

Morgan, Lewis & Bockius LLP
2020 K Street, NW
Washington, District of Columbia 20006-1806
Tel. 202.373.6000
Fax: 202.373.6001
www.morganlewis.com

Morgan Lewis
C O U N S E L O R S A T L A W

Tamar E. Finn
Partner
+1.202.373.6117
tamar.finn@morganlewis.com

December 8, 2014

Via ECFS

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

**Re: Ex Parte Communication, CC Docket No. 01-92; WC Docket No. 07-135; WC
Docket No. 10-90**

Dear Ms. Dortch:

On December 4, 2014, John Murdock, President and Greg Rogers, Deputy General Counsel of Bandwidth.com, Inc. (“Bandwidth”) and the undersigned as counsel to Bandwidth, along with Joseph Cavender, Vice President & Assistant General Counsel of Level 3 Communications, LLC (“Level 3”) and John Nakahata of Harris, Wiltshire & Grannis LLP as counsel to Level 3, met separately with Priscilla Delgado Argeris, Legal Advisor to Commissioner Jessica Rosenworcel and with Daniel Alvarez, Legal Advisor to Chairman Tom Wheeler. We urged the Commission to expedite its approval of the proposed order on circulation that would resolve the so-called “VoIP symmetry” issue. Every month of delay in addressing this issue costs Bandwidth and Level 3 time and money in disputed and unpaid access bills, diverting resources from running and growing their business. Delay effectively rewards the IXCs that engage in self-help, forcing CLECs to turn to courts to preserve their right to collect their charges.¹ This in turn creates a risk that district courts around the country will decide on their own (with potentially inconsistent results) what the *Transformation Order* means, instead of the FCC issuing a single, definitive interpretation of its rules.

Before the Tenth Circuit, the FCC explained that “AT&T asserts that the challenged rule does not apply to certain types of VoIP service arrangements” and that “[t]he FCC has not yet ruled on this issue.”² Although *YMax v. AT&T*, which pre-dated the VoIP symmetry rule, includes a

¹ For example, XO recently sued AT&T in the Eastern District of Virginia. Complaint, *XO Communications Services, LLC et al v AT&T Corp.* No. 14-CV-1521 (E.D.Va Nov. 14, 2014).

² See Federal Respondents Final Response to the AT&T Principal Brief at n. 6, *In re FCC 11-161*, No. 11-9900 (10th Cir. July 29, 2013). Verizon mistakenly attributes a footnote in the federal intervenors’ brief to the FCC.

discussion about a “virtual loop” as compared to the terms of YMax’s tariff, footnote 55 makes it clear that the FCC did not decide that the use of the end user’s broadband Internet access service as a substitute for a traditional wired loop precludes LECs from assessing local switching charges when the tariff properly describes the services provided: “[w]e express no view about whether or to what extent YMax’s functions, if accurately described in a tariff, would provide a lawful basis for any charges.”³ Tellingly, neither Verizon nor AT&T⁴ acknowledge the existence of footnote 55, and neither explains its meaning consistent with their theory that YMax established a pre-existing rule.⁵ In short, YMax did not establish a preexisting rule that over-the-top VoIP traffic cannot be subject to local switching charges.

As explained in our previous *ex parte* submissions, the Commission in the *Transformation Order* clearly intended that the intercarrier compensation rules should not depend on the technology used to originate or terminate traffic, including Voice over IP technology. Calls originated or terminated over VoIP are subject to the same intercarrier compensation obligations as any other wireline traffic. Moreover, the VoIP provisions of the *Transformation Order* were meant to establish a new regime to govern access charges with respect to all VoIP traffic, irrespective of what rules may or may not have existed prior to that Order, in order to “best balance[] the competing policy goals during the transition to the final intercarrier compensation regime.”⁶ The Commission can and should issue a declaratory ruling to terminate this controversy, restore the certainty it intended to provide in the *Transformation Order*, and be explicit that its clarification applies retroactively to the effective date of the *Transformation Order*. Staying silent on the issue of retroactivity will only prolong the self-help and continued disputes and litigation that the *Transformation Order* was designed to end.

³ *AT&T Corp. v YMAX Communications Corp.*, 26 FCC Rcd. 5742, n.55 (“YMax Order”).

⁴ As previously disclosed, Bandwidth and AT&T have agreed to a negotiated settlement of their particular disputes.

⁵ For example, in its November 19, 2014 *ex parte*, AT&T argues that the Commission’s statements about a “virtual loop” were “not limited to YMax, and nothing about the Commission’s articulation of that principle would lend itself to such a cramped construction,” but that argument cannot be reconciled with the express language of footnote 55. Letter of Christi Shewman, AT&T, to Marlene H. Dortch, Secretary, FCC, at 3 (filed November 19, 2014). Similarly, in its *ex parte* of November 10, 2014, Verizon claims, “[T]he Commission’s conclusion that the public “internet is not a virtual loop was not limited to the specific language of YMax’s federal tariff,” but also fails to cite or to give any meaning to the express language of footnote 55. Letter of Alan Buzacott, Verizon, to Marlene H. Dortch, Secretary, FCC, at 5 (November 10, 2014). Neither of these arguments by AT&T and Verizon can be reconciled with footnote 55, because footnote 55 says the exact opposite – that the Commission was not articulating a general rule with respect to the ability to assess access charges for over-the-top VoIP traffic through a properly drafted tariff.

⁶ *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, 18003 ¶ 935 (2011) (“*Transformation Order*”).

Marlene H. Dortch, Secretary
December 8, 2014
Page 3

Morgan Lewis
C O U N S E L O R S A T L A W

Verizon has resorted to arguing that VoIP providers may be engaged in some new form of arbitrage with respect to 8YY traffic. In fact, the *Transformation Order* brought all originating and terminating access services under the section 251(b)(5) regime, while deferring any changes to that regime for 8YY traffic to a future stage of the rulemaking. If these alleged arbitrage activities are within the scope of the access stimulation rules, the proper way to address them is by enforcing those rules. If they are not covered by the access stimulation rules, then measures to address alleged 8YY arbitrage would require substantive changes to the rules adopted in 2011, and could not be achieved by a clarification or interpretation of them. Either way, it would not be appropriate for the Commission to fail to enforce the VoIP symmetry principle, which applies to all traffic, based on these allegations relating to a narrower subset of originating 8YY calls.

Respectfully submitted,

/s/ Tamar E. Finn

Tamar E. Finn

cc: Priscilla Delgado Argeris
Daniel Alvarez
John Nakahata