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Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: **Notice of Ex Parte Communication CC Docket No. 96-45;
CC Docket No. 01-92; WC Docket No. 03-109; WC Docket
No. 05-337; WC Docket No. 07-135; WC Docket No. 10-90;
GN Docket No. 09-51**

Dear Ms. Dortch:

On October 20, 2014, John Murdock, President, Greg Rogers, Deputy General Counsel of Bandwidth.com, Inc. (“Bandwidth”), and the undersigned met separately with Priscilla Delgado Argeris, Legal Advisor to Commissioner Jessica Rosenworcel; Amy Bender, Legal Advisor to Commissioner Michael O’Rielly; Nicholas Degani, Legal Advisor to Commissioner Ajit Pai; and Daniel Alvarez, Legal Advisor to Chairman Tom Wheeler. On October 21, 2014, Mr. Rogers and Ms. Finn met with Rebekah Goodheart, Legal Advisor to Commissioner Mignon Clyburn. The purpose of the meetings was to discuss Verizon’s very recent dispute with Bandwidth and urge the Commission to re-affirm and clarify the VoIP symmetry rule as soon as possible.

Bandwidth explained that it prefers to negotiate commercial arrangements. For example, in the *ICC Reform Order*, the Commission noted Bandwidth’s commercial arrangement with Verizon under which the parties exchanged VoIP traffic at a rate of \$0.0007.¹ After the Commission adopted the *ICC Reform Order*, Bandwidth revised its tariffs to implement the default end office switching rates permitted under the VoIP symmetry rule. Bandwidth and the carriers with whom it exchanged traffic began applying the VoIP symmetry rule to all VoIP-PSTN

¹ *In the Matter of 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 an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663, 17926, §784 n. 1443 (2011) (“*ICC Reform Order*”).

traffic, regardless of whether the VoIP customer is served by a loop-facilities based or over-the-top (“OTT”) VoIP provider. Bandwidth charged, and with one exception was paid, end office switching for terminating calls to customers it serves in conjunction with its VoIP partners.

AT&T disputed Bandwidth’s revised tariff rates shortly after the *ICC Reform Order* was adopted. Bandwidth and AT&T have now resolved that dispute. No other carrier disputed Bandwidth’s end office switching charges under the VoIP symmetry rule until several weeks ago, when Verizon belatedly did so—nearly three years after the rule was adopted. Verizon now retroactively disputes all previously paid tariffed end office charges in their entirety, and refuses to pay all such charges prospectively. The sums at issue in the dispute are significant. Therefore, it remains imperative that the Commission act now to re-affirm its rule that CLECs perform the “functional equivalent” of local switching together with their VoIP service provider partners, regardless of whether those partners are loop-facilities based or OTT providers.

Bandwidth argued that the intent, text and context of the *ICC Reform Order* support its reading that the VoIP symmetry rule applies to all VoIP-PSTN traffic, regardless of whether the VoIP partner owns the last mile loop. Bandwidth reiterated its position that the Commission intended to end uncertainty and disputes about what compensation applies to VoIP-PSTN traffic, to adopt a symmetrical framework that applies to VoIP-PSTN traffic at both ends, and to encourage investment in IP network infrastructure.² Commission clarification will promote the transition to IP-based networks, which require an IP voice infrastructure to handle call set-up, routing, transport, interconnection and traffic exchange. Bandwidth provides that infrastructure, for its own operations in which it provides last mile transmission, for third party providers that furnish their own last-mile transmission (such as cable operators), and for “over-the-top” voice providers that use the end user’s already-purchased Internet access capacity as the medium for last mile transmission. Applying the VoIP symmetry rule to all VoIP-PSTN traffic has not slowed the deployment of IP-based loop facilities because it does not alter the intercarrier compensation received by providers who deploy IP-based loop facilities.³ In contrast, limiting the VoIP symmetry rule only to loop-facilities based VoIP would slow investment in and transition to IP switching and interconnection, because such a limitation would be an asymmetrical penalty on

² Letter from Level 3 Communications, LLC and Bandwidth.com, Inc. to Marlene H. Dortch, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 05-337; CC Docket No. 01-92; and CC Docket No. 96-45 at pp. 2-5 (filed August 8, 2013) (“*Aug. 8 Ex Parte*”).

<http://apps.fcc.gov/ecfs/document/view?id=7520936838>

³ Letter from Level 3 Communications, LLC and Bandwidth.com, Inc. to Marlene H. Dortch, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 05-337; CC Docket No. 01-92; and CC Docket No. 96-45 at pp. 1-2, 7-8 (filed April 15, 2013) (“*April 15 Ex Parte*”).

<http://apps.fcc.gov/ecfs/document/view?id=7022282496>.

carriers that adopt IP switching and thereby lose the ability to charge end office switching charges that they could continue to charge by leaving TDM switches in service.

The Commission adopted rules that are consistent with its intended purposes outlined above. As Bandwidth has previously explained,⁴ §51.913(b) provides that a LEC is entitled to assess and collect the full Access Reciprocal Compensation charges for the access services defined in §51.903 regardless of whether the LEC or its VoIP partner performs those functions. Section 51.903(d) includes three definitions of End Office Access service. The third definition states that End Office Access Service is the functional equivalent of two separate ILEC rate elements, local switching defined in §69.106 and carrier common line defined in §69.154. Since 1997 for price cap 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. In other words, even if Bandwidth and/or its VoIP partners are not providing common line or line port functions under §69.154, they can still provide the end office local switching function under §69.106.⁵

It is the switching matrix which routes calls that is the essential characteristic of interconnection provided by a local switch, not the physical connection to a dedicated loop. As the Commission found in RAO 21 Reconsideration Order, if a piece of equipment “is capable of interconnecting lines or trunks, *i.e., if it has the switching matrix required for call interconnection,*” it should be classified as a switch.⁶ As previously explained to FCC staff, Bandwidth together with its VoIP partners perform the essential interconnection functions of a local switch. Both OTT VoIP calls and all other calls require local switching 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).

⁴ Aug. 8 Ex Parte at pp. 6-7; Letter from Level 3 Communications, LLC and Bandwidth.com, Inc. to Marlene Dortch, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 05-337; CC Docket No. 01-92; and CC Docket No. 96-45 at pp. 1-2 (filed Dec. 17, 2012) (“*Dec. 17 Ex Parte*”). <http://apps.fcc.gov/ecfs/document/view?id=7022085411>

⁵ See April 15 Ex Parte at pp. 3-4.

⁶ *Petitions for Reconsideration and Applications for Review of RAO 21*, Order on Reconsideration, 12 FCC Rcd 10061,10066-10067 ¶ 11 (1997) (“*RAO 21 Reconsideration Order*”) (emphasis added).

All of these functions are performed by an ILEC end office switch and by Bandwidth and/or their VoIP partners, in the case of both loop facilities-based VoIP and OTT VoIP.⁷ Under the Commission's VoIP symmetry rule, Bandwidth is entitled to local switching compensation for its and its VoIP partner's performance of these functions.

The context of the *ICC Reform Order* also supports applying the VoIP symmetry rule to all VoIP-PSTN traffic, including OTT VoIP. The Commission found that LECs supporting VoIP service could collect compensation for VoIP-PSTN traffic "regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture."⁸ This finding recognizes that traditional hub-and-spoke, circuit-switched dedicated connections are not required for an IP-based service to provide the functional equivalent of End Office Access service. Bandwidth's reading of the VoIP symmetry rule also compensates like uses of the same switching equipment for toll traffic by assessing like access charges, implementing the principle that "comparable uses of the network should be subject to comparable intercarrier compensation charges."⁹ Denying local switching compensation for OTT VoIP calls would perpetuate the arbitrary line drawing that the *ICC Reform Order* was intended to end.

Although Bandwidth asserts that the Commission's intent and rules are clear, some IXCs dispute end office switching charges billed under the functional equivalency test.¹⁰ The Commission has not addressed this question and should issue a declaratory ruling to end the controversy and remove the uncertainty.¹¹

⁷ Aug. 8 Ex Parte at pp. 7-8, Letter from Level 3 Communications, LLC and Bandwidth.com, Inc. to Marlene Dortch, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 05-337; CC Docket No. 01-92; and CC Docket No. 96-45 at 10-12 and Attachment A (filed Sept. 10, 2012). <http://apps.fcc.gov/ecfs/document/view?id=7022010987>.

⁸ *ICC Reform Order*, 26 FCC Rcd 18026, ¶970.

⁹ *ICC Reform Order*, 26 FCC Rcd 17011, ¶949.

¹⁰ Although Bandwidth and Level 3 have been most active on this issue, other LECs have urged the Commission to clarify the VoIP symmetry rule. See Letter from Jennifer P. Bagg, to Marlene H. Dortch, WC Docket No. 10-90, WC Docket No. 07-135; GN Docket No. 09-51, WC Docket No. 12-353; CC Docket No. 01-92 at p. 2 (filed Dec. 21, 2012) ("*Broadvox Ex Parte*"); Letter from Lisa Youngers, to Marlene H. Dortch, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337; CC Docket No. 01-92 and CC Docket No. 96-45 at pp. 2-3 (filed Dec. 23, 2013) ("*XO Communications Ex Parte*"); Letter from Michel Singer Nelson to Marlene H. Dortch, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337; CC Docket No. 01-92 and CC Docket No. 96-45 at p 2 (filed August 22, 2013) ("*O1 Communications Ex Parte*").

¹¹ Aug. 8 Ex Parte at pp. 8-10.

Contrary to Verizon's implication,¹² the *February 27 Clarification Order* does not resolve this dispute because it answered a different question:

YMax seeks guidance from the Commission as to whether the revised rule language in Part 61, specifically, section 61.26(f) permits a competitive LEC to tariff and charge the full benchmark rate even if it includes functions that neither it nor its VoIP retail partner are actually providing...¹³

The FCC clarified that "it is not sufficient merely for the competitive LEC to be listed in the Number Portability Administration Center (NPAC) database as providing the associated telephone numbers to enable a competitive LEC to assess the full benchmark rate."¹⁴ Moreover, Bandwidth does not charge the full benchmark rate (end office switching, tandem switching, and other rate elements), it charges for the end office switching function that it and its VoIP partners provide.

In *YMax v. AT&T*, which pre-dated the VoIP symmetry rule, the Commission resolved the complaint on the basis of whether YMax provided the service described in its tariff,¹⁵ concluding that YMax could not assess "End Office Switching" charges pursuant to the terms of its FCC Tariff¹⁶ because "YMax does not provide End Office Switching *under the Tariff* [since] it does not operate any 'End Office Switches' where 'station loops' that connect to End User premises are 'terminated.'"¹⁷ The Commission "express[ed] no view about whether or to what extent YMax's functions, if accurately described in a tariff, would provide a lawful basis for any charges."¹⁸

The FCC now needs to clarify how to apply the *ICC Reform Order's* functional equivalent test to the IP switching functions provided by a LEC and its OTT VoIP partner. Because Bandwidth and Level 3 brought this issue to the Commission's

¹² Letter from Alan Buzacott, Verizon to Marlene H. Dortch, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 05-337; CC Docket No. 01-92; and CC Docket No. 96-45 at p. 2 (filed May 24, 2013).

¹³ *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*; Order, 27 FCC Rcd 2142, 2144 ¶4 (2012) ("*February 27 Clarification Order*").

¹⁴ *Id.*, 27 FCC Rcd 2144 n.15.

¹⁵ *AT&T Corp. v YMAX Communications Corp.*, 26 FCC Rcd 5742, 5761, ¶53, n.147 ("*YMax Order*").

¹⁶ *Id.*, 26 FCC Rcd 5759, ¶45 (quoting YMax's FCC Tariff).

¹⁷ *Id.*, 26 FCC Rcd 5755, ¶36 (emphasis added).

¹⁸ *Id.*, 26 FCC Rcd 5749, n.55.

attention in June, 2012,¹⁹ Verizon cannot reasonably rely on a unilateral and unfounded interpretation of the *February 27 Clarification Order* to reverse course and abruptly dispute applicable charges that it fully and timely paid without dispute. At best, application of the *ICC Reform Order* to the factual scenario of OTT VoIP is reasonably unclear. The Commission can and should issue a declaratory ruling to terminate this controversy, restore the certainty it intended to provide in the *ICC Reform Order*, and stop the self-help that it has refused to endorse.²⁰ As the D.C. Circuit explained, “[c]larifications... presuppose a lack of antecedent clarity. They stand in contrast to rulings that upset settled expectations--expectations on which a party might reasonably place reliance.”²¹ Moreover, “there is no question that a declaratory ruling can be a form of adjudication” and that

Retroactivity is the norm in agency adjudications no less than in judicial adjudications.... For our part we have drawn a distinction between agency decisions that “substitut[e] ... new law for old law that was reasonably clear” and those which are merely “new applications of existing law, clarifications, and additions.” The latter carry a presumption of retroactivity that we depart from only when to do otherwise would lead to “manifest injustice.”²²

As noted, Verizon paid Bandwidth’s local switching charges for two years, including after it filed its ex parte arguing that such charges were inappropriate. Non-retroactive application of the Commission’s clarification of its established VoIP symmetry rule would inflict significant losses on Bandwidth, a key innovator in the emerging IP communications ecosystem that has and continues to invest heavily in its nationwide IP network. As a primary service provider that unlocks IP innovation for well-established and emerging partners on the creative edge of IP user experiences, denying Bandwidth compensation for its forward-looking investments in IP switching runs directly afoul of the express policy goals of the *ICC Reform Order*.²³ The Commission intended to and provided certainty, symmetry, and incentives for carriers that make investments in IP switching

¹⁹ Letter from Tamar E. Finn to Marlene H. Dortch, CC Docket No. 96- 45; CC Docket No. 01-92; WC Docket No. 03-109; WC Docket No. 05-337; WC Docket No. 07-135; WC Docket No. 10-90; GN Docket No. 09-51 at pp. 2-3 (filed June 11, 2012) (“*Bandwidth.com and Level 3 Ex Parte*”) <http://apps.fcc.gov/ecfs/document/view?id=7021922307>.

²⁰ *ICC Reform Order*, 26 FCC Rcd 17889, ¶ 700.

²¹ *Qwest Svcs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007).

²² *Qwest*, 509 F.3d at 539 citing *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006).

²³ *See id.* at 540-41 (“every loss that retroactive application of its statutory interpretation would inflict on providers of menu-driven card services is matched by an equal and opposite loss that nonretroactivity would inflict on access suppliers such as Qwest. The Commission having determined the liability for such access costs under its interpretation of the statute, we see no reason why the users should not pay in accord with that interpretation.”).

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facilities necessary to achieve the IP transition. The Commission should act now to clarify its VoIP symmetry rule before carrier self-help usurps its rule and intercarrier compensation transition for VoIP-PSTN traffic.

Respectfully submitted,

/s/

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