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VIA ELECTRONIC SUBMISSION

Notice of Ex Parte Presentation

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *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*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208

Dear Ms. Dortch:

On November 4, 2014, Robert Quinn, Hank Hultquist, Gary Phillips and I (of AT&T), as well as David Lawson of Sidley Austin LLP (counsel for AT&T), met with Nick Degani, Legal Advisor to Commissioner Pai, regarding the above-referenced proceeding. On November 5, 2014, Robert Quinn, Hank Hultquist, Gary Phillips and I, as well as David Lawson of Sidley Austin LLP, met with Priscilla Argeris, Legal Advisor to Commissioner Rosenworcel. On November 6, 2014, Robert Quinn, Hank Hultquist, Gary Phillips and I, as well as David Lawson of Sidley Austin LLP, met with Amy Bender, Legal Advisor to Commissioner O’Rielly. On November 6, 2014, Robert Quinn and I, as well as David Lawson of Sidley Austin LLP, met with Daniel Alvarez, Legal Advisor to Chairman Wheeler.

In the meetings, AT&T addressed arguments in the record by Level 3, among others, that the Commission’s access charge rules permit CLECs to assess local end office switching charges for their limited role in partnering with various “over-the-top” VoIP providers to route to the public Internet calls to the VoIP providers’ end users. In our discussion, we explained the limited role played by CLECs and VoIP providers in these calls that may traverse hundreds or even thousands of miles on the public Internet before reaching the called parties. We discussed Commission precedent in support of the proposition that neither these CLECs, the VoIP providers, nor any combination of them, provide “local switching” under the Commission’s rules. Finally, we explained that if the Commission were to change course and allow assessment of local switching charges in these circumstances, it could do so only on a prospective basis.

Although AT&T has thoroughly briefed all issues on the record of this proceeding, a few specific points warrant mention here. First, although AT&T appealed the Commission’s

decision to adopt the Symmetry Rule in the Tenth Circuit appeal of the *USF/ICC Transformation Order*,¹ the issue appealed there was an entirely different legal issue than the issue before the Commission here. That case concerned whether it was arbitrary and capricious for the Commission to conclude that it was lawful for a carrier to tariff charges for access functions actually performed by the VoIP partner. AT&T's appeal did not involve the question here: whether a carrier may tariff charges for access functions performed by neither that carrier nor the VoIP partner. Indeed, AT&T's brief in that case expressly carved out this issue on the ground that the Commission had already concluded that a carrier may not.²

In fact, it has done so in *three* separate orders. In the *YMax Order*—a decision about precisely the same functions provided by Level 3 in this context—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.”³ Notably, Level 3 urged the Commission to reverse the *YMax Order* in the *USF/ICC Transformation Order*.⁴ The Commission declined Level 3's invitation and instead cited that Order in support of the proposition that no group of entities may charge for a function that they do not perform.⁵ Subsequently, the Wireline Competition Bureau rejected a request by a carrier (again, YMax) for the Commission to clarify that a LEC provides the “functional equivalent” of traditional access services, and can charge the full benchmark access rate, including end office switching charges, “regardless of how or by whom the last-mile transmission is provided.”⁶ The *YMax Clarification Order* instead re-affirmed that the Commission's rules do “not permit a local exchange carrier to charge for functions not performed” by the LEC itself or its VoIP partner.⁷

Level 3 suggests that AT&T's position would preclude CLECs from assessing local switching on traffic associated with over-the-top VoIP in all circumstances.⁸ That is not the case. The issue—as the Commission has squarely held—is simply whether the local switching function for which local switching charges are billed is actually provided. In certain instances, local switching charges would be permitted for over-the-top VoIP services—for example, by a CLEC that provides broadband service bundled with an

¹ *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, paras. 662-66 (2011) (“*USF/ICC Transformation Order*”), *petitions for rev. denied sub nom, In re* FCC 11-161, 753 F.3d 1015 (10th Cir. 2014).

² See AT&T Principal Brief, No. 11-9900, at 2 n.2 (10th Cir. filed July 16, 2013) (attached).

³ *AT&T Corp. v. YMax Commc'ns*, 26 FCC Rcd 5742, para. 44 (2011) (“*YMax Order*”).

⁴ Letter to Marlene H. Dortch, Secretary, FCC, from John T. Nakahata, Counsel for Level 3, CC Docket No. 01-92 *et al.* (filed Sept. 16, 2011).

⁵ See *USF/ICC Transformation Order*, para. 970 & n.2028.

⁶ *YMax Clarification Order*, 27 FCC Rcd 2142, para. 4 (WCB 2012).

⁷ *Id.*

⁸ Letter to Marlene H. Dortch, Secretary, FCC, from John T. Nakahata, Counsel for Level 3, WC Docket No. 10-90 *et al.*, at 4 (filed Nov. 3, 2014) (“*Level 3 2014 Ex Parte*”).

over-the-top VoIP service, in which case it would be able to assess local switching consistent with the VoIP Symmetry rule.

Additionally, Level 3 states that “it uses the exact same facilities to provide local switching for calls terminated to TDM loops, over cable VoIP facilities and over-the top.”⁹ But the issue is not about what *facilities* are being used, but rather what *function* the equipment is performing. AT&T does not dispute that the same equipment can perform a tandem function in some circumstances and an end office function in others, but that in no way supports Level 3’s claims that it is entitled to assess charges for *functions* that neither it nor its VoIP partner provides.

Further, although Level 3 claims that the various signaling and call setup functions that it (along with its over-the-top VoIP partners) actually do perform constitute end office switching, the Commission has long recognized the local switching includes functions *beyond* signaling/call management. In fact, for decades it has been established in courts, in the industry, and at the Commission—including in the very proceeding relied on by the CLECs—that the defining characteristic of an end office switch and “what distinguishes” it from other network functionalities is “interconnection, i.e., actual connection of [subscriber] lines and trunks.”¹⁰ In contrast, Level 3 and its VoIP partners deliver calls in an undifferentiated stream onto the public Internet, over which the calls may travel for hundreds or even thousands of miles over the facilities of multiple Internet backbone providers and ISPs and through any number of packet switches (which are the true successors to the PSTN’s circuit switches),¹¹ before their ultimate delivery to the premises (or mobile device) where the over-the-top VoIP application is being used. The CLECs and their VoIP partners are thus providing end office switching only if placing calls destined for multiple users and locations in a single undifferentiated stream onto the public Internet could be deemed to involve the same functions and work as using local switches to separate and place calls onto individual subscriber lines. Such a conclusion would be irreconcilable with the *YMax Order*.

Level 3 tries to distinguish the *YMax Order* precedent by arguing that the Order was “a holding specific only to YMax and its tariff,”¹² but that argument is unavailing. The mere fact that the case involved YMax’s tariff provisions does not mean that the legal principles stated in that decision had application only to YMax. To the contrary, the Commission considered YMax’s tariff with reference to Commission rules and policy. In no uncertain terms, the Commission stated in that Order that the Internet could not possibly be seen as a “virtual loop,” a connection to which would constitute “local switching” in any meaningful way. That principle was not limited to YMax, and nothing

⁹ *Id.* at 1.

¹⁰ *Petitions for Reconsideration and Applications for Review of RAO 21*, 12 FCC Rcd 10061, para. 11 (1997).

¹¹ At least since 1978, distinguished engineers have predicted that packet switching would ultimately replace circuit switching even for voice communications. See, e.g., Roberts, Lawrence G., “The Evolution of Packet Switching” (Nov. 1978), available at <http://www.packet.cc/files/ev-packet-sw.html> (visited Feb. 20, 2014).

¹² Level 3 2014 *Ex Parte* at 3.

about the Commission's articulation of that principle would lend itself to such a cramped construction. To the contrary, this was a legal principle that was articulated in the context of the review of YMax's tariff.

Finally, at the time the Bureau issued the *YMax Clarification Order*, Commission staff was well aware of the manner in which YMax provided service. If the Bureau intended CLECs to be able to assess local switching in these circumstances, it is inconceivable that it would have responded to YMax's request for clarification in the way that it did. In its Order, the Bureau paraphrased YMax's request in the following fashion: "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 It is hard to believe that the Bureau, knowing exactly what functions YMax performed based on the Commission's recent complaint decision, would have answered the question asked by YMax in the way it did, if it intended that the *USF/ICC Transformation Order* would empower YMax to do the very thing that the *YMax Order* forbade.

During the meetings, AT&T provided the attached presentation. If you have any questions or need additional information, please do not hesitate to contact me. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,



Christi Shewman

Attachments

cc: Daniel Alvarez
Priscilla Argeris
Nick Degani
Amy Bender

¹³ *YMax Clarification Order* at para. 4.