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November 19, 2014

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 17, 2014, Hank Hultquist, Gary Phillips and I (of AT&T), as well as David Lawson of Sidley Austin LLP (counsel for AT&T), met with Suzanne Tetreault, Marcus Maher and Rick Mallen of the Office of General Counsel and Thomas Parisi and Rhonda Lien of the Wireline Competition Bureau, regarding the above-referenced proceeding. Separately, on November 17, Hank Hultquist, Gary Phillips and I, as well as David Lawson of Sidley Austin LLP, met with Rebekah Goodheart, Legal Advisor to Commissioner Clyburn, and Christine Sanquist, Legal Intern.

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, AT&T reiterated a few critical points. First, the Commission has already addressed the issue raised here 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.”¹ Notably, Level 3 urged the Commission to reverse the *YMax Order* in the *USF/ICC Transformation Order*.² The Commission declined Level 3’s invitation and instead cited the *YMax Order* in support of the proposition that no group of entities may charge for a function that they do not perform.³ 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.”⁴ 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.⁵

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.”⁶ 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),⁷ 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

¹ *AT&T Corp. v. YMax Commc’ns*, 26 FCC Rcd 5742, para. 44 (2011) (“*YMax Order*”).

² 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).

³ See *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, para. 970 & n.2028 (2011) (“*USF/ICC Transformation Order*”), *petitions for rev. denied sub nom, In re* FCC 11-161, 753 F.3d 1015 (10th Cir. 2014).

⁴ *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Order, 27 FCC Rcd 2142, para. 4 (WCB 2012) (“*YMax Clarification Order*”).

⁵ *Id.*

⁶ *Petitions for Reconsideration and Applications for Review of RAO 21*, 12 FCC Rcd 10061, para. 11 (1997).

⁷ 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).

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,”⁸ 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 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.⁹

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.”¹⁰ 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

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

⁹ *YMax Order* at para. 38 (“The Tariff does not define ‘termination’ of ‘station loops’ and ‘end user lines,’ however. Thus, as previously stated, we must construe these terms according to their common meaning in the industry.”); *id.* at para. 45 (“For all these reasons, we find that YMax’s construction of the terms ‘termination’ of ‘station loops’ and ‘end user lines’ is contrary to the common meaning of these terms in the telecommunications industry.”).

¹⁰ *YMax Clarification Order* at para. 4.

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the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

A handwritten signature in cursive script, appearing to read "Christi Shewman". The signature is written in black ink on a white background.

Christi Shewman

Attachment

cc: Rebekah Goodheart
Christine Sanquist
Suzanne Tetreault
Marcus Maher
Rick Mallen
Thomas Parisi
Rhonda Lien

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 focus on the service provided by the terminating carrier to the carrier from which it receives the traffic. 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.