

November 3, 2014

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
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:

AT&T and Verizon filed ex parte letters claiming that, if the Commission issues a declaratory ruling reaffirming that, pursuant to 47 C.F.R. § 51.913(b), a CLEC working in tandem with an over-the-top VoIP provider can assess end office local switching access, the Commission may only do so prospectively.¹ AT&T and Verizon are wrong; in fact, were the Commission to limit the application of its declaratory ruling to prospective effect, the Commission would commit reversible error. *Qwest Services Corp. v. Federal Communications Commission*,² is directly on point: “The mere possibility that a party may have relied on its own (rather convenient) assumption that unclear law would ultimately be resolved in its favor is insufficient to defeat the presumption of retroactivity when that law is finally clarified.”³ The Supreme Court decision in *Christopher v. SmithKline Beecham Corp.*⁴ is inapplicable here and does not undermine *Qwest*.

As Level 3 has previously stated, it uses the exact same facilities to provide local switching for calls terminated to TDM loops, over cable VoIP facilities and over-the-top. Interpreting the VoIP Symmetry Rule to allow CLECs to collect end office local switching access charges for calls terminated to TDM loops and over cable VoIP facilities, but not over-the-top, moves in exactly the opposite direction from the *Transformation Order*, which seeks to

¹ Letter from Christi Shewman, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 *et al.* (filed Oct. 3, 2014) (“AT&T Oct. 3, 2014 Letter”); letter from Alan Buzacott, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 & 05-337; CC Docket Nos. 01-92 & 96-45, GN Docket No. 09-51 (“Verizon Oct. 27, 2014 Letter”).

² *Qwest Servs. Corp. v. F.C.C.*, 509 F.3d 531 (D.C. Cir. 2007) (“*Qwest*”).

³ *Id.* at 540.

⁴ *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) (“*Christopher*”).

eliminate artificial distinctions between traffic traversing the same network facilities.⁵ In fact, when it adopted the VoIP Symmetry Rule, the Commission expressly stated, “we adopt rules that permit a LEC to charge the relevant intercarrier compensation for functions performed by it and/or by its retail VoIP partner, regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture.”⁶

I. NO PRE-EXISTING RULE BARS END USER LOCAL SWITCHING ACCESS CHARGES FOR OVER-THE-TOP VOIP.

AT&T and Verizon argue any declaratory ruling must be prospective only because, they assert, this ruling would substitute “new law for old law that was reasonably clear.”⁷ But that is not the case.

The Commission adopted 47 C.F.R. § 51.913 prospectively to establish clearly the obligation to pay access charges with respect to VoIP traffic, against a backdrop in which the obligation to pay access was unsettled.⁸ The VoIP Symmetry Rule, 47 C.F.R. § 51.913(b), was a part of this new prospective regime.⁹ The VoIP Symmetry rule, along with the rest of 47 C.F.R. § 51.913, was a new rule that supplanted whatever went before. None of the orders cited by AT&T or Verizon established a pre-existing rule that excluded over-the-top VoIP from the scope of the VoIP Symmetry Rule or conclude that a CLEC may never assess local switching access charges for service to its VoIP partner’s over-the-top end user.

⁵ *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17,663, 17,678 ¶ 40 (2011) (“*Transformation Order*”) (“Under this framework, all carriers originating and terminating VoIP calls will be on equal footing in their ability to obtain compensation for this traffic.”); Letter from John T. Nakahata, Counsel to Level 3 Communications, LLC and Tamar Finn, Counsel to Bandwidth.com, Inc., to Marlene H. Dortch, Secretary, FCC at 4, WC Docket Nos. 10-90 & 05-337; CC Docket Nos. 01-92 & 96-45, GN Docket No. 09-51 (filed Aug. 8, 2013); Letter from John T. Nakahata, Counsel to Level 3 Communications, LLC and Tamar Finn, Counsel to Bandwidth.com, Inc., to Marlene H. Dortch, Secretary, FCC at 6, WC Docket Nos. 10-90 & 05-337, CC Docket Nos. 01-92 & 96-45, GN Docket No. 09-51 (filed Apr. 15, 2013).

⁶ *Transformation Order*, 26 FCC Rcd. at 18,026-7 ¶ 970.

⁷ *Verizon Telephone Cos. v. F.C.C.*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (“*Verizon*”).

⁸ *Transformation Order*, 26 FCC Rcd. at 18,005 ¶ 939.

⁹ *See id.* at 18,007-8 ¶ 942.

A. *AT&T v. YMax* did not establish a general rule against CLECs receiving end office local switching access for over-the-top VoIP calls or declare that CLECs never provide the functional equivalent of end office local switching for such calls.

AT&T and Verizon argue that the Commission's decision in *AT&T Corp. v. YMax Communications Corp.*¹⁰ established a rule that CLECs cannot collect end user local switching access charges when they do not connect the switch to a physical loop, but instead deliver traffic to the end user via the Internet.¹¹ The Commission, however, expressly stated in *YMax* that it was *not* ruling generally on whether a CLEC could collect end office access charges for over-the-top VoIP traffic: "We express 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."¹² The Commission, as it stated, was only finding that "YMax's Tariff fails to unambiguously describe the kinds of services and functions that YMax performs with regard to the traffic at issue"—a holding specific only to YMax and its tariff.¹³

B. The *February 2012 Clarification Order* did not establish a general rule against CLECs receiving end office local switching access for over-the-top VoIP calls or declare that CLECs never provide the functional equivalent of end office local switching for such calls.

Verizon suggests that the Bureau's February 27, 2012 clarification order (*February 2012 Clarification Order*)¹⁴ confirmed that CLECs could never collect end office local switching access charges with respect to traffic bound to its VoIP partner's over-the-top VoIP customer.¹⁵ But the Bureau made no such statement or holding in the *February 2012 Clarification Order*. As the Bureau noted, "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 include functions that neither it nor its VoIP retail partner are actually providing."¹⁶ The Bureau (correctly and un-controversially) reiterated that a carrier can only charge for the functions performed by that carrier or its VoIP partner, and not for functions

¹⁰ *AT&T Corp. v. YMax Communications Corp.*, Memorandum Opinion and Order, FCC 11-59, 26 FCC Rcd. 5742 (2011) ("*YMax*").

¹¹ See AT&T Oct. 3, 2014 Letter; see also Verizon Oct. 27, 2014 Letter.

¹² *YMax*, 26 FCC Rcd. at 5749 n.55.

¹³ *Id.* at 5748-5749 ¶ 14. In addition, because the Commission's decision in *YMax* pre-dated the *Transformation Order*, it could not have been interpreting the VoIP Symmetry Rule adopted in the *Transformation Order*.

¹⁴ *Connect America Fund, et al.*, Order, FCC 12-298, 27 FCC Rcd. 2142 (2012) ("*February 2012 Clarification Order*").

¹⁵ Verizon October 27, 2014 Letter at 5.

¹⁶ *February 2012 Clarification Order*, 27 FCC Rcd. at 2144 ¶ 4.

that neither performs.¹⁷ Moreover, the rule change to 47 C.F.R. 61.26(f) made by the *February 2012 Clarification Order*, simply refers back to 47 C.F.R. § 51.913(b). The *February 2012 Clarification Order* thus did not establish a rule that a CLEC cannot assess an end office local switching charge for over-the-top VoIP traffic.

C. The Commission has never otherwise addressed whether a CLEC and its VoIP Partner can provide the functional equivalent of ILEC end office local switching as specified in 47 C.F.R. § 69.106 without providing a physical loop.

The key question presented by Level 3 and other CLECs is whether a CLEC can ever provide the “functional equivalent” of the ILEC end office local switching charge specified in 47 C.F.R. § 69.106 without providing the physical loop. That question did not—and could not—arise definitively prior to the *Transformation Order’s* adoption of the VoIP Symmetry Rule in 47 C.F.R. § 51.913(b) and the definition of “End Office Access Service” in 47 C.F.R. § 51.903(d); those rules did not exist prior to that time. Moreover, the obligation to pay access charges at all with respect to any VoIP-PSTN traffic was not definitively settled until the adoption of 47 C.F.R. § 51.913. All the other decisions cited by AT&T and Verizon address traditional circuit switched networks in which the switch necessarily connected to a physical loop. None (except *AT&T v. YMax*, which, as discussed above, did not decide this issue) addressed over-the-top VoIP calls. Thus, they could not have addressed access charges for over-the-top VoIP calls.

Moreover, as Level 3 has previously noted, AT&T’s citation of the *RAO 21 Reconsideration Order* is highly misleading. In that Order, when the Commission referred to “the interconnection of lines and trunks,” it was specifically referring to “the switching matrix required for call interconnection”—the intelligence in the switch, not the presence of the line port. In any event, this 1997 Order predates both the *Transformation Order* and over-the-top VoIP over broadband.¹⁸

Notably, AT&T and Verizon also never acknowledge that the line port—the functionality of actually connecting a switch with a physical loop—is not part of the 47 C.F.R. § 69.106 ILEC end office local switching charge used as the basis for the functional equivalence determination. The Commission removed line ports from all ILEC local switching charge in 2000 and 2001, further undermining AT&T’s and Verizon’s claim that there is a preexisting rule that requires a CLEC (or, for that matter, an ILEC) to provide a physical loop as a prerequisite to assessing end office local switching charges.

¹⁷ *Id.*

¹⁸ Vonage, for example, did not launch its service until March 2002. Vonage, Corporate Timeline, http://www.vonage.com/corporate/images/vonage_timeline.pdf.

II. WITH NO PREEXISTING RULE PRECLUDING CLECS FROM ASSESSING END OFFICE LOCAL SWITCHING CHARGES FOR OVER-THE-TOP VOIP TRAFFIC, NO MANIFEST INJUSTICE EXISTS AND QWEST REQUIRES RETROACTIVE EFFECT.

AT&T and Verizon argue that *Verizon v. FCC*¹⁹ precludes retroactive effect of a declaratory ruling permitting CLECs to assess end office local switching access charges when they provide switching functions even if they are not connecting to a physical loop. But the language they cite presupposes a change from a pre-existing rule, which, as shown above, does not exist here.

Qwest, however, is directly on point. In *Qwest*, the D.C. Circuit rejected the FCC's attempt to preclude retroactive application of its declaratory ruling that menu-drive prepaid calling cards were subject to access charges. In the order under review in *Qwest*, the Commission had asserted that "lack of clarity in the law on this issue" would result in manifest injustice. The D.C. Circuit disagreed, stating "a mere lack of clarity in the law does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct."²⁰ "Clarifying the law and applying that clarification to past behavior are routine functions of adjudications."²¹ Moreover, the Court held that in order to establish a manifest injustice, any reliance must be reasonable, i.e., "reasonably based on settled law contrary to the rule established in the adjudication."²² Where, as here, there was no settled law contrary to the rule being set forth, "The mere possibility that a party may have relied to its own (rather convenient) assumption that unclear law would ultimately be resolved in its favor is insufficient to defeat the presumption of retroactivity when that law is finally clarified."²³

Furthermore, as in *Qwest*, there is "the obvious fact that every loss that retroactive application of its . . . interpretation would inflict . . . is matched by an equal and opposite loss that non-retroactivity would inflict on access suppliers"²⁴ The D.C. Circuit in *Qwest* observed, "The Commission having determined the liability for such access costs under its interpretation . . . , we see no reason why the users should not pay in accord with that interpretation."²⁵ The same is true here.

Notably, AT&T cannot even claim a surprise. In AT&T's one and only filing addressing the proposals that led to the VoIP Symmetry Rule (which AT&T filed on the day the

¹⁹ *Verizon*, 269 F.3d 1098.

²⁰ *Qwest*, 509 F.2d at 540.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

Commission issued its Sunshine Act notice and more than one to two months after the ex partes to which it was responding), AT&T itself acknowledged that adoption of a VoIP Symmetry Rule could lead to access charges for calls terminated to over-the-top VoIP users.²⁶ In fact, AT&T proposed that, if the Commission adopted a VoIP symmetry rule, it should “consider limiting the availability of full benchmark access switched access charges to only those situations where the CLEC delivers the call directly to an affiliated, facilities-based voice provider that directly serves the end user and provides all of the signaling, switching and routing functions needed to reach that end user.”²⁷ The Commission declined to adopt AT&T’s proposal, and in fact made clear that the VoIP Symmetry Rule applies whether the CLEC’s VoIP partner is an affiliated or unaffiliated entity.²⁸

Accordingly, based on the record before the Commission, it would be reversible error for the Commission to declare that the CLECs may charge end office local switching access charges for over-the-to VoIP traffic, but then to deny retroactive application on the grounds of a “manifest injustice.” A declaratory ruling that CLECs can assess local switching charges when they perform local switch functions for over-the-top VoIP traffic must be given retroactive effect.

III. CHRISTOPHER V. SMITHKLINE BEECHAM CORP. DOES NOT PRECLUDE RETROACTIVE EFFECT HERE.

AT&T and Verizon argue that according a declaratory ruling permitting local switching access charges for over-the-top VoIP retroactive effect would contravene the Supreme Court’s decision in *Christopher v. SmithKline Beecham*, but again they drastically overread that decision. The situation here is nothing like *Christopher*, which presupposed “unfair surprise” from “a very lengthy period of conspicuous inaction” to enforce a rule or suggest that industry was acting unlawfully by engaging in the practice in dispute.²⁹

Christopher involved a case under the Fair Labor Standards Act as to whether certain pharmaceutical representatives that called upon physicians to promote drugs (called “detailers”) were exempt from the FLSA’s overtime requirements as “outside salesmen.” The regulations at issue had been promulgated in 1938, 1940 and 1949, and the pharmaceutical industry had been treating “detailers” as exempt “outside salesmen” since the 1950s.³⁰ The case arose after the Department of Labor announced, in an amicus curiae brief that it considered this type of pharmaceutical representative not to be an exempt “outside sales.”

²⁶ Letter from Robert W. Quinn, Jr., AT&T, to Marlene H. Dortch, Secretary, FCC, at 5, CC Docket No. 01-92, WC Docket No. 07-135, GN Docket No. 09-51 (filed Oct. 21, 2011).

²⁷ *Id.* at n.24.

²⁸ See 47 C.F.R. § 51.913(b); *Transformation Order*, 26 FCC Rcd. at 18,026-7 ¶ 970.

²⁹ *Christopher*, 132 S. Ct. at 2168.

³⁰ *Id.* at 2162-2164.

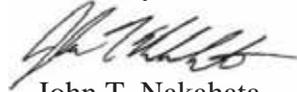
In declining to defer to the Department of Labor's 2009 interpretation of its over 60-year old rules, the Court observed that "Until 2009, the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA."³¹ A critical factor to the court was that "despite the industry's decades-long practice of classifying pharmaceutical detailers as exempt employees, the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully."³² Under these circumstances, the Court found "the potential for unfair surprise is acute."³³

Here, by contrast, there is no long period of inaction and no surprise. As discussed above, AT&T in its one and only comment filed on this issue prior to the adoption of the *Transformation Order* raised the possibility that the VoIP Symmetry Rule could require payment of access charges to CLECs serving over-the-top VoIP providers.³⁴ As the issue here only involves periods after 47 C.F.R. § 51.913 took effect, there can be no surprise at all, given AT&T's comments. Indeed, Level 3 and Bandwidth.com brought this issue to the attention of the Commission staff in June 2012, after they became aware that AT&T was asserting that the *February 2012 Clarification Order* meant that it did not have to pay end user local switching access charges associated with service to over-the-top VoIP users.³⁵ *Christopher* certainly provides no basis for altering the D.C. Circuit's analysis in *Qwest*, which is on point with the situation presented here.

* * *

Accordingly, the Commission should issue a declaratory ruling making clear that a CLEC and its VoIP partner may collect end office local switching charges for over-the-top VoIP service even though they do not provide a physical loop. When the Commission issues such a ruling, under *Qwest* and the circumstances presented here, that ruling must have retroactive as well as prospective effect. There is no preexisting rule barring end office local switching charges for over-the-top VoIP service that would be changed by such a declaratory ruling, and the fact that AT&T and Verizon have asserted a contrary interpretation of the VoIP Symmetry rule is insufficient to constitute the manifest injustice necessary to overcome the ordinary presumption of retroactive effect.

Sincerely,



John T. Nakahata

Counsel to Level 3 Communications, LLC

³¹ *Id.* at 2167.

³² *Id.* at 2168.

³³ *Id.*

³⁴ *See* n.26, *supra*.

³⁵ *See* Letter of Tamar Finn, Counsel to Bandwidth.com, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 *et al.* (filed June 11, 2012).