Rcd 10061, 10067, ¶ 11 (1997).

[4] At least since 1978, distinguished engineers have predicted that packet switching would ultimately replace circuit switching even for voice communications. *See, e.g.*, Roberts, Lawrence G., "The Evolution of Packet Switching" (Nov. 1978), available at http://www.packet.cc/files/ev-packet-sw.html (visited Feb. 20, 2014).

[5] *AT&T Corp.* v. *YMax Comme'ns*, 26 FCC Rcd 5742, 5759, ¶ 44 (2011) ("*YMax Order*").

[6] *Id.*

[7] *Connect America Order*, 26 FCC Rcd at 18026, ¶ 970; *see* 47 C.F.R. § 51.913(b).

[8] *Connect America Order*, 26 FCC Rcd at 18026, ¶ 970 (emphasis added; citations omitted).

change in policy or provides a "reasoned analysis" that "prior policies and standards are being deliberately changed" with regard to this principle.[9] Thus, nothing in the text of the Order indicates any intent by the Commission to modify or narrow the *Ymax Order*; rather, it strengthened it by expressly adopting these principles into the new intercarrier compensation rules.

There are thus two Commission decisions that are squarely on point, and neither Level 3 nor Bandwidth.com can get around them. At bottom, these two CLECs are performing the very same function that YMax was performing; they make the same arguments that YMax made; and the Commission's holdings that the central functionality of end office switching is connecting trunks to loops and that the exchange of packets over the Internet is not the connection of trunks to loops is as applicable to them as it was to YMax.

Even if the Commission were now to adopt the CLECs' position, it could not lawfully adopt that new rule in the guise of a "clarification" that applies retroactively to the effective date of the *Connect America Order*. Even agencies with undisputed authority to adopt legislative rules are routinely reversed when they seek retroactively to impose new obligations "under the guise of interpreting a regulation."[10] As the Supreme Court recently emphasized, deference to agencies' interpretations of ambiguous rules "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrating the notice and predictability purposes of rulemaking.'"[11] "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the … interpretation[] in advance or else be held liable" when the new "interpretation[is announced] for the first time in an enforcement proceeding" or otherwise outside the process of notice and comment.[12] Permitting CLECs like Level 3 and Bandwidth.com to charge end office switching charges for the minimal softswitch functions they provide far from any actual subscriber would constitute just such an impermissible "clarification," and thus could be applied only prospectively.

Finally, AT&T responded to recent assertions by Vonage that AT&T's interpretation of the symmetry rule is distorting industry negotiations for IP-to-IP interconnection.[13] AT&T acknowledged that negotiations are against a backdrop of historic regulation of relationships between providers—this is true for all parties across the industry, not just

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[9] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

[10] *See, e.g., Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000); *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012); *Hardy Wilson Memorial Hosp. v. Sebelius*, 616 F.3d 449 (5th Cir. 2010); *Casares-Castellon v. Holder*, 603 F.3d 1111 (9th Cir. 2010); *Boose v. Tri-County Metropolitan Trans/ Dist. Of Oregon*, 587 F.3d 997 (9th Cir. 2009); *City of Cleveland v. Ohio*, 508 F.3d 827 (6th Cir. 2007); *In re Sealed Case*, 237 F.3d 657 (D.C. Cir. 2001).

[11] *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (*quoting Talk America, Inc. v. Michigan Bell*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J. concurring)).

[12] *Id.* at 2168.

[13] Letter from Brita D. Strandberg, Counsel to Vonage Holdings Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 05-337; GN Docket No. 09-51; CC Docket Nos. 01-92, 96-45 (filed Feb. 12, 2014).

AT&T. But as intercarrier compensation ramps down to the bill-and-keep default regime (which is well underway), any residual distortions are quickly giving way to incentives to capture the inherent efficiencies (and cost savings) of IP.

In sum, there is nothing unfair about the application of this rule: to the contrary, what is unfair is charging for functionalities not performed. Nor does application of the rule here run contrary to the concept of symmetry in the intercarrier compensation regime; certainly, it cannot possibly be "symmetrical" for carriers to attempt to obtain compensation for services they (or their retail VoIP partner) do not even perform.

If you have any questions or need additional information, please do not hesitate to contact me. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

Christi Shewman

Attachment
cc: Daniel Alvarez