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**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> 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 a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Federal State Joint Board on Universal Service, CC Docket No. 96-45**

Dear Ms. Dortch:

On October 22, 2014, Curtis L. Groves and Alan Buzacott of Verizon met with Daniel Alvarez, Legal Advisor to Chairman Wheeler, to discuss claims that the Commission can, today, interpret rules it promulgated in November 2011 to permit LECs to collect local end office switched access charges when they do not actually perform end office switching. There is no dispute that a LEC can charge switched access on VoIP-PSTN traffic when the LEC provides switched access. But a carrier cannot charge for an access function it does not provide.<sup>1</sup> And the Commission has decided that when LECs route over-the-top VoIP traffic over the public Internet – instead of actually connecting lines and trunks – they do not perform end office switched access and therefore cannot assess local end office switched access charges.<sup>2</sup> We said that if the Commission intends a different outcome, it would have to change its existing rules, which would have only prospective effect.

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<sup>1</sup> “[T]he right to charge does not extend to functions not performed by the LEC or its retail service partner.” *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶¶ 970 n.2028 (2011) (“*USF-ICC Transformation Order*”).

<sup>2</sup> See *AT&T Corp. v. YMax Communications Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 5742, ¶¶ 36-45 (2011) (“*YMax Order*”).

**1. LECs that route over-the-top VoIP traffic over the public Internet do not provide end-office switched access or its functional equivalent, and allowing them to charge end office switched access when they do not provide it would create asymmetry.**

As Verizon and others have explained,<sup>3</sup> allowing a LEC to collect end office switching charges when it routes over-the-top VoIP traffic over the public Internet would grant them a windfall for work that neither the LEC nor the over-the-top VoIP provider performs. As the Commission explained in rejecting YMax’s claimed entitlement to collect end office switching charges for over-the-top VoIP traffic, “end office switching rates are among the highest recurring intercarrier compensation charges” in order to “allow local exchange carriers to recover the substantial investment required to construct the tangible connections between themselves and their customers throughout their service territory.”<sup>4</sup> As the Fourth Circuit held in applying that decision to deny such compensation to CoreTel for over-the-top VoIP traffic, a “carrier that finds a way to deliver incoming calls to its customers without building physical connections to each of them has far less infrastructure investment to recoup.”<sup>5</sup> Moreover, the Fourth Circuit rejected CoreTel’s arguments that the *USF-ICC Transformation Order* changed the law to permit a LEC to collect its end office switched access charges for over-the-top VoIP traffic.<sup>6</sup>

The symmetrical approach to VoIP-PSTN intercarrier compensation that the Commission adopted in the *USF-ICC Transformation Order* ensures that “CLECs are entitled to charge the same intercarrier compensation as incumbent LECs do under comparable circumstances.”<sup>7</sup> With that approach, the Commission put VoIP-PSTN and legacy TDM traffic on equal intercarrier-compensation footing and adopted rules that allow LECs to charge switched access on VoIP-PSTN traffic for functions that the LEC or its retail VoIP partner provides.<sup>8</sup> But those same rules “do not permit a LEC to charge for functions performed neither by itself or its retail service provider partner.”<sup>9</sup> Here, neither the LEC nor its retail VoIP service provider partner provides end office switching and so cannot collect end-office switched access.

The core function of a switch – whether circuit or packet, end office or tandem – is interconnection: connecting one link to another through the switch to provide a path between the

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<sup>3</sup> See, e.g., Letter from Alan Buzacott, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 10-90 *et al.* (May 24, 2013); Letter from Alan Buzacott, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 10-90 *et al.* (Feb. 28, 2013); Letter from Christi Shewman, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 10-90 *et al.* (Feb. 21, 2014); Letter from David L. Lawson, counsel for AT&T, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (Jan.17, 2013).

<sup>4</sup> *YMax Order*, ¶ 40.

<sup>5</sup> *CoreTel Virginia, LLC v. Verizon Virginia LLC*, 752 F.3d 364 (4th Cir. 2014).

<sup>6</sup> See *id.* at 375 n.16.

<sup>7</sup> *USF-ICC Transformation Order*, ¶ 970.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

calling and called parties. In a circuit switch, the switch sets up dedicated capacity through the switch matrix for the duration of the call. In a packet switch, the switch routes packets from the incoming link to the next link in the path based on the address shown in the packet's "address header." For a PSTN *end office* switch, the Commission has found that the "defining characteristic" is the "actual connection of lines and trunks."<sup>10</sup> Thus, because a "trunk" is a connection to another switch, and a "line" is a connection to a subscriber, "the defining characteristic" of an end office switch is that it performs the necessary switching between the trunk and the called party (in the terminating direction) or between the calling party and the trunk (in the originating direction).

Some LECs like Level 3 have argued that they provide the functional equivalent of end office switching because they and their over-the-top VoIP partners perform some call setup tasks, including "indicating to the called party that they have an incoming call (usually by signaling ringing)"; "monitoring the call and informing the upstream caller's carrier ... when the called party has terminated the call"; "encod[ing] the call so that it can be uniquely received by the end user"<sup>11</sup>; and "determin[ing] that the subscriber is seeking to place a call."<sup>12</sup> Level 3 defines those tasks as "call setup intelligence," and argues that such "intelligence" defines the "core function of an end office switch."<sup>13</sup> But Level 3 is wrong. While a PSTN end office switch performs some of the tasks listed by Level 3, those tasks do not define the "core function" of an end office switch as the Commission itself has defined it. Equally wrong is Level 3's contention that the end office switched access rate is unrelated to that core function.<sup>14</sup> In rejecting YMax's identical claim, the Commission recognized that "[e]nd office switching charges *were and are* authorized by law to allow local exchange carriers to recover the substantial investment required to construct the tangible connections between [their switches] and their customers."<sup>15</sup>

The partnership between a LEC like Level 3 and an over-the-top VoIP provider does not perform the functional equivalent of end office switching because it does not perform the necessary switching to connect a trunk to the called party. The partnership's role in the call flow ends after it converts the voice signal arriving over the trunks into IP packets – often referred to as a "media gateway" function – and hands the IP packets off to the public Internet. The rest of the path from the gateway to the called party is provided by Internet Service Providers, including the called party's ISP. Packet switches operated by the various ISPs along the path switch the packets from link to link through the Internet until the packets arrive at the called party's broadband network.

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<sup>10</sup> *Petitions for Reconsideration and Applications for Review of RAO 21*, Order on Reconsideration, 12 FCC Rcd 10061, ¶ 11 (1997) ("*1997 RAO Reconsideration Order*").

<sup>11</sup> Letter from John Nakahata, counsel to Level 3, to Marlene Dortch, FCC, WC Docket No. 10-90 *et al.*, at 2-4 (April 15, 2013) ("*Level 3 April 15, 2013 Ex Parte*").

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at 3; *see* Letter from John Nakahata, counsel to Level 3, to Marlene Dortch, FCC, WC Docket No. 10-90 *et al.*, at 7 (Aug. 8, 2013) ("*Level 3 Aug. 8, 2013 Ex Parte*").

<sup>15</sup> *YMax Order* ¶ 40 (emphasis added).

Neither the CLEC nor its over-the-top VoIP partner provides the packet switching that delivers the call to the called party over that person's "line," and they are not providing the functional equivalent of end office switching. By contrast, a partnership between a cable company – which has invested in facilities to serve its end user customers – and its retail VoIP provider generally does provide the necessary packet switching to deliver the packets from the gateway to the called party and does provide the functional equivalent of end office switching.

Apparently recognizing that the partnership between a CLEC and an over-the-top VoIP provider does not provide the actual switching needed to deliver calls to their destination, Level 3 has implied that it is sufficient that the partnership "encodes the call so that it can be uniquely received by the end user."<sup>16</sup> In other words, Level 3 is asserting that it should be permitted to charge for end office switching merely because it provides the media gateway function of translating the voice signal from TDM to IP packets and inserting the called party's IP address into the packets' address headers. But the media gateway's translation function falls well short of the function provided by a PSTN end office switch, which is to provide "actual connection" – the necessary switching to deliver the call to its destination. Indeed, Level 3's argument is no different from YMax's contention — which the Commission expressly rejected — that the "entire worldwide Internet . . . comprises a 'virtual' loop" that runs from the media gateway to the called party's premises.<sup>17</sup> Allowing LECs to charge switched access in this scenario – when they do not provide it – would not create symmetry. Instead it would create a disparity that favors some providers.

**2. If the Commission decides that LECs can charge end office switched access despite not actually connecting lines and trunks when they route over-the-top VoIP traffic over the public Internet, the Commission must apply that new rule prospectively.**

Nonetheless, if the Commission were now to decide that – despite not actually performing end office switched access by connecting lines and trunks – LECs involved in routing over-the-top VoIP traffic over the public Internet can collect originating and terminating end office switched access charges for that traffic, the Commission must apply that rule *prospectively* for the following three reasons.

First, the rule the Commission promulgated in the *USF-ICC Transformation Order* expressly "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 service or non-interconnected VoIP service."<sup>18</sup> When an over-the-top VoIP customer receives a "long-distance" VoIP call or dials a toll free (8YY) number, neither the LEC nor the VoIP provider performs the function of end office switching. Instead, if anyone, that customer's broadband Internet provider — with which the LEC and VoIP provider has no "contractual or

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<sup>16</sup> Level 3 April 15, 2013 Ex Parte at 4; Level 3 Aug. 8, 2013 Ex Parte at 7.

<sup>17</sup> *YMax Order* ¶ 44.

<sup>18</sup> 47 C.F.R. § 51.913(b).

other arrangements”<sup>19</sup> — performs the defining characteristic of the end office switching function: “the actual connection of lines and trunks.”<sup>20</sup> The Commission, moreover, has rejected the contention that a VoIP provider, by routing traffic over the public Internet to or from its customer is using a “‘virtual’ loop that terminates at [its] equipment.”<sup>21</sup> As the Commission explained, if the “exchange of packets over the Internet is a ‘virtual loop,’ . . . the term ‘loop’ has lost all meaning.”<sup>22</sup> Therefore, because neither the LEC nor the VoIP provider performs the end office switching function, the LEC may not collect its originating or terminating switched access charges for that traffic under unambiguous language of the Commission’s rule.

The Chief of the Wireline Bureau, moreover, confirmed this just months after the Commission released the *USF-ICC Transformation Order*. YMax specifically asserted that the Commission’s new rule allowed it — and LECs serving “‘over-the-top VoIP’ providers such as Skype or Vonage” — to collect the “full ‘benchmark’ rate” even though it is an “unrelated ISP[]” that physically transmits the traffic to or from the VoIP provider’s customer.<sup>23</sup> The Bureau promptly responded to YMax’s assertion, stating in no uncertain terms: “We disagree.”<sup>24</sup> Indeed, the Bureau noted that YMax — in claiming that the new rule gave CLECs the right to collect the full benchmark rate for over-the-top VoIP traffic — was specifically seeking to charge for “functions that neither [the CLEC] nor its VoIP retail partner are actually providing.”<sup>25</sup> The Bureau, moreover, amended 47 C.F.R. § 61.26(f) to ensure that it was absolutely clear that a LEC cannot collect its tariffed switched access rates for functions that neither it nor the VoIP provider performs.<sup>26</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *1997 RAO Reconsideration Order*, ¶ 11. The broadband Internet provider also performs the “control” function, because it is that provider that “determines call destination and assigns [the] call to [an] available line or trunk.” *Classification of Remote Central Office Equipment for Accounting Purposes*, Responsible Accounting Officer Letter No. 21, 7 FCC Rcd 6075, n.1 (1992).

<sup>21</sup> *YMax Order* ¶ 44.

<sup>22</sup> *Id.*

<sup>23</sup> Letter from John B. Messenger, YMax, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (Feb. 3, 2012).

<sup>24</sup> *Connect America Fund*, Order, 27 FCC Rcd 2142, ¶ 4 (2012) (“*Clarification Order*”)

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* ¶ 5 (noting that the amendment to § 61.26(f) likely was unnecessary, because § 51.913(b) states that it applies “notwithstanding any other Commission rule”).

As the D.C. Circuit recently reiterated:

It is axiomatic . . . that an agency is bound by its own regulations. Although it is within the power of [an] agency to amend or repeal its own regulations, [an] agency is not free to ignore or violate its regulations while they remain in effect.<sup>27</sup>

Therefore, to permit LECs to collect their originating and terminating end office switched access rates for over-the-top VoIP traffic that they route over the public Internet, the Commission would have to amend § 51.913 to change the rule that prevents a LEC from collecting its tariffed rates for functions that neither it nor the VoIP provider performs. Because the Administrative Procedure Act requires that such regulations “be given future effect only,”<sup>28</sup> any new rule could apply only prospectively and not retroactively to the effective date of § 51.913.

Second, even if the Commission could convince a reviewing court that § 51.913 is ambiguous on this question, that court would not defer to the Commission’s claim that its new interpretation reflects the original meaning of the rule and should apply retroactively. As shown above, the Bureau — exercising authority the Commission specially delegated to “ensure that the reforms adopted in the [*USF-ICC Transformation Order*] are properly reflected in the rules”<sup>29</sup> — expressly “disagree[d]” with YMax’s assertion that the new rule allowed a LEC to collect its end office switched access charges when routing over-the-top VoIP traffic and amended § 61.26(f) to make that disagreement crystal clear.<sup>30</sup> As the Supreme Court recently reiterated, to defer to a new, contrary interpretation of § 51.913 would “impose potentially massive liability” on carriers that had relied on the *Clarification Order*, “result[ing] in precisely the kind of ‘unfair surprise’ against which th[e] Court has long warned.”<sup>31</sup> Those considerations would not apply to a new interpretation to be given only prospective effect.

Third, because any new interpretation would, at a minimum, change the Commission’s existing interpretation of § 51.913, that new interpretation would be a legislative rule and may only be applied prospectively.<sup>32</sup> The D.C. Circuit has explained that a new interpretation is a legislative rule where, as here, it would “adopt[] a new position inconsistent with existing regulations” or “effect[] a substantive change in existing law or policy.”<sup>33</sup> But matters would be

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<sup>27</sup> *National Environmental Development Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (internal quotation marks and citations omitted; alterations in original).

<sup>28</sup> *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997) (internal quotation marks omitted).

<sup>29</sup> *USF-ICC Transformation Order*, ¶ 1404.

<sup>30</sup> *Clarification Order* ¶¶ 4, 16.

<sup>31</sup> *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

<sup>32</sup> *Chadmoore Communications*, 113 F.3d at 240.

<sup>33</sup> *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

no different if the new interpretation were classified as an interpretive rule, because “interpretative rules, no less than legislative rules, are subject to [the] ban on retroactivity.”<sup>34</sup>

For all of these reasons, Level 3 is wrong to contend that the D.C. Circuit’s decision in *Qwest Services Corp. v. FCC*<sup>35</sup> entitles it to retroactive application of a new interpretation of § 51.913.<sup>36</sup> There, the court found that “a mere lack of clarity in the law” was insufficient to prevent the normal rule that adjudications apply retroactively.<sup>37</sup> Here, in contrast, the “settled law” is “contrary” to the new rule Level 3 urges.<sup>38</sup> The plain text of § 51.913 precludes a LEC like Level 3 for charging for functions — like end office switching — that neither it nor its VoIP provider partner performs. Furthermore, even if there were any ambiguity in § 51.913, the Commission resolved that ambiguity when it rejected YMax’s interpretation of that section and amended § 61.26(f) to remove all doubt that a LEC like Level 3 cannot collect end office switched access rates when it routes over-the-top VoIP traffic over the public Internet. Indeed, Level 3 notably says nothing in its *ex partes* about the *Clarification Order*. A new decision reversing that position would constitute a new rule that must be applied only prospectively, whether treated as a legislative or an interpretive rule.

Finally, at the meeting Verizon discussed that the claims that a LEC should be permitted to collect its tariffed end office switched access rates when it routes over-the-top VoIP traffic apply to *both* originating *and* terminating access. People who use over-the-top VoIP services — no different from those who use other VoIP services, wireless service, and so on — dial toll-free (8YY) telephone numbers. Those calls travel from the person dialing the phone, over her broadband Internet connection to the public Internet, to the VoIP provider’s server, and then to a LEC, which routes the call to the carrier that provides service to the toll-free customer. If the Commission were to amend or reinterpret its existing rules, that LEC could claim to be owed its originating end office switched access rates. Indeed, many LECs currently bill Verizon originating end office switched access rates for these very calls, and these comprise a substantial portion of the total amount billed for over-the-top VoIP traffic.

Although the Commission has limited originating switched access rates for VoIP traffic to those in carriers’ interstate tariffs, the Commission has not yet mandated reductions to those rates, as it has with terminating rates. Therefore, current Commission rules will not reduce over time the

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<sup>34</sup> *Health Ins. Ass’n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994); *see also Bergerco Canada v. U.S. Treasury Dep’t, Office of Foreign Assets Control*, 129 F.3d 189, 192 n.2 (D.C. Cir. 1997) (“Insofar as the non-retroactivity norm derives from the words ‘future effect’ in the APA’s definition of rules, such an argument [that the ban on retroactivity does not apply to interpretive rules] would not wash, as the norm under that view is independent of any requirement of specific rulemaking procedures.” (citations omitted)).

<sup>35</sup> 509 F.3d 531 (D.C. Cir. 2007).

<sup>36</sup> Letter from John Nakahata, counsel to Level 3, to Marlene Dortch, FCC, WC Docket No. 10-90 *et al.*, at 2-3 (Oct. 8, 2014).

<sup>37</sup> *Qwest*, 509 F.3d at 539-40.

<sup>38</sup> *Id.* at 540.

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windfall that LECs handling this originating toll-free VoIP traffic would receive if the Commission amended or changed its interpretation of § 51.913. Moreover, many VoIP providers are already using a LEC to route toll-free VoIP traffic to the PSTN that is different from the LEC that receives its terminating traffic and is “listed in the database of the Number Portability Administration Center as providing the calling party or dialed number.”<sup>39</sup> Changing the rules to permit LECs to collect originating end office switching rates will exacerbate problems the Commission identified in its legacy intercarrier compensation regime. LECs will compete to provide this outbound service to VoIP providers in order to collect this windfall intercarrier compensation, competing on their willingness to share the windfall, rather than the quality of service.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission’s rules. Please contact me if you have any questions.

Sincerely,

*/s/ Alan Buzacott*

cc: Daniel Alvarez

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<sup>39</sup> 47 C.F.R. § 61.26(f).