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November 10, 2014

**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 November 6, 2014, Christopher M. Miller, Curtis L. Groves, and Alan Buzacott of Verizon and Scott H. Angstreich of Kellogg, Huber, Hansen, Todd, Evans, and Figel, P.L.L.C. met with Marcus Maher, Rick Mallen, Suzanne Tetreault, and James Carr of the Office of General Counsel and Deena Shetler, Victoria Goldberg, and Thom Parisi of the Wireline Competition Bureau 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. Also on November 6, 2014, Curtis L. Groves and Alan Buzacott met with Amy Bender, Legal Advisor to Commissioner O’Rielly, to discuss the same topic.

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 and send traffic over the public Internet do not provide the functional equivalent of end office switching because neither performs the necessary switching, or controls the switching decisions, that send 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 longstanding rule that a LEC can only charge tariffed switched access for the access functions it provides<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup>

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 it 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

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<sup>1</sup> “[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*”).

<sup>2</sup> *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.

<sup>3</sup> 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*”).

schemes at the same time consumers already are fed up and struggling to find solutions to annoying robocalls.<sup>4</sup>

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

As Verizon and others have explained,<sup>5</sup> allowing a LEC to collect end office switching charges when it sends over-the-top VoIP traffic over the public Internet would grant it a windfall and exacerbate existing opportunities for arbitrage with originating access charges (particularly for 8YY traffic), which the Commission has not taken action to reduce. The Commission should therefore reaffirm the current rules under which a LEC cannot collect end office switching charges when it and its VoIP partner send traffic over the public Internet to or from VoIP customers.

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*. As Verizon and others have explained – and Level 3, Bandwidth.com, and others cannot dispute – where the existing legal rules are clear, new legal rules cannot be applied retroactively.<sup>6</sup> Verizon explained at the meetings why the existing rules here clearly preclude a LEC from charging end office switched access rates for VoIP-PSTN traffic sent over the public Internet.

**A.** Since at least 1983, the Commission has explained that the key feature that distinguishes an *end office* switch from other types of switches – such as tandem switches or long-

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<sup>4</sup> 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) (“NAAG Letter”), available at <http://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Consumer-Protection/2014-09-09-Final-Robocalling-Letter-to-the-FCC>.

<sup>5</sup> See, e.g., Letter from Christi Shewman, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (Nov. 6, 2014); Letter from Alan Buzacott, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (Nov. 3, 2014); 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).

<sup>6</sup> See, e.g., *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012); *National Environmental Development Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014); *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997); *Bergerco Canada v. U.S. Treasury Dep’t, Office of Foreign Assets Control*, 129 F.3d 189, 192 n.2 (D.C. Cir. 1997); *Health Ins. Ass’n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994); see also *supra* note 5 (citing prior filings). In contrast, *Qwest Services Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007), presented a situation where there was a “lack of clarity in the law” — not one where, as here, the “settled law” is “contrary” to the new rule that Level 3 and others urge the Commission to adopt. *Id.* at 539-40.

distance carrier switches – is connecting lines to trunks. The Commission in 1983 described a “‘class 5 or ‘end’ office . . . switch[]” as one that “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.”<sup>7</sup> That same year, the MFJ court explained that an “end office is the plant into which individual subscribers’ telephone access lines feed” and distinguished the “end office” or “Class 5” switching function from the tandem and toll (“Class 4”) switching functions.<sup>8</sup> And in the very *RAO 21* proceeding on which Level 3 and others rely, the Commission reiterated that the “defining characteristic” of a PSTN *end office* switch is the “actual connection of lines and trunks.”<sup>9</sup>

Furthermore, the Commission has found that when a LEC-VoIP partnership sends voice traffic onto the public Internet for delivery by one or more unrelated ISPs to VoIP customers, the partnership has not connected a trunk to a line or loop. In the *YMax Order*, the Commission addressed this precise question. Although the dispute between AT&T and YMax arose in the specific context of YMax’s federal tariff, that tariff used the terms “loops” and “lines” without defining them.<sup>10</sup> Therefore, the Commission was required to “construe these terms according to their common meaning in the industry.”<sup>11</sup> The Commission explained that these terms “have well established meanings within the telecommunications industry, in Commission orders, and in court decisions.”<sup>12</sup> Under that settled meaning, a loop or line is “a physical transmission facility” – commonly known as a “last mile facilit[y]” – that connects “an individual home or business and a telephone company office.”<sup>13</sup>

The Commission found further that the “purpose and relative amount of end office switching charges,” which “are among the highest recurring intercarrier compensation charges,” “confirm[s]” the meaning of the terms lines and loops.<sup>14</sup> The Commission explained 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 themselves and their customers throughout their service territory.”<sup>15</sup>

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<sup>7</sup> *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).

<sup>8</sup> *United States v. Western Elec. Co., Inc.*, 569 F. Supp. 1057, 1064 n.18 (D.D.C. 1983).

<sup>9</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>10</sup> See *YMax Order*, ¶ 38.

<sup>11</sup> See *id.* ¶ 38 & n.113 (cross-referencing cases cited in *YMax Order* ¶ 27 n.92).

<sup>12</sup> *Id.* ¶ 39.

<sup>13</sup> *Id.* ¶ 39 & nn.114, 116 (citing Commission and court authorities).

<sup>14</sup> *Id.* ¶ 40.

<sup>15</sup> *Id.* The Commission’s explanation refutes claims by Level 3 and others that end office switched access charges are unrelated to the switching that connects lines and trunks. Indeed, the Commission there

Finally, as relevant here, the Commission held in the *YMax Order* that using a switch to send voice packets to customers over the public Internet is not the functional equivalent of sending a call over a loop or line. The Commission squarely rejected YMax’s claim that the Commission should treat “the entire worldwide Internet” as a “‘virtual’ loop” that runs from YMax’s switching equipment to its customer.<sup>16</sup> As the Commission recognized, accepting that contention would drain the terms of “all meaning,” as these virtual loops could be “of indeterminate length and configuration” and could “extend thousands of miles throughout the country (or even the world)” if the over-the-top VoIP customer is using her VoIP service while outside of the U.S.<sup>17</sup>

Despite these clear determinations that end office switching is the connection of lines and trunks and that the public Internet is not a line or loop, Level 3 and Bandwidth.com now urge the Commission to accept the same virtual loop theory that it rejected in the *YMax Order*. Just like YMax, Bandwidth.com and Level 3 now claim that “the third party ISP’s gateways and routers” – that is, the equipment owned by the companies that handle the voice packets while they travel over the public Internet and reassemble on the network of the called party’s broadband ISP – “are part of the local loop.”<sup>18</sup> The Commission cannot reverse itself on the meaning of local loop in the context of the end office switching function through a declaratory ruling that applies retroactively.

In addition to urging the Commission to adopt arguments that the Commission rejected when YMax raised them, Level 3 seeks to brush away pre-*USF-ICC Transformation Order* law. Contrary to Level 3’s claim, the Commission’s conclusion that the public Internet is not a virtual loop was not limited to the specific language of YMax’s federal tariff.<sup>19</sup> Instead, as shown above, the Commission relied on the “well established meaning[]” of the terms lines and loops as set forth in numerous Commission and court decisions.<sup>20</sup> Nor can the Commission’s longstanding conclusion that an *end office* switch is one that connects lines and trunks be ignored because the Commission established new VoIP-PSTN rules in the *USF-ICC Transformation Order*.<sup>21</sup> As the Fourth Circuit held when it rejected a CLEC’s claim that the *USF-ICC Transformation Order* changed the law from the *YMax Order* and allowed that CLEC to collect its end office switched access charges for over-the-top VoIP traffic,<sup>22</sup> nothing in that order changed the Commission’s longstanding view of the functions that constitute end office switching. Again, if the Commission

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rejected YMax’s claim that the carrier common line (CCL) charge is the only charge relevant to recovering the substantial investment required to deploy last-mile facilities. *See id.* ¶ 41 n.120.

<sup>16</sup> *Id.* ¶ 44.

<sup>17</sup> *Id.*

<sup>18</sup> Letter from Tamar E. Finn, counsel for Bandwidth.com, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.*, at 1 (Nov. 5, 2014) (emphasis added). *See also* Letter from John T. Nakahata, counsel to Level 3, to Marlene H. Dortch, FCC, WC Docket No. 10-90 *et al.* (Nov. 6, 2014).

<sup>19</sup> *See* Letter from John T. Nakahata, counsel for Level 3, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.*, at 3 (Nov. 3, 2014).

<sup>20</sup> *See YMax Order* ¶ 39.

<sup>21</sup> *See* Level 3 Nov. 3, 2014 *ex parte* at 4.

<sup>22</sup> *See CoreTel Virginia, LLC v. Verizon Virginia LLC*, 752 F.3d 364, 375 n.16 (4th Cir. 2014).

were now to change its conclusion that switching traffic onto the Internet is *not* switching from a trunk to a loop – and, therefore, is not end office switching – the Commission could do so only prospectively.

**B.** When the Commission permitted a LEC to collect its switched access charges only for functions performed by it or its VoIP partner – and not for functions that neither perform<sup>23</sup> – the Commission was not authorizing LECs to charge end office switched access for traffic sent over the public Internet.

The Chief of the Wireline Bureau confirmed this reading of the rule just months after the Commission released the *USF-ICC Transformation Order*, in the *Clarification Order*. Like Level 3, Bandwidth.com, and others now, YMax urged the Commission to reject this interpretation of § 51.913, under which a “LEC and its VoIP service partner are not performing the ‘access’ function” – namely, end office switching – when “the physical transmission facilities connecting the IXC and the VoIP service customer are provided in part by one or more unrelated ISPs (as is the case with YMax or ‘over-the-top’ VoIP providers such as Skype or Vonage).”<sup>24</sup> YMax contended further that, on its interpretation of the rule, for a LEC to charge end office switched access “it is not necessary for either the LEC or its VoIP service partner to be . . . providing ‘loop facilities’ or any other physical connection to the VoIP customer.”<sup>25</sup> Instead, according to YMax, the Commission had 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.’”<sup>26</sup> Finally, YMax stressed that its interpretation of the rule 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.”<sup>27</sup>

The Bureau promptly responded to YMax’s “request[] [that] the Commission confirm that its reading of the Order is correct,”<sup>28</sup> stating in no uncertain terms: “We disagree.”<sup>29</sup> Notably, the Bureau characterized YMax request as one that sought the right to charge for “functions that neither [the CLEC] nor its VoIP retail partner are actually providing.”<sup>30</sup> YMax did not describe its request in that manner — in YMax’s (erroneous) view, it was “providing [the] ‘switched exchange access services’ ” for which it sought compensation, including end office switching.<sup>31</sup> The

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<sup>23</sup> See 47 C.F.R. § 51.913(b).

<sup>24</sup> Letter from John B. Messenger, YMax, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.*, at 2 (Feb. 3, 2012); *see id.* (“YMax does not believe this is what the Commission actually ruled.”).

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.* at 3 (quoting Comments of Level 3, *Connect America Fund*, WC Docket No. 10-90, *et al.*, at 22 (Aug. 24, 2011)); *see id.* at 4 (same, quoting 47 C.F.R. § 61.26(f)).

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> *Clarification Order*, ¶ 4.

<sup>30</sup> *Id.*

<sup>31</sup> YMax Feb. 3, 2012 *ex parte* at 3-4.

Bureau, therefore, correctly recognized that allowing YMax to charge end office switched access for sending VoIP traffic over the public Internet would permit YMax – no different from other LECs partnering with over-the-top VoIP providers – to charge for functions that neither the LEC nor its VoIP partner perform.

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.”<sup>32</sup> 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 send traffic between the end user customer and the media gateway.

C. For both of these reasons, current law is clear and prohibits LECs from collecting their originating and terminating end office switched access rates for over-the-top VoIP traffic that they send over the public Internet. Any decision now that would permit LECs to collect those charges – whether by amending the Commission’s longstanding determination that the distinguishing feature of an end office switch is that it connect lines to trunks or by amending § 51.913 to permit a LEC to charge for a function that neither it nor its VoIP partner provides – would be a new rule that could be given only prospective effect.

## **2. Permitting LECs to charge end office switched access when they send over-the-top VoIP traffic over the public Internet would encourage arbitrage schemes to proliferate.**

As shown above, the Commission explained shortly before issuing the *USF-ICC Transformation Order* that end office switching rates “are among the highest recurring intercarrier compensation charges” and that 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.”<sup>33</sup> 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.”<sup>34</sup> Therefore, allowing LECs that send VoIP traffic over the public Internet 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.

The lessons of past arbitrage and fraud schemes, including those involving termination of dial-up ISP traffic and traffic pumping, are sobering. In eventually addressing the arbitrage

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<sup>32</sup> *Clarification Order* ¶ 4 (emphasis added).

<sup>33</sup> *YMax Order* ¶ 40.

<sup>34</sup> *CoreTel Virginia*, 752 F.3d at 375.

associated with ISP-bound traffic, the Commission “found convincing evidence in the record that carriers had targeted ISPs as customers merely to take advantage of . . . intercarrier payments (including offering free service to ISPs, paying ISPs to be their customers, and sometimes engaging in outright fraud).”<sup>35</sup> Similarly, with traffic pumping, the Commission found that “traffic-inflating revenue-sharing arrangements” between LECs and chat-line or other providers of high call volume operations resulted in a “combination of significant increases in switched access traffic with unchanged access rates” that “almost uniformly” resulted in unjust and unreasonable switched access rates under section 201(b).<sup>36</sup> In both cases the schemes flourished until the Commission stepped in and addressed the issue. But by the time the Commission acted, the problems ballooned and in each case involved billions of dollars in uneconomic arbitrage payments that the Commission found harmed consumers, broadband deployment, and infrastructure investment.<sup>37</sup>

The Commission cannot allow a repeat of those situations with originating access, which the Commission has not taken action to reduce. But providing LECs a windfall by letting them collect end offices switched access when neither they nor their retail VoIP partners provide that function would encourage and exacerbate the existing opportunities for arbitrage with originating access charges. 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 originating switched access and database dip charges for the “originating” LEC (and its partner), imposing costs on both the user and its carrier.<sup>38</sup> The FBI’s Cyber Division has warned about toll free traffic pumping, specifically noting that CLECs’

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<sup>35</sup> *Inter-carrier Compensation for ISP-Bound Traffic, et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, ¶ 3 (2008) (subsequent appellant history and internal citations and quotations omitted) (“*ISP Remand Order*”); *see also Inter-carrier Compensation for ISP-Bound Traffic, et al.*, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶ 70 (2001) (“*2001 ISP Order*”) (subsequent appellant and other history omitted) (“The record is replete with evidence that reciprocal compensation provides enormous incentive for CLECs to target ISP customers. The four largest ILECs indicate that CLECs, on average, terminate eighteen times more traffic than they originate, resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, ninety percent of which is for ISP-bound traffic. Although there may be sound business reasons for a CLEC’s decision to serve a particular niche market, the record strongly suggests that CLECs target ISPs in large part because of the availability of reciprocal compensation payments. Indeed, some ISPs even seek to become CLECs in order to share in the reciprocal compensation windfall, and, for a small number of entities, this revenue stream provided an inducement to fraudulent schemes to generate dial-up minutes.”).

<sup>36</sup> *USF-ICC Transformation Order* ¶ 657.

<sup>37</sup> *Id.* ¶ 664 (“TEOCO estimates that the total cost of access stimulation to IXCs has been more than \$2.3 billion over the past five years. . . . When carriers pay more access charges as a result of access stimulation schemes, the amount of capital available to invest in broadband deployment and other network investments that would benefit consumers is substantially reduced.”); *ISP Remand Order*, ¶¶ 3, 24.

<sup>38</sup> *See, e.g.*, NAAG Letter, *supra* note 4; <http://www.dsreports.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](http://community.ringcentral.com/ringcentral/topics/calls_from_nobody).

“revenue share agreements become a vehicle for [this] fraud.”<sup>39</sup> 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.”<sup>40</sup>

To avoid encouraging a proliferation of 8YY origination robocalling, if the Commission were to adopt a new, prospective rule permitting a LEC to charge end office switching for calls sent over the public Internet, it should limit that rule to *terminating* charges. The Commission should defer considering whether to allow LECs that receive VoIP customers’ originating 8YY traffic over the public Internet to collect end office switched access until the Commission addresses the issue of originating access rates generally. This would be consistent with the Commission’s general approach to the transformation of the switched access regime in the *USF-ICC Transformation Order*, in which it deferred its consideration of originating access reductions to a further rulemaking proceeding.<sup>41</sup> This would also be consistent with the Commission’s decision to treat originating and terminating VoIP-PSTN traffic differently until July 1, 2014, allowing LECs to apply their intrastate tariffed switched access rates to certain originating VoIP-PSTN traffic before that date.<sup>42</sup> The Commission there recognized that “the balancing of policy interests” could justify dissimilar treatment of originating and terminating VoIP-PSTN traffic.<sup>43</sup> Here, there is a very real threat of originating access arbitrage scams using VoIP robocallers to generate sham 8YY traffic to collect originating end office switching and dip charges — charges that are not being reduced under Commission rules and, therefore, present an increasingly attractive arbitrage opportunity. That threat and the consumer harms from these sham calls support striking that balance to continue precluding LECs that receive originating 8YY traffic over the public Internet from charging their originating end office switching rates, while the Commission continues to address originating access charges more generally.

### **3. The side issues that supporters of changing the rules have presented lack merit.**

**A.** The Commission has long recognized that LECs may be required to charge different rates for the same equipment depending on the function that equipment is performing in a particular call path. The Commission addressed this issue squarely in the *Eighth Report and*

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<sup>39</sup> FBI Cyber Division Private Industry Notification (Oct. 25, 2013), *available at* [http://voipsecurityblog.typepad.com/files/toll-free-traffic-pumping\\_11-7-13-.pdf](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](https://cdn.shopify.com/s/files/1/0380/5305/files/telecom_frauds.pdf).

<sup>40</sup> *2001 ISP Order*, ¶¶ 21, 71; *see also, e.g., USF-ICC Transformation Order* ¶¶ 664-665.

<sup>41</sup> *See id.* ¶¶ 817-818, 1297-1305.

<sup>42</sup> *See Connect America Fund*, Second Order on Reconsideration, 27 FCC Rcd 4648, ¶¶ 34-35 (2012).

<sup>43</sup> *Id.* ¶ 34.

*Order.* There, the Commission discussed Class 4/5 switches, which are “capable of performing both tandem and end office functions,” and noted that the “applicable switching rate” – tandem or end office – “should reflect only the function(s) actually provided to the IXC” for a given call.<sup>44</sup> The Commission found that the same “policy should apply to competitive LECs,” which as a result charge different rates for the same switch depending on the functions it performs for any particular call.<sup>45</sup> That rule supports Level 3’s ability to collect end office switched access when it uses its switch to connect a trunk and a loop — such as when it delivers calls to TDM or cable VoIP customers — but at the same time precludes it from collecting those charges when its switch does not perform that function, such as when it uses that switch to send over-the-top VoIP traffic over the public Internet. Level 3’s assertion 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” VoIP customers<sup>46</sup> therefore is unavailing.

**B.** Verizon currently has nine agreements for IP VoIP interconnection for the exchange of voice traffic in IP format between VoIP customers. These agreements are with VoIP providers of a variety of sizes and business plans, including not only Vonage, but also Bandwidth.com. As Vonage told the Commission, 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.”<sup>47</sup>

Vonage has suggested that the current rules, under which Vonage’s LEC partners cannot charge end office switched access when sending traffic over the public Internet to Vonage’s customers, impede the development of agreements to exchange traffic between two VoIP customers in IP format.<sup>48</sup> But the facts show otherwise. The current VoIP symmetry rule — which only applies to VoIP-PSTN traffic that is exchanged in TDM format<sup>49</sup> — does not impede negotiated 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. In contrast, allowing LECs to begin charging end office switched access for over-the-top VoIP traffic when they do not perform end office switching would deter the development of more such agreements. A VoIP provider agreeing to send 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

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<sup>44</sup> *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, ¶ 21 & n.71 (2004).

<sup>45</sup> *Id.* ¶ 21.

<sup>46</sup> Level 3 Nov. 3, 2014 ex parte at 1.

<sup>47</sup> Comments of Vonage Holdings Corp., *Numbering Policies for Modern Communications*, WC Docket No. 13-97, et al., at 2-3 (Mar. 4, 2014).

<sup>48</sup> Letter from Brita D. Strandberg, counsel for Vonage, to Marlene H. Dortch, FCC, WC Docket No. 10-90, et al., Attach. at 1 (Feb. 12, 2014).

<sup>49</sup> 47 C.F.R. § 51.913(a) (establishing intercarrier compensation rules only for VoIP-PSTN 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”).

partner. Indeed, it is telling that those most 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.

C. When AT&T challenged an aspect of the VoIP symmetry rule before the Tenth Circuit, AT&T was clear that its “appeal focus[ed] only on fixed VoIP services.”<sup>50</sup> AT&T moreover, explained that it limited its appeal to this issue because the Commission had “effectively precluded, in relevant part, access charges for calls to subscribers of ‘over-the-top’ VoIP services offered by providers such as Vonage or Skype that do *not* supply broadband transmission.”<sup>51</sup> The Commission expressly recognized in its brief that “AT&T’s challenge involves fixed VoIP providers” and that “over-the-top services are not at issue here.”<sup>52</sup> Nevertheless Broadvox has recently suggested that the Tenth Circuit sided with its — and Level 3’s and Bandwidth.com’s — interpretation of the VoIP symmetry rule.<sup>53</sup> But that’s not so. The Tenth Circuit’s decision has nothing to do with the question before the Commission now.

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: Marcus Maher  
Rick Mallen  
Suzanne Tetreault  
James Carr  
Deena Shetler  
Victoria Goldberg  
Thom Parisi  
Amy Bender

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<sup>50</sup> AT&T Principal Brief at 2 n.2, No. 11-9900 (10th Cir. filed July 16, 2013).

<sup>51</sup> *Id.*

<sup>52</sup> Brief of the FCC and the United States at 1 n.1, No. 11-9900 (10th Cir. filed July 29, 2013).

<sup>53</sup> Letter from James C. Falvey, counsel for Broadvox, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.*, Attach. at 1 (Oct. 30, 2014).