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December 10, 2014

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
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 8, 2014, Joseph Cavender, Vice President & Assistant General Counsel of Level 3 Communications, LLC ("Level 3"), John Nakahata, Chris Wright, and Tim Simeone of Harris, Wiltshire & Grannis LLP as counsel to Level 3, and Tamar Finn of Morgan Lewis, counsel for Bandwidth.com, Inc. ("Bandwidth"), met with Suzanne Tetreault, Marcus Maher, Jim Carr and Rick Mallen, from the Office of General Counsel, and with Deena Shetler, Victoria Goldberg, and Tom Parisi from the Wireline Competition Bureau. We discussed the proper legal framework for analyzing claims by AT&T and Verizon that the proposed order on circulation should apply only prospectively if the Commission finds that a CLEC working in tandem with an over-the-top VoIP provider may assess end office local switching access charges. We also discussed application of that framework to the record facts. In short, we showed that the test for prospective-only application of an agency adjudicative order is not met here, and the Commission therefore must apply its determination in this proceeding consistently beginning from the time the *Transformation Order*[1] took effect.

***The Legal Framework*:** As the D.C. Circuit's 2001 decision in *Verizon v. FCC*[2] reaffirmed, the default rule is to give retroactive effect to *adjudicative* agency action such as the proposed order here. The *Verizon* court also recognized an exception to that rule intended to "alleviat[e] the hardships that may befall regulated parties who *rely* on 'quasi-judicial' determinations that are altered by subsequent agency action."[3] In such circumstances, an agency

[1] *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17, 663 (2011) ("*Transformation Order*").

[2] *Verizon Telephone Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

[3] *Id.* (emphasis added).

may—but is not *required* to—give a "new rule . . . prospectively-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule."[4]

The D.C. Circuit's decision in *Qwest v. FCC* confirmed and explained the *Verizon* rule, beginning by emphasizing that courts start with a "presumption of retroactivity for adjudications."[5] That presumption, the court held, may be overcome only by a showing of "manifest injustice"—a term used for many years in analysis of retrospective vs. prospective application of NLRB decisions[6]—that would result from retroactive application of an adjudicatory decision. Significantly, the *Qwest* court repeatedly emphasized that, in evaluating such a showing, the courts "proceed[] without deference to the Commission's determination."[7] In other words, the strength of the presumption is such that the courts review *de novo* any agency finding that it has been overcome, as opposed to extending the deference traditionally due expert agency determinations.

In applying the term "manifest injustice" to the FCC context, *Qwest* reiterated the *Verizon* court's observation that, at a minimum, an adjudicative decision must make "new law" that "upset[s] settled expectations" to justify prospective-only application.[8] But *Qwest* also raised the bar by emphasizing that those expectations must be ones on which a party might "*reasonably* place reliance."[9] Together, then, *Verizon* and *Qwest* make clear that the general rule of retroactive application of adjudicative rules may only be overcome when: (1) a *new rule* (2) upsets *settled expectations* (3) based on *reasonable reliance*—and even if the Commission finds that those requirements have been satisfied, its findings are not entitled to deference on appeal.

Outside of *Verizon* and *Qwest*, decades of NLRB cases applying the "manifest injustice" standard demonstrate that this standard is extremely difficult to satisfy. For example, the Seventh Circuit's decision in *NLRB v. Bufco*,[10] found that *even though the challenged rule was an "abrupt departure" from the NLRB's "former approach*," there was still no *reasonable* reliance sufficient to justify prospective-only application.

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[4] *Id.*

[5] *Qwest Services Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007).

[6] *See id.* at 537 (quoting *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)).

[7] *Qwest*, 509 F.3d at 537; *see also id.* ("We review an agency's conclusions on manifest injustice with no overriding obligation to the agency ['s'] decision.") (internal citation and quotation omitted); *id.* at 539 ("In reviewing agency decisions on retroactivity . . . we have generally shown little or no deference to the agencies" determinations).

[8] *Id.* at 539-40 (internal quotation and citation omitted).

[9] *Id.* at 540 (emphasis added).

[10] *NLRB v. Bufco Corp.*, 899 F.2d 608, 612 (7th Cir. 1990) (emphasis added).

***This Proceeding does not Implicate any "New Rule" Or "Settled Expectations" Or "Reasonable Reliance*:** After discussing the legal framework applicable to the question whether the presumption of retroactivity should apply here, we discussed the application of that framework to the facts here—and showed that *none* of the *Qwest/Verizon* requirements for prospective-only application are present here.

First, the Commission had not previously established any specific rule addressing whether CLECs may collect end office local switching access charges for over-the-top VoIP calls. AT&T and Verizon purport to rely on a general rule that a LEC may not "charge for functions performed neither by itself or its retail provider partner."[11] But that proposition in and of itself is neither remarkable nor contested. At issue here is whether a CLEC should be considered to provide the functional equivalent of 47 C.F.R. § 69.106 local switching *only* when it or its VoIP partner also provides a physical loop. Absent a prior determination that the provision of a physical loop is necessary to the provision of 47 C.F.R. § 69.106 local switching, there can be no "substitu[tion]" of "new law for old law that was reasonably clear."[12]

AT&T and Verizon attempt to manufacture the requisite clarity (*i.e.*, the existence of "old law") through reliance on the *YMax Order*.[13] But in that *Order*, the Commission expressly stated that it was *not* establishing a *rule* on whether a CLEC may collect end office access charges for over-the-top VoIP traffic. To the contrary, the Commission expressly stated in footnote 55: "We 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."[14] Tellingly, neither AT&T nor Verizon offers any explanation of how, given footnote 55, *YMax* could possibly establish a rule in this context. In any event, footnote 55 certainly eliminates any possibility of *reasonable* reliance on the *YMax Order* as having established a rule.

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[11] Letter from Alan Buzacott, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45 (Oct. 27, 2014) (citation omitted).

[12] *Qwest*, 509 F.3d at 539.

[13] *AT&T Corp. v. YMax Communications Corp.*, Memorandum Opinion and Order, 26 FCC Rcd. 5742 (2011) ("*YMax Order*").

[14] *YMax*, 26 FCC Rcd. at 5749 n.55.

With respect to the other factors, we discussed how—given the facts on the record—AT&T and Verizon cannot claim to have had *settled* expectations regarding access charges for over-the-top VoIP traffic. Indeed, of all of Level 3's commercial partners, *only* AT&T refused to pay these charges.[15] Similarly, Bandwidth charged, and with one exception was paid,[16] end office switching for terminating calls to customers it serves in conjunction with its VoIP partners. Against that absence of widespread sharing of AT&T's interpretation, AT&T's behavior looks far less like "settled expectations" than "wishful thinking." And, as the *Qwest* court wrote, a party's "reli[ance on] its own (rather convenient) assumption that unclear law would ultimately be resolved in its favor is insufficient to defeat the presumption of retroactivity when that law is finally clarified."[17]

Given the fact that AT&T and Verizon cannot demonstrate the existence of a new rule, reasonable reliance, or settled expectations, the Supreme Court's recent decision in *Christopher v. SmithKline* has no application here.[18] Most importantly, the Court there expressly found that imposing retroactive application *would* result in the sort of "unfair surprise" that is absent here.[19] In addition, however, that case is thoroughly distinguishable on its facts—in that case, the agency "changed course" on an issue *through an amicus brief filed after certiorari was granted*.[20] Plainly, as a procedural matter, such behavior poses a grave risk of unfair surprise. Here, in contrast, AT&T and Verizon have been active participants in a lengthy and deliberate agency decision-making process, both leading up to and following the *Transformation Order*. In other words, (1) *Christopher* was not about the kind of careful agency adjudication at issue here, but about a freshly minted position taken in a post-certiorari amicus brief, and (2) the Supreme Court there relied on precisely the sort of reliance concerns about which AT&T and Verizon have very little to say here.

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[15] *See also* Letter from Level 3 Communications, LLC and Bandwidth.com, Inc. to Marlene H. Dortch, at 1, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 05-337; CC Docket No. 01-92; and CC Docket No. 96-45 (June 11, 2012) (explaining one IXC was violating the VoIP symmetry rule and withholding payment of end office switching), available at http://apps.fcc.gov/ecfs/document/view?id=7021922307.

[16] Although AT&T disputed Bandwidth's revised tariff rates shortly after the *Transformation Order* was adopted, as previously disclosed, Bandwidth and AT&T have now resolved that dispute. No other carrier disputed Bandwidth's end office switching charges under the VoIP symmetry rule until Verizon belatedly did so—nearly three years after the rule was adopted. *See also* Letter from Bandwidth.com, Inc. to Marlene H. Dortch, at 2, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 05-337; CC Docket No. 01-92; and CC Docket No. 96-45 (Oct. 22, 2014) (explaining that AT&T was only carrier disputing until Verizon belatedly disputed), available at http://apps.fcc.gov/ecfs/document/view?id=60000975343.

[17] *Qwest*, 509 F.3d at 540.

[18] *Christopher v. SmithKline Beecham Co.*, 132 S. Ct. 2156 (2012).

[19] *Id.* at 2167.

[20] *Id.* at 2165-66.

In sum, if the Commission concludes (as it should) that over-the-top VoIP should be treated the same as other forms of VoIP under the VoIP Symmetry Rule, there is no basis for prospective-only application of the decision. In order to avoid applying the rule consistently from the time the VoIP Symmetry Rule took effect, the Commission would have to conclude that such a decision is a new rule rather than a clarification of the VoIP Symmetry Rule and AT&T and Verizon reasonably relied on a settled rule prohibiting access charges to be assessed in connection with over-the-top VoIP service. There is no basis for such conclusions, which would be reviewed *de novo*.

Please do not hesitate to contact us if you have any questions.

Sincerely,

/s/ Christopher J. Wright

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