ATTACHMENT 1

Over-the-Top VoIP Compensation

The Commission has long recognized that the core functionality that distinguishes end office switches from other switches, such as tandem switches or long distance switches, is that end office switches connect the individual lines that serve particular subscribers, to higher capacity trunks that carry traffic for many subscribers. *RAO Reconsideration Order*, July 9, 1997.

2011: Only months before adopting the *Transformation Order,* the Commission soundly rejected the argument that the Internet itself could represent the line-side connection associated with end office switching: "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 v. YMax Order*, April 8, 2011.

2011: Leading up to the Commission's landmark *Transformation Order*, cable operators began advocating a Symmetry Rule focused on the corporate structure common in the cable industry (in which a non-carrier affiliate provides the functional equivalent of end-office switching):

> "Any new rules designed to address VoIP compensation should <u>focus on the service provided by the terminating carrier to the carrier from which it receives the traffic</u>. As NCTA has described, for many cable VoIP providers, the terminating carrier may not be the entity that has the retail relationship with the customer. Specifically, the Commission should make clear that an originating provider is obligated to pay the specified terminating rate, regardless of the technology of the terminating network and regardless of whether the traffic is delivered to the called location by the terminating carrier or a partner company (e.g., when a VoIP provider and a competitive LEC partner to deliver service)." NCTA *Ex Parte*, October 5, 2011 (emphasis added).

2011: Around the same time, Level 3 proposed a rule that would have allowed for the application of end office switching charges in the circumstances in which the Commission had disallowed them in the April *AT&T v. YMax* order: The Commission should "[e]stablish [a] bright line test defining when a LEC is eligible for end office switching access, which states that a LEC provides end office service when it is identified in the NPAC database as providing the calling party or dialed number." Level 3 *Ex Parte*, September 16, 2011.

2011: In the *Transformation Order*, the Commission rejected an approach based on numbering and instead adopted rules along the lines proposed by the cable companies. Those rules maintained the long-standing principle that a carrier may not charge for a function not provided (albeit extending the rule to the VoIP partner): "…our rules do not permit a LEC to charge for functions performed neither by itself or its retail service provider partner." *USF/ICC Transformation Order*, November 18, 2011. Rather than reverse the *AT&T v. YMax Order* as argued by Level 3, the Commission instead cited that Order in support of the proposition that no group of entities may charge for a function that they do not perform.

2012: Three months after the Commission adopted the *Transformation Order,* YMax sought virtually the same clarification as Level 3 had requested and as the CLECs here have requested. The Bureau promptly and expressly rejected that request and reiterated that "Section 51.913(b) expressly states that 'this 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 [VoIP service].'" The Bureau exercised delegate authority to explicitly cross-reference the prohibition on charging for functions not performed in the Symmetry Rule. *YMax Clarification Order*, February 27, 2012.

2012: Less than four months later, Level 3 and Bandwidth.com sought the same clarification already rejected in the *YMax Clarification Order*. Level 3/Bandwidth *Ex Parte*, June 11, 2012.