

LEVEL 3 AND BANDWIDTH PERFORM THE SAME FUNCTIONS AS YMAX

- Like YMax, Level 3, Bandwidth.com and their VoIP partners take calls coming in from the PSTN, convert them to IP and provide SIP signaling, and then dump the voice packets in an undifferentiated stream onto the public Internet.
- They have no idea where or how the calls are ultimately terminated and the voice packets may travel thousands of miles through many networks before delivery to called parties.

LEVEL 3 AND BANDWIDTH ARE MAKING THE SAME ARGUMENTS AS YMAX

- YMax: “The essence of end office switching is not connection to a loop, but rather comprises the signaling, call setup, call tear-down, and other functions . . . that permit a telephone call to originate or terminate on the public switched network.” YMAX Initial Brief, File No. EB-10-MD-005 (filed February 4, 2011) at 18.
- Level 3/Bandwidth: “[T]he core function of an end office switch cannot and should not rationally be defined by the line to which it connects . . . The end office switch provides the intelligence surrounding the call—its set-up, conduct, and take-down—which are the core functions of the end office switch.” April 15, 2013 Ex Parte Letter at 1.

THE COMMISSION’S PRECEDENTS FORECLOSE THE CLECS’ POSITION

- Decades of Commission precedent establish that the *sine qua non* of end office switching functionality is actual local switching – *i.e.*, using the switching matrix to interconnect trunks and local lines that serve end user premises. *Access Charge Reform*, 12 FCC Rcd 15982, ¶ 123 (1997) (“The local switch connects subscriber lines both with other local subscriber lines and with interoffice dedicated and common trunks”).
- In the very *RAO 21* proceeding upon which Level 3 and Bandwidth have relied, the Commission stressed that “interconnection, *i.e.*, *the actual connection of lines and trunks*, is the characteristic that distinguishes switches from other central office equipment.” *RAO 21 Reconsideration Order*, 12 FCC Rcd. 10061, ¶ 11 (1997)
- The Commission rejected YMax’s theory that it can be deemed to perform “local” switching in the middle of the call flow because the entire Internet can be considered a “virtual” loop: “the ‘virtual loops’ YMax claims to provide . . . could extend thousands of miles via numerous intermediaries throughout the country (or even the world) If 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.” *AT&T Corp. v. YMax*, 26 FCC Rcd. 5742, ¶ 44 (2011).
- The *Connect America* rules expressly state: “[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 or non-interconnected VoIP.” 47 C.F.R. § 51.913(b); *Connect America Order* ¶ 970.

- When YMax filed a petition for clarification complaining that the new rules might foreclose the imposition of access charges when “the physical transmission facilities connecting the IXC and the VoIP service customer are provided in part by one or more unrelated ISPs (*as is the case with YMax or ‘over-the-top’ VoIP providers such as Skype or Vonage*),” the Commission denied the petition and reaffirmed that its rules do “not permit a local exchange carrier to charge for functions not performed” by the LEC or its VoIP partner. *Connect America Clarification Order* ¶¶ 4-5.

THE CLECS’ INTERPRETATION OF THE RULES IS NOT COHERENT

- Under the CLECs’ view of either Rule 51.903(d)(2) or (d)(3), as long as they are performing call set-up and other signaling functions anywhere in the world, they are performing the core “local” switching functions and can charge the full end office switching charges.
- Their interpretation would negate the rule that a LEC and its partner may not charge for functions that they do not provide. Whether delivered by circuit switch (§ 51.903(d)(1)) or IP router (§ 51.903(d)(2)), the rules state that the LEC (or its VoIP partner) must actually switch/route the call “to or from the called party” and “functional equivalence” (§ 51.903(d)(3)) equally demands the provision of this core interconnection function.

THE CLECS’ ALTERNATIVE CLAIMS BASED ON THE INDIVIDUAL RATE ELEMENTS OF END OFFICE SWITCHING ALSO FAIL

- Inteliquent’s suggestion that local switching costs associated with interconnecting trunks and lines are recovered in the Carrier Common Line charge is wrong. The Carrier Common Line charge recovers costs of the loop itself. *Access Charge Reform*, 12 FCC Rcd. 15982, ¶ 37 (1997).
- The CLECs point out that the Commission’s rules permit a separate per-message charge for costs associated with call-setup and other signaling functions, but, as the Commission has recognized, any such charge would necessarily be a small fraction of the per-minute local switching charge the CLECs instead seek to assess. *Id.* ¶¶ 137-39 & 143 n.184.

THE CLECS’ POSITION WOULD CREATE DISINCENTIVES FOR BROADBAND INVESTMENT AND SYSTEM-WIDE ECONOMIC DISTORTIONS

- If the Commission endorses the CLECs’ position, it will have created a blueprint for economic distortion. Given that the Commission will have established that a CLEC/VoIP partnership can have one “end office” to serve the entire country (and the world), a thousand YMax’s will bloom.
- Rather than investing to build broadband networks, the CLECs’ requested ruling would invite companies to set up shop as over-the-top “end office” service providers. With a negligible investment in a rack of equipment in a single “end office,” such providers could collect massive amounts of end office local switching charges merely by processing SIP messages and dumping IP traffic on to the public Internet.

THE RULES CANNOT BE “CLARIFIED” TO ALLOW RETROACTIVE ASSESSMENT OF LOCAL SWITCHING CHARGES

- Under D.C. Circuit law, agencies must “deny retroactive effect” when there is “a substitution of new law for old law that was reasonably clear.” *Verizon Telephone Co. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001). Here, for all of the reasons discussed above, existing law is at least “reasonably clear” that the CLECs cannot charge for local switching under these circumstances. And agencies are routinely reversed when they impose new obligations retroactively “under the guise of interpreting a regulation.”¹
- But even if the current rule were ambiguous, the courts could not defer to the “clarification” the CLECs seek. In its *Christopher* decision last Term, the Supreme Court held that “if an agency’s announcement of its interpretation is preceded by a very lengthy period of conscious inaction” – as is the case here – “the potential for unfair surprise is acute,” and to permit substantial liability to be imposed retroactively based on a sudden “clarification” would “seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’” *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012). The Court responded to the “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.’” *Id.* at 2168. “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. *Id.* at 2168.
- Here, thirty years of precedent establish that local switches are used for local switching – *i.e.*, to interconnect trunks with the local lines that serve end user premises, and the *Connect America Order* confirmed that CLECs can assess access charges for the functions they or their VoIP partners actually provide. The Commission has consistently reaffirmed the common sense conclusion that these CLECs cannot assess end office local switching charges when they merely provide call set-up and other signaling in the middle of a call and that they cannot avoid that outcome by treating the Internet as a local loop. The Commission has taken no action against carriers that have not paid access charges based on these interpretations. In light of this history, the Commission cannot retroactively apply a contrary view through “clarification”: even if the rules were ambiguous, carriers were justified in interpreting the rules in light of this unbroken line of precedents, which the Commission’s lengthy period of inaction confirmed.

¹ 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).