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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 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 November 4, 2014, Curtis L. Groves and Alan Buzacott of Verizon met with Priscilla Delgado Argeris, Legal Advisor to Commissioner Rosenworcel, to discuss claims that the Commission can, today, interpret rules it promulgated in November 2011 to permit LECs that send VoIP traffic over the public Internet to collect local end office switched access charges even though neither those LECs nor their VoIP partners actually perform end office switching or its functional equivalent.

There is no dispute that a LEC can charge end office switched access on VoIP-PSTN traffic when the LEC or its VoIP partner performs end office switching or its functional equivalent. For example, where a cable company LEC partners with its affiliated retail VoIP provider, that partnership — which has invested in facilities to serve end user customers — normally provides the functional equivalent of end office switching, and the LEC can collect its end office switched access charges.

But LECs that partner with over-the-top VoIP providers do not provide the functional equivalent of end office switching because neither performs the necessary switching, or controls the switching decisions, that route a VoIP call to (or from) the VoIP customer over the broadband line that connects to the end user's premises. Companies that provide these over-the-top VoIP services — e.g., Skype and Vonage — have not invested in facilities to serve the end user customers

who initiate and receive voice calls. Neither have their LEC partners. These companies do not own, control, or maintain the physical routers, lines, and other equipment that performs analogous switching functions. These facilities belong to the Internet service providers – e.g., Comcast, Cox, and Verizon – who provide Internet access services to customers making and receiving over-the-top VoIP calls.

When the Commission modified its long-standing rule that a LEC can only charge tariffed switched access for the access functions it provides¹ to permit a LEC to charge switched access for functions “performed by it and/or by its retail VoIP partner,” the Commission took pains to be clear that the LEC still cannot charge for an access function “performed neither by itself nor its retail [VoIP] service provider partner.”² Both before and after the *USF-ICC Transformation Order*, the Commission has determined that, when LECs send over-the-top VoIP traffic over the public Internet — instead of actually connecting lines and trunks — they do not perform end office switching (or its functional equivalent) and therefore cannot assess local end office switched access charges.³

If the Commission now intends a different outcome — whether by changing the definition of end office switching or creating a new exception to permit a LEC to charge for a function that neither it nor its over-the-top VoIP partner provides — it would have to change its existing rules or its existing interpretation of those rules. In all events, that new rule could have only prospective effect. Moreover, the Commission should limit any new rule to terminating access charges, where the Commission has reformed the access regime and is far along the process of reducing rates, and should not extend it to originating access charges, which remain at their pre-*USF-ICC Transformation Order* levels. Toll-free traffic pumping — using autodialers to generate sham 8YY calls to collect originating switched access and database dip charges — and other robocall activity is already a serious arbitrage problem. Permitting arbitrageurs to collect originating switched access when they use over-the-top VoIP autodialing equipment could open the floodgates to new robocall schemes at the same time consumers already are fed up and struggling to find solutions to annoying robocalls.⁴

¹ “[U]nder the Commission’s historical approach in the access charge context, when relying on tariffs, LECs have been permitted to charge access charges to the extent that they are providing the functions at issue.” *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 970 (2011) (“*USF-ICC Transformation Order*”).

² *Id.* Indeed, the Commission said it twice, repeating that “the right to charge does not extend to functions not performed by the LEC or its retail service partner.” *Id.* ¶ 970 n.2028.

³ See *AT&T Corp. v. YMax Communications Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 5742, ¶¶ 36-45 (2011) (“*YMax Order*”); *Connect America Fund*, Order, 27 FCC Rcd 2142, ¶¶ 4-5 (2012) (“*Clarification Order*”).

⁴ See, e.g., Letter from Greg Zoeller, Indiana Attorney General, *et al.*, National Association of Attorneys General, to Hon. Tom Wheeler, Chairman, FCC (Sept. 9, 2014), available at <http://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Consumer-Protection/2014-09-09-Final-Robocalling-Letter-to-the-FCC>.

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 and encourage arbitrage.

a. As Verizon and others have explained,⁵ allowing a LEC to collect end office switching charges when it routes over-the-top VoIP traffic over the public Internet would grant it a windfall — the opposite of the symmetry the Commission sought to achieve in allowing LECs to charge switched access for functions performed by either the LEC or its over-the-top VoIP provider partner.⁶ As the Commission explained shortly before issuing the *USF-ICC Transformation Order*, end office switching rates “are among the highest recurring intercarrier compensation charges,” and they “were and are authorized by law 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.”⁷ Applying that Commission decision, the Fourth Circuit recognized that a “carrier that finds a way to deliver incoming calls to its customers without building physical connections to each of them” — such as by routing them over the public Internet — “has far less infrastructure investment to recoup.”⁸ Therefore, allowing LECs to collect end office switched access when — in contrast to cable company LECs and their affiliated VoIP partners — neither they nor their retail VoIP partners have incurred that infrastructure investment yields a windfall, not symmetry.

That windfall, moreover, will exacerbate existing opportunities for arbitrage with originating access charges, which the Commission has not taken action to reduce. The arbitrage risk is particularly acute with originating toll-free (8YY) traffic. Toll-free users are already complaining about receiving “junk” or “spam” calls to their 8YY numbers, which are designed to generate revenues for the “originating” LEC (and its partner), imposing costs on both the user and its carrier.⁹ The FBI’s Cyber Division has warned about toll free traffic pumping, specifically

⁵ See, e.g., Letter from Alan Buzacott, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (Oct. 27, 2014); 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).

⁶ See *USF-ICC Transformation Order*, ¶ 970 (“CLECs are entitled to charge the same intercarrier compensation as incumbent LECs do under comparable circumstances.”).

⁷ *YMax Order*, ¶ 40. The Commission also specifically rejected YMax’s claim that it is only the common line charge, not the end office switching charge, that is designed to recoup that substantial investment. See *id.* ¶ 41 n.120.

⁸ *CoreTel Virginia, LLC v. Verizon Virginia LLC*, 752 F.3d 364 (4th Cir. 2014).

⁹ See, e.g., <http://www.dslreports.com/forum/r29203875-Nighttime-junk-calls-to-toll-free-numbers>; <http://800notes.com/forum/ta-769d4ac0c0701d8/silent-spam-calls-to-toll-free-numbers>; http://community.ringcentral.com/ringcentral/topics/calls_from_nobody.

noting that CLECs' "revenue share agreements become a vehicle for [this] fraud."¹⁰ Because the Commission has not yet mandated reductions to originating access rates, these arbitrage scams will only become more prevalent — and harder to catch — if the Commission permits LECs to collect end-office originating switched access on over-the-top VoIP calls, as scammers who have not invested in a network switch to VoIP equipment that can connect from anywhere on the Internet to autodial 8YY numbers. As the Commission has recognized in multiple contexts — such as dial-up ISP traffic and traffic pumping — the availability of such windfalls harms competition because it enables LECs to "pay their own customers to use their services," rather than competing "on the basis of the quality and efficiency of the services they provide."¹¹

b. Not only do a LEC and its over-the-top VoIP provider partner not incur the substantial infrastructure costs of deploying a local network when they rely on the public Internet to send traffic to customers, but also the switching the LEC or the VoIP provider performs is not *end office* switching or its functional equivalent. Neither the LEC nor the VoIP provider controls the final (or initial) switching decisions that route VoIP packets to (or from) the VoIP customer over the broadband line that connects to the end user's premises.

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 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." The Commission has found that the "defining characteristic" of a PSTN *end office* switch — that is, what distinguishes it from a tandem switch or a long-distance carrier's switch — is the "actual connection of lines and trunks."¹² This recognition that the key function of an *end office* switch is the connection of wires or cables that connect to other switches (trunks) to wires or cables that connect to end users' premises (lines) is long-standing.¹³

¹⁰ FBI Cyber Division Private Industry Notification (Oct. 25, 2013), *available at* http://voipsecurityblog.typepad.com/files/toll-free-traffic-pumping_11-7-13-.pdf; *see also* TransNexus, *Telecom Fraud Call Scenarios* at 8, *available at* https://cdn.shopify.com/s/files/1/0380/5305/files/telecom_frauds.pdf.

¹¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶¶ 21, 71 (2001); *see also, e.g., USF-ICC Transformation Order*, ¶¶ 664-665.

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

¹³ *See, e.g., Consolidated Application of AT&T Co. and Specified Bell Sys. Cos.*, Memorandum Opinion, Order and Authorization, 96 F.C.C. 2d 18, ¶ 21 n.28 (1983) (explaining that a "'class 5 or 'end' office . . . switch[] . . . connect[s] subscriber loops (the transmission path between the customer premises equipment and the class 5 office) to other subscriber loops and subscriber loops to interoffice trunks"); *United States v. Western Elec. Co., Inc.*, 569 F. Supp. 1057, 1064 (D.D.C. 1983) (explaining that an "end office is the plant into which individual subscribers' telephone access lines feed" and distinguishing the "end office" or "Class 5" switching function from the tandem and toll ("Class 4") switching functions).

The traffic in question includes both interstate long-distance calls from the PSTN to a customer of an over-the-top VoIP provider and toll-free calls from customers of those over-the-top VoIP providers to the PSTN.

In the terminating scenario, a PSTN customer places a long-distance call to a customer of an over-the-top VoIP provider like Vonage that has partnered with a LEC like Level 3. Because the over-the-top VoIP service is nomadic, the called party could be anywhere. In fact neither Level 3 nor Vonage would know where that customer is, because a Vonage customer with a New York telephone number could be in Massachusetts and could plug the terminal adapter that Vonage provides into a broadband Internet access service at the Massachusetts location that a cable company or another broadband company – but not Vonage or Level 3 – provides.

The calling party dials the Vonage customer, and because the Vonage customer's telephone number is assigned to Level 3, Verizon's network makes the switching decisions to deliver the call over high-capacity trunks to a Level 3 media gateway. The Level 3-Vonage partnership then converts the voice signal arriving over the trunks into IP packets — often referred to as a “media gateway” function — performs a lookup to determine the IP address of the called party, and hands the IP packets off to the public Internet. At that point, the LEC-VoIP provider partnership's role in the call flow ends. The rest of the path from the gateway to the called party is provided by Internet Service Providers, including the called party's ISP, which provides the broadband connection that the Vonage service needs in order to function. 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, which performs that final switching onto the called party's “line.”

In the originating scenario, a similar process takes place but in reverse. The Vonage customer dials an 8YY number that belongs to a PSTN customer. After the calling party's Vonage terminal adapter converts the call to packets, the packets travel from the customer's premises over a broadband connection provided by the VoIP customer'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 Level 3 media gateway. From there Level 3 converts the call to a TDM signal and hands the call to the long distance carrier that serves the 8YY customer, which will carry the call over its network to reach its destination. Notably, some CLECs' business model is to aggregate 8YY traffic from several VoIP providers, including those with telephone numbers assigned to other LECs, and bill “end office” access charges on all of those originating calls.

To treat the function the LEC and VoIP provider perform as “end office” switching is to ignore all of the packet switching over which those entities have no control and to treat the “entire worldwide Internet” as though it “comprises a ‘virtual’ loop” that runs from the media gateway to the called party's premises.¹⁴ As the Commission correctly found in rejecting that claim, “[i]f

¹⁴ *YMax Order*, ¶ 44.

th[e] 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.”¹⁵

Contrast these scenarios with a different VoIP scenario. Where a LEC partners with a cable company and they collectively provide the local connection to the customer, without sending the call over the public Internet and relying on many other unaffiliated and unknown ISPs to perform switching functions, then that LEC is entitled to end office switching charges under the Commission’s rules. That’s not at issue here. But where the partnering LEC does not provide a local connection and delivers over-the-top VoIP calls via the public Internet over a broadband Internet access service that someone else provides, neither the partnering LEC nor its VoIP partner provide end-office switched access.

Instead, if anyone is providing the functional equivalent of end office switching when a LEC routes over-the-top VoIP traffic over the public Internet, it is the called (or calling) party’s broadband Internet provider. Those broadband providers are not common carriers and are prohibited from filing switched access tariffs. Moreover, under the Commission’s past net neutrality rules and current proposals, the broadband provider is prohibited from charging for the work it performs in routing that over-the-top VoIP traffic over the facilities that it deployed to reach the end user’s premises.

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.

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.”¹⁶ As shown above, under the Commission’s existing rulings distinguishing end office switches from other PSTN switches, 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

¹⁵ *Id.*

¹⁶ 47 C.F.R. § 51.913(b).

“contractual or other arrangements”¹⁷ — performs the defining characteristic of the end office switching function: “the actual connection of lines and trunks.”¹⁸

Even if there were any ambiguity about whether, under the Commission’s current rules, a LEC-VoIP provider partnership provides the functional equivalent of end office switching when routing VoIP traffic over the public Internet, the Chief of the Wireline Bureau eliminated that ambiguity just months after the Commission released the *USF-ICC Transformation Order*. YMax specifically asserted that the Commission’s VoIP symmetry 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.¹⁹ YMax argued that the VoIP symmetry rule adopted a Level 3 proposal, under which a LEC “provides end office service when it is identified in the NPAC database as providing the calling party or dialed number.”²⁰ YMax also noted that the Commission had adopted Comcast’s proposed language for 47 C.F.R. § 61.26(f), which allowed a “CLEC [to] assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services” if it “is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number.”²¹ YMax stressed that its request posed “no double-billing problem,” because it was limited to the situations where “neither the VoIP service provider nor any other provider in the chain is also seeking to collect access charges on the call.”²²

The Bureau promptly responded to YMax’s “request[] [that] the Commission confirm that its reading of the Order is correct,”²³ stating in no uncertain terms: “We disagree.”²⁴ Indeed, the Bureau recognized that YMax, in asserting the right to charge end office switched access because it met the criteria in § 61.26(f), was seeking to charge for “functions that neither [the CLEC] nor its VoIP retail partner are actually providing.”²⁵ The Bureau then amended 47 C.F.R. § 61.26(f) to ensure that it was absolutely clear that meeting the criteria in § 61.26(f) — providing “some portion of the switched exchange access services” and being “listed in the [NPAC] database . . . as

¹⁷ *Id.*

¹⁸ *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).

¹⁹ Letter from John B. Messenger, YMax, to Marlene H. Dortch, FCC, at 1-2, WC Docket No. 10-90, *et al.* (Feb. 3, 2012).

²⁰ *Id.* at 3 (quoting Comments of Level 3, *Connect America Fund*, WC Docket No. 10-90, *et al.*, at 22 (Aug. 24, 2011)).

²¹ *Id.* at 3-4 (quoting Letter from Mary McManus, Comcast, to Marlene H. Dortch, FCC, *Connect America Fund*, WC Docket No. 10-90, *et al.* (Sept. 22, 2011)).

²² *Id.* at 4.

²³ *Id.* at 5.

²⁴ *Clarification Order*, ¶ 4.

²⁵ *Id.*

providing the . . . dialed number” — is *insufficient* to entitle “the CLEC [to] assess a rate” that includes “all exchange access services,” including end office switching.²⁶ Although the Bureau went on to note that YMax’s position “could enable double billing” — despite YMax’s express limitation of its request to situations where the LEC partnering with the VoIP provider was the sole carrier charging originating or terminating switched access — the Bureau reiterated that the VoIP symmetry rule was designed *both* “to prevent double billing *and* charging for functions not actually provided.”²⁷ The Bureau’s rejection of YMax’s interpretation of the VoIP symmetry rule therefore cannot be read as limited to concerns about double billing. Instead, that rejection further confirms that a LEC-VoIP provider partnership is *not* providing the functional equivalent of end office switching when it uses the public Internet to route traffic between the end user customer and the media gateway.

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 or amend its long-standing determination that the distinguishing feature of an end office switch is that it connect lines to trunks. 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.²⁸

Because the Administrative Procedure Act requires that amendments to regulations “be given future effect only,”²⁹ 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 is a reasonable reading of the text of the rule that 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”³⁰ — 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.³¹ As the Supreme Court recently reiterated, to

²⁶ *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”).

²⁷ *Id.* ¶ 4 (emphasis added).

²⁸ *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).

²⁹ *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997) (internal quotation marks omitted).

³⁰ *USF-ICC Transformation Order*, ¶ 1404.

³¹ *Clarification Order* ¶¶ 4, 16.

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.”³² Those considerations would not apply to a new interpretation that is 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.³³ 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.”³⁴ But matters would be 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.”³⁵

For all of these reasons, Level 3 is wrong to contend that the D.C. Circuit’s decision in *Qwest Services Corp. v. FCC*³⁶ entitles it to retroactive application of a new interpretation of § 51.913.³⁷ There, the court found that “a mere lack of clarity in the law” was insufficient to prevent the normal rule that adjudications apply retroactively.³⁸ Here, in contrast, the “settled law” is “contrary” to the new rule Level 3 and others urge.³⁹ 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 Bureau resolved that ambiguity when it rejected YMax’s interpretation of that section and amended § 61.26(f) to remove all doubt that a LEC 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.

³² *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

³³ *See Chadmoore Communications*, 113 F.3d at 240.

³⁴ *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

³⁵ *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)).

³⁶ 509 F.3d 531 (D.C. Cir. 2007).

³⁷ 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).

³⁸ *Qwest*, 509 F.3d at 539-40.

³⁹ *Id.* at 540.

3. The VoIP symmetry rule has nothing to do with IP VoIP interconnection, and changing the VoIP symmetry rule to expand the applicability of switched access charges would deter the shift to IP VoIP interconnection arrangements.

In the *USF-ICC Transformation Order*, the Commission expressly and repeatedly stressed that the new intercarrier compensation rules that it adopted for VoIP-PSTN traffic, including the VoIP symmetry rule, are limited to traffic that is exchanged over the PSTN. In the paragraph immediately preceding its discussion of the VoIP symmetry rule, the Commission stressed that its “transitional VoIP-PSTN rules focus specifically on whether the exchange of traffic occurs in TDM format (and not in IP format).”⁴⁰ The Commission’s definition of VoIP-PSTN traffic, moreover, is “traffic exchanged over PSTN facilities that originates and/or terminates in IP format.”⁴¹ In codifying the new VoIP-PSTN rules, including the VoIP symmetry rule, the Commission likewise limited its rule to traffic “exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format.”⁴² For these reasons, the question whether the VoIP symmetry rule will be modified to allow a LEC to charge end office switched access when it routes over-the-top VoIP traffic over the public Internet has nothing to do with the exchange of VoIP traffic in IP format.

Verizon currently has nine agreements for IP VoIP interconnection for the exchange of voice traffic in IP format between voice customers. These agreements are with VoIP providers of a variety of sizes and business plans, including both Vonage and Bandwidth.com. The current VoIP symmetry rule, which prevents LECs from charging for end office switching when they send over-the-top VoIP traffic over the public Internet and do not perform end office switching, is thus no impediment to the negotiation of agreements to exchange traffic between VoIP customers in IP format, allowing for the all-IP transmission of that traffic and the resulting benefits to both consumers and the providers. As Vonage told the FCC, its “groundbreaking” agreement for IP VoIP interconnection with Verizon “will allow both Verizon and Vonage customers to enjoy the quality of service and cost benefits that come from the IP exchange of traffic, including the potential to offer subscribers services that rely on end-to-end IP networks — such as high-definition voice.”⁴³

In contrast, allowing LECs to begin charging end office switched access for over-the-top VoIP traffic would deter the development of more such agreements. A VoIP provider agreeing to route its traffic directly to another VoIP provider, in IP format, would lose the ability to share in those windfall switched access charges with its LEC partner. Indeed, it is telling that those most

⁴⁰ *USF-ICC Transformation Order*, ¶ 969; *accord id.* ¶ 940 (“[W]e focus specifically on whether the exchange of traffic between a LEC and another carrier occurs in Time-Division Multiplexing (TDM) format and not in IP format.”).

⁴¹ *Id.* ¶ 940.

⁴² 47 C.F.R. § 51.913(a).

⁴³ Comments of Vonage Holdings Corp., *Numbering Policies for Modern Communications*, WC Docket No. 13-97, *et al.*, at 2-3 (Mar. 4, 2014).

Marlene H. Dortch

November 5, 2014

Page 11 of 11

opposed to the Commission's efforts to allow VoIP providers to receive telephone number assignments directly are the very LECs — like Level 3 — that partner with the over-the-top VoIP providers and here seek the windfall of payment for functions they are not performing.

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: Priscilla Delgado Argeris