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December 17, 2014

Via ECFS

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

Re: *Connect America Fund, WC Docket No. 10-90; Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135*

Dear Ms. Dortch:

AT&T has previously explained why the Commission should reject claims that the *Connect America* rules permit carriers like Level 3 to charge end office switching for the limited role they play in partnering with “over-the-top” VoIP providers in the routing of calls that are originated and terminated by others. These CLECs do not provide “end office switching” as that concept is universally understood in the industry. Rather, they simply dump the calls at issue in an undifferentiated stream onto the public Internet, over which the calls may travel for hundreds or even thousands of miles before they are ultimately delivered to the end user. Equally important, any Commission ruling that it will now treat such limited functions as end office switching for purposes of the *Connect America* rules would invite widespread regulatory arbitrage. Instead of investing in broadband networks, a CLEC could simply make a negligible investment in a rack of equipment in a single “end office” serving the entire nation (or the world) and collect massive end office switching charges merely by processing SIP messages and dumping IP traffic onto the public Internet. Moreover, since the Commission has not acted to reduce originating end office switching charges, this arbitrage would not be mitigated by the transition to bill-and-keep that applies to terminating local switching charges.

In this letter, however, we focus solely on the question of retroactivity. The existing rules, as written, permit local exchange carriers to impose access charges for calls delivered via a VoIP provider, but do “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 interconnected VoIP service or non-interconnected VoIP service.”¹ For purposes of this letter, let us assume

¹ 47 C.F.R. § 51.913(b).

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that the Commission could defend an order which, for reasons specific to the *Connect America* context, treats a LEC like Level 3 as if it is performing the “functions” of an end office switch, even when it is doing nothing more than placing calls onto the open Internet where they may be carried over many additional networks before they are finally delivered to an end user. In other words, let us assume that the Commission can successfully “clarify” that the concepts of “end office,” “functions,” and “functional equivalent” will be interpreted *very* loosely, in this context only, to further a policy of “symmetry” specific to this transitional *Connect America* regime.

Level 3 insists that if the Commission issues such a declaratory ruling, cases like *Qwest Services Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007) require the Commission to apply its ruling retroactively to the date the rules were issued, on the ground that a declaratory ruling is an adjudication.² That is clearly incorrect. Level 3 misstates the controlling standards. The Supreme Court has long held that whether a new standard announced in adjudication can be applied retroactively is a question of equity: the agency must balance retroactivity “against the mischief of producing a result which is contrary to a statutory design or legal and equitable principles.”³ In applying that standard, the D.C. Circuit has “drawn a distinction” between two types of agency decisions. If there is “a substitution of new law for old law that was reasonably clear,” agencies are required to “deny retroactive effect.”⁴ If the new interpretation is truly merely a clarification of existing law, there is a presumption of retroactivity, but even then the presumption may be overcome if retroactivity would lead to “manifest injustice.”⁵ As Level 3 recognizes, reviewing courts owe agencies *no* deference when reviewing a decision whether to apply a new interpretation retroactively.⁶

² See Letter from Christopher J. Wright, et al., to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 et al. (Dec. 10, 2014) (“*Level 3 12/10/14 Ex Parte*”); see also, e.g., Letter from John T. Nakahata to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 et al. (Nov. 3, 2014) (“*Level 3 11/3/14 Ex Parte*”).

³ See *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)); see also *id.* at 388-90 (“Whether to give retroactive effect to new rules adopted in the course of agency adjudication is a difficult and recurring problem in the field of administrative law . . . [and i]n deciding whether to grant or deny retroactive force to newly adopted administrative rules, reviewing courts must look to the standard established by the Supreme Court in *SEC v. Chenery*”).

⁴ *Verizon Telephone Co. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001); see also *Qwest Services Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007).

⁵ *Qwest*, 509 F.3d at 539 (“we have drawn a distinction between agency decisions that ‘substitut[e] ... new law for old law that was reasonably clear’ and those which are merely ‘new applications of existing law, clarifications, and additions.’ The *latter* carry a presumption of retroactivity that we depart from only when to do otherwise would lead to ‘manifest injustice’” (quoting *AT&T Corp. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (emphasis added))).

⁶ See, e.g., *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554 (D.C. Cir. 1987).

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Here, any declaratory ruling adopting Level 3's interpretation of the *Connect America* rules would constitute "the substitution of new law for old law that was reasonably clear," which may not be applied retroactively.⁷ In adopting the rules at issue, the Commission consistently used terms and concepts – including "end office switching" and the principle that carriers may not charge for "functions" they do not provide – that have well-settled meanings in every other context of communications law. The Commission established those understandings in decades of precedent that predate the *Connect America Order*, and even after the issuance of the rules both the Commission and independent authorities further reaffirmed those understandings in closely related cases. Thus, even if the Commission has sufficient leeway under the Administrative Procedure Act to adopt Level 3's interpretation of the rules today, it would be patently inequitable to apply any such interpretation retroactively to parties that reasonably interpreted the terms of the *Connect America Order* and rules in accordance with the meanings those terms have consistently carried for years in all other contexts.

This case is therefore nothing like *Qwest*. In *Qwest*, the question was whether new menu-driven prepaid cards were information services – a question that the Commission had never considered or addressed. Indeed, the Commission there had initiated a proceeding to resolve what it acknowledged was legal uncertainty. Moreover, the Commission's ultimate ruling there was consistent with previous cases concerning the classification of other prepaid cards with "enhanced" functionality, in which the Commission had always focused on the underlying telephony function and rejected claims that such services were information services. Accordingly, the court held that, under such circumstances, parties could not claim that they had reasonably relied on settled law or otherwise suffered a manifest injustice.

Here, by contrast, the Commission resolved the issue in the *Connect America Order*, and in doing so used terms that have well-settled meanings in the industry. In contrast to *Qwest*, the requested declaratory ruling here would represent a sharp departure from prior practice and understandings. Any declaratory ruling at this late date accepting Level 3's proposed interpretation of the rules would be the first time the Commission has suggested that it intended those well-settled terms to be applied differently here – and only here – and therefore the Commission must "deny retroactive effect."⁸ And, contrary to Level 3's contention, a sharp departure from prior practice – upsetting settled expectations after years of agency inaction with respect to enforcement – would create precisely the "unfair surprise" the Supreme Court recently condemned in *Christopher v. SmithKline Beecham Corp.*⁹ Permitting substantial liability to be imposed retroactively based on such a sudden "clarification" would "seriously undermine the

⁷ *Verizon*, 269 F.3d at 1109.

⁸ *Qwest*, 509 F.3d at 539 (quoting *Verizon*, 269 F.3d at 1109).

⁹ *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

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principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’”¹⁰

1. The *Connect America Order* and Rules Used Terms That Have Settled Meanings Without Signaling That The Commission Intended Different Meanings Here.

The Commission’s VoIP-PSTN rules allow LECs to assess charges on VoIP-PSTN traffic,¹¹ when LECs partner with interconnected VoIP providers, but “this rule *does not permit a local exchange carrier to charge for functions not performed* by the local exchange carrier itself [or by its retail VoIP partner].”¹² As to end office switching charges, therefore, the Commission’s rules provide that a LEC cannot impose such charges unless the LEC or its retail VoIP partner are performing the functions of an end office switch.

For purposes of this submission, let us assume that the Commission could now adopt an interpretation of its rules under which a LEC or its VoIP partner will be treated as performing the functions of an end office switch when they place calls onto a “loop” that is in fact the public Internet. The *Connect America Order*, and the rules themselves, however, use terms and legal concepts that have well-settled and consistent meanings throughout communications law, and parties reading the *Connect America Order* and its rules were entitled to rely on those settled meanings in interpreting the scope of those rules in the absence of any Commission indication to the contrary. Specifically: (1) it has been settled for decades that an end office switch is a switch that physically connects a neighborhood switch to dedicated loops; (2) it has also been settled for at least a decade that intermediate switching (including use of the public Internet) is not the “functional equivalent” of end office switching; and (3) the Commission and other courts have consistently confirmed these understandings in closely related cases since the issuance of the *Connect America* rules, particularly the concept that the Internet cannot be considered a “virtual loop.”¹³

¹⁰ See also *id.* at 2168 (deference to agencies’ interpretations of ambiguous rules “creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby ‘frustrating the notice and predictability purposes of rulemaking’”) (quoting *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J. concurring)).

¹¹ 47 C.F.R. § 51.913; Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, FCC 11-161, ¶¶ 943-70 (rel. Nov. 18, 2011) (“*Connect America Order*”).

¹² 47 C.F.R. § 51.913(b) (emphasis added); *Connect America Order* ¶ 970.

¹³ Memorandum Opinion and Order, *AT&T Co. v. YMax Communications Corp.*, File No. EB-10-MD-005, FCC 11-59, ¶ 44 (2011) (“*YMax Order*”).

(1) *End Office Switching*. For decades, the Commission and the industry have understood the core functions of an end office switch to be to switch calls from trunks onto loops that serve individual end users.¹⁴ As far back as 1983, for example, the Commission stated that “[a] ‘class 5’ or ‘end’ office switch” is one that “[c]onnect[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.”¹⁵ While end office switches have other functions (such functions relating to signaling or call management), the Commission has emphasized that the “characteristic that distinguishes” an end-office switch from other switches and central office equipment is the “actual connection of lines and trunks.”¹⁶ In other words, an end office switch takes commingled calls from trunks, and selects and places the particular call for a particular end user onto the dedicated loop facility that directly connects the end office switch with that end user (and *vice-versa*). No other facility performs this function.

Commission and court decisions over the years consistently and universally refer to end office switches as the switches that have the function of directly connecting to loops. For example, the Commission’s STATISTICS OF COMMUNICATIONS COMMON CARRIERS – “one of the most widely used reference works in the field of telecommunications” – states that “[c]entral office switches are assemblies of equipment and software designed to establish connections among lines and between lines and trunks.”¹⁷ Courts have recognized that end office switches are connected to loops and thus “directly serve customers in a particular local calling area.”¹⁸

¹⁴ *Petitions For Reconsideration and Applications For Review of RAO 21*, 12 FCC Rcd. 10061, ¶ 11 (1997) (“*RAO Recon Order*”).

¹⁵ *Consolidated Application of AT&T Co. and Specified Bell Sys. Tel. Cos.*, 96 F.C.C. 2d 18, ¶ 21 n.28 (1983). The Commission’s view was also consistent with the MFJ Court. *U.S. v. Western Elec. Co.*, 569 F. Supp. 1057, 1064 n.18 (D.D.C. 1983) (“end office is the plant into which individual subscribers’ telephone access lines feed” and does not perform the same function as other switches).

¹⁶ *RAO Recon Order* at 10067, ¶ 11.

¹⁷ FCC, STATISTICS OF COMMUNICATIONS COMMON CARRIERS, 2006/07 Ed., at iii, 116 (rel. Sept. 2010); *id.* at 115 (“Switched access lines connect end-user customers with their end office for switched services.”); *see also, e.g., Southwestern Bell Tel. Co.*, 12 FCC Rcd. 19311, n. 23 (1997) (“An incumbent LEC’s ‘central office’ is where the local loops serving end users interconnect with the LEC’s exchange system”); *Review of the Section 251 Unbundling Obligations of Incumbent LECs*, 18 FCC Rcd. 16978, 17244, ¶ 429 (“an important function of the local circuit switch is as a means of accessing the local loop”), *vacated in part on other grounds, USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004);); Memorandum Opinion, Order, and Certificate, *Application of Indiana Switch Access Div.*, 1986 FCC LEXIS 3689, at n.3 (1986) (“End office is defined as a local switching office where loops are terminated for purposes of interconnection to each other and to trunks”).

¹⁸ *SBC Inc. v. FCC*, 414 F.3d 486, 491 (3d Cir. 2005); *Atlas Tel. Co. v. Okla. Corp. Comm’n*, 400 F.3d 1256, 1264 (10th Cir. 2005) (“the terminating carrier’s end office switch...directly serves the called party.”); *Ind. Bell Tel. Co. v. McCarty*, 362 F.3d 378, 384 (7th Cir. 2003) (defining “end-office switch” as

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Basic telecommunications dictionaries define end office switches as local switches “in which trunks and loops are terminated and switched.”¹⁹ And, as AT&T has previously explained, the tariffs of incumbent LECs uniformly define the term “end office switch” to be “a local Telephone Company switching system where Telephone Exchange Service customer station loops are terminated for purposes of interconnection to trunks.”²⁰

Nothing in the Commission’s 2011 VoIP rules purported to reverse or change the universal, established meaning of an end office switch. To the contrary, the Commission adopted a definition of “End Office Access Service” in 2011 that on its face reinforced the decades of precedent holding that an end office switch placed calls directly onto loops that were connected to subscriber’s premises and equipment.²¹

(2) *Intermediate Routing Is Not The Functional Equivalent of End Office Switching.* The Commission also has a settled body of law establishing when a carrier is performing the “functional equivalent” of end office switching. Under those precedents, the Commission has consistently held that intermediate routing steps, including placing calls onto the public Internet, is not the functional equivalent of end office switching.

“a computer that directly serves the...customer being called.”); *MCI WorldCom Commc’ns v. Pac. Bell Tel. Co.*, 2002 U.S. Dist. LEXIS 4789 at *6 (N.D. Ca. 2002) (“End office switches transfer calls to and from customers within a small geographic area.”).

¹⁹ Javvin Tech., NETWORK DICTIONARY, at 92 (“Central Office (CO) is the local switching facility of a telephone company to which telephones are connected. Central Office is a common carrier switching center in which trunks and loops are terminated and switched”) *available at* books.google.com/books?isbn=1602670005; NEWTON’S TELECOM DICTIONARY, 25th Ed. at 435 (2009) (defining “end office” as a “central office to which a telephone subscriber is connected. Frequently referred to as a Class 5 office. The last central office before the subscriber’s phone equipment. The central office which actually delivers dial tone to the subscriber. It establishes line to line, line to trunk, and trunk to line connections.”).

²⁰ See Letter from David L. Lawson, representing AT&T, to Marlene H. Dortch, FCC, CC Docket Nos. 96-45 *et al.*, at 7 and Att. B (Jan. 17, 2013) (compilation of excerpts of incumbent LEC tariffs, defining end office switch to be a system where “customer station loops are terminated for purposes of interconnection to trunks”) (“*AT&T 1/17/13 Ex Parte*”)

²¹ 47 C.F.R. § 51.903(d) (End Office Access Service is either (a) “the switching of access traffic at the carrier’s end office switch *and the delivery to or from such traffic to the called party’s premises;*” (b) “[t]he routing of interexchange telecommunications traffic *to or from the called party’s premises,* either directly or via contractual or other arrangements with an affiliated or unaffiliated entity, regardless of the specific functions provided or facilities used;” or (c) “[a]ny *functional equivalent* of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier”) (emphasis added). As explained below, the Commission has long held that intermediate switching functions like those at issue here are not the “functional equivalent” of end office switching.

The Commission first addressed these issues over a decade ago when it considered access charges imposed by competitive LECs that were not serving the end users that placed or received the calls.²² On such calls, the CLECs were passing the calls to other entities such as wireless carriers, which owned and provided the facilities that were used to deliver the calls to and from the called or calling parties. Using exactly the same language it later used in the *Connect America Order*, the Commission established a “functional equivalence” standard. The Commission explained that a CLEC’s access charges “should be no higher than the rate charged by the competing incumbent LEC *for the same functions*.”²³ The Commission also explained that its “long-standing policy” was that LECs “should charge only for those services that they provide”²⁴ – the same language used in § 51.913(b). And in applying that standard to the CLEC scenario, the Commission held that such intermediate CLECs were *not* performing the functional equivalent of end office switching: “[the appropriate rate] is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers.”²⁵ Accordingly, it has been established for over a decade that a LEC is not providing the “functional equivalent” of end office switching when it is not switching a call directly onto a loop serving a particular end user.

In a 2011 order issued a few months before the *Connect America Order*, the Commission expressly extended these principles to an arrangement like Level 3’s operations here. The Commission held that under the “established” meaning in the industry of an end office switch and a loop, an over-the-top VoIP provider that merely routed calls onto the public Internet was not performing the same task as placing calls on a subscriber loop.²⁶

In that order, the Commission addressed claims by a competitive LEC, YMax, that it was entitled to collect end office switching and other access charges under its tariff, even though the tariff defined end office switch using the traditional and established meaning, namely a facility where end user loops are terminated and interconnected with trunks.²⁷ YMax partnered with an over-the-top VoIP affiliate, handed calls off to the public Internet, and thus depended on the local facilities of many unaffiliated broadband ISPs to actually deliver the calls to and from calling and called parties.²⁸ YMax argued that its facilities were the same as an end office switch

²² *Access Charge Reform*, 19 FCC Rcd. 9108 (2004) (“*Eighth Report and Order*”).

²³ *Eighth Report and Order* ¶ 17 (emphasis added); see 47 C.F.R. § 61.26(f).

²⁴ *Eighth Report and Order* ¶ 21.

²⁵ *Id.*

²⁶ *YMax Order* ¶¶ 38-40.

²⁷ *YMax Order* ¶¶ 37-38.

²⁸ *Id.* ¶¶ 5, 7, 41.

because they placed calls onto a “virtual channel” by “exchang[ing] streams of IP packets transmitted over the Internet,” which “serves the same functions as a legacy fixed loop.”²⁹

The Commission rejected the argument. In doing so, it again relied on long-settled legal and industry understandings. It noted that “[u]nder [YMax’s] interpretation, the ‘virtual loops’ YMax claims to provide would be of indeterminate length and configuration. They could extend thousands of miles via numerous intermediaries throughout the country (or even the world), or only a few miles via a couple of intermediaries in contiguous states. . . . 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.”³⁰ Because the Commission found that the worldwide Internet could not be a loop, the Commission rejected YMax’s contention that its limited softswitch equipment (which merely placed calls onto the Internet) could be an end office switch within the meaning of its tariff.³¹

(3) *Subsequent Commission and Judicial Affirmations of These Understandings.* Even after the issuance of the *Connect America Order*, both the Commission and independent authorities continued to re-affirm the settled understandings of the terms and concepts used in the new rules. For example, in this very *Connect America* proceeding, YMax asked 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.”³² YMax was concerned that the new rules appeared to provide that “if 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*), then the LEC and its VoIP service partner are not performing the ‘access’ function and cannot charge for it.”³³ YMax asked

²⁹ See, e.g. *id.* ¶¶ 42, 44 (“In essence, YMax contends that the entire worldwide Internet—from a Called/Calling Party’s premises through the network of the Called/Calling Party’s ISP, through the networks of other ISPs, up to an including the connection YMax purchases from its own ISPs . . . comprises a ‘virtual loop’ that terminates at [its] equipment”).

³⁰ *Id.* ¶ 44.

³¹ The Commission further reiterated that an end office switch makes “tangible connections” between trunks and individual loop facilities. See *YMax Order* at 5757, ¶ 40 (“end office switching rates are among the highest recurring intercarrier compensation charges” because they “allow local exchange carriers to recover the substantial investment required to construct the tangible connections between themselves and their customers throughout their service territory”).

³² Order, *Connect America Fund*, 27 FCC Rcd. 2142, ¶ 4 (2012) (“*Clarification Order*”) (discussing Letter of John B. Messenger, counsel for YMax, to Marlene H. Dortch, FCC, at 1 (Feb. 3, 2012) (“*Messenger Ltr.*”).

³³ *Messenger Ltr.* at 2 (emphasis added).

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the Commission to hold that this was not the case, and argued that it should be “not necessary” for LECs to “provid[e] ‘loop facilities’ or any other physical connection to the VoIP customer.”³⁴ The Wireline Competition Bureau “disagreed” with and rejected YMax’s proposals to clarify the *Connect America Order* in this manner.³⁵

Later in 2012, the Maryland Public Service Commission conducted a proceeding to determine if a carrier’s (again, YMax) proposed tariff language was consistent with this Commission’s 2011 VoIP rules. The proposed tariff included a definition of “end office switch” that allowed end office switching to be charged on calls “regardless of how the End User obtains its connection to the switch.” An ALJ of the Maryland PSC found that this language was inconsistent with the Commission’s VoIP rules, because she interpreted the Commission’s rules to require that, in order “to provide the functional equivalent” of end office switching, a LEC “must not only switch the access traffic at the end office switch, but it also must ‘deliver’ the traffic to the called party’s premises.”³⁶ The ALJ further concluded that the Commission “was *clear* in its rules that for a LEC to be able to charge the full benchmark rate for access services when it ‘partners’ with a provider of VoIP services, the LEC must have a contractual or other arrangement with the provider of the VoIP service *to deliver the access traffic to the called party’s premises.*”³⁷ In short, the ALJ read the Commission’s rules as “clear” in prohibiting end office switching charges on over-the-top VoIP traffic where neither the LEC or VoIP partner delivered traffic to the called party.

Earlier this year, the Fourth Circuit rejected the claim of a competitive LEC that was seeking to charge end office switching on over-the-top traffic. *CoreTel Va. LLC v. Verizon Va., LLC*, 752 F.3d 364 (4th Cir. 2014). Although the court’s decision rested on the language of the carrier’s tariff (as did the Commission’s YMax Order), the Court rejected claims that the Commission’s *Connect America Order* either changed the law as stated in the Commission’s *YMax Order* or revised the Commission’s longstanding views of the functions that constitute end office switching. *Id.* at 375 n.16.

³⁴ *Id.* at 3.

³⁵ *Clarification Order* ¶¶ 4-5.

³⁶ Proposed Order of Public Utility Law Judge, *In the Matter of the Dispute between AT&T Commc’ns of Maryland, LLC, TCG Maryland and YMax Commc’ns Corp.*, Case No. 9295, at 11 (Oct. 26, 2012) (“ALJ Order”).

³⁷ *Id.* at 13-14 (emphasis added).

2. In Light of These Settled Understandings, It Would Be Inequitable To Apply A New Interpretation Retroactively.

Given this decades-old unbroken line of precedent, it would be inequitable suddenly to adopt materially different understandings of those well-settled terms and apply those modified understandings retroactively. In that regard, Level 3 and its allies misstate the controlling legal standard governing retroactivity.³⁸ The Supreme Court established that standard decades ago, and held that whether a new standard announced in adjudication can be applied retroactively is simply a question of equity: the agency must balance the ill effects of retroactivity “against the mischief of producing a result which is contrary to a statutory design or legal and equitable principles.”³⁹ The D.C. Circuit’s cases merely attempt to apply this flexible Supreme Court standard,⁴⁰ and in adopting certain rules of thumb, the D.C. Circuit has “drawn a distinction” between two types of agency decisions.⁴¹ If there is “a substitution of new law for old law that was reasonably clear,” an agency “decision to deny retroactive effect is *uncontroversial*.”⁴² If the new interpretation is a clarification of existing law, courts “start” with a presumption of retroactivity,⁴³ but even then the presumption may be overcome if retroactivity would lead to “manifest injustice.”⁴⁴ Contrary to Level 3’s suggestion, the “presumption” of retroactivity and the requirement of a showing of “manifest injustice” is required only in this second category of cases (*i.e.*, clarifications of existing law).⁴⁵

³⁸ *Level 3 12/10/14 Ex Parte* at 1-2.

³⁹ *See Retail, Wholesale*, 466 F.2d at 390 (“Whether to give retroactive effect to new rules adopted in the course of agency adjudication is a difficult and recurring problem in the field of administrative law . . . [and i]n deciding whether to grant or deny retroactive force to newly adopted administrative rules, reviewing courts must look to the standard established by the Supreme Court in *SEC v. Chenery* . . .”) (quoting *Chenery*, 332 U.S. at 203).

⁴⁰ *Verizon*, 269 F.3d at 1109.

⁴¹ *AT&T Corp.*, 454 F.3d at 332.

⁴² *Verizon*, 269 F.3d at 1109 (emphasis added) (citing cases); *see also Qwest*, 509 F.3d at 539.

⁴³ *Verizon*, 269 F.3d at 1109.

⁴⁴ *E.g.*, *Qwest*, 509 F.3d at 539.

⁴⁵ *See, e.g., AT&T Corp.*, 454 F.3d at 332 (“we have drawn a distinction between agency decisions that ‘substitut[e] ... new law for old law that was reasonably clear’ and those which are merely ‘new applications of existing law, clarifications, and additions.’ The *latter* carry a presumption of retroactivity that we depart from only when to do otherwise would lead to ‘manifest injustice’” (quoting *Verizon*, 269 F.3d at 1109) (emphasis added)); *see also Qwest*, 509 F.3d at 539 (quoting same). Contrary to Level 3’s suggestion, *Qwest* did not “raise the bar” or purport to change the relevant standard, which merely seeks

The case here, however, is a classic example of the first type of case, when there is “a substitution of new law for old law that was reasonably clear.”⁴⁶ In this case, it was “reasonably clear” from the Commission’s prior pronouncements that the new rules did not permit carriers like Level 3 to charge end office switching merely because they operate soft switches that place VoIP traffic onto the public Internet. As explained above, the Commission’s *Connect America Order* and rule used terms and formulations that have well-settled and consistent meanings in all other contexts in communications law. Accordingly, contrary to Level 3’s suggestion, this was not a case in which parties like AT&T that declined to pay such charges were relying solely on a “convenient assumption” that their position on an unsettled issue would ultimately be vindicated.⁴⁷ It was *reasonable* for parties to rely on the decades of precedent establishing the meaning of terms like “end office switch” and “functional equivalence,” and the principle requiring a carrier to charge only for the functions provided, in interpreting the scope of the new rules.⁴⁸ That is particularly true here, where contemporaneous holdings from both the Commission and independent adjudicators reinforced the continuing primacy of those long-settled meanings. Therefore, even if the Commission has sufficient authority and justification now to adopt a new interpretation of those terms as they apply in the *Connect America* context, it cannot equitably apply those novel interpretations retroactively in the face of decades of well-settled precedents and understandings to the contrary.

In that regard, it bears emphasis that the meaning of terms like “end office switch” and “functional equivalence” are so deeply settled that they presumably will remain so settled in all other contexts even if the Commission issues the requested declaratory ruling. For example, “end office switching” will presumably continue to have the same meaning it has always had in the context of the ILEC access charge regime; ILECs will not suddenly be permitted to assess end office charges for other circuit-switched TDM switching functions (such as intermediate TDM tandem switching) that have never been considered end office switching. Similarly, the Commission presumably will not overrule the *CLEC Access Charge Eighth Report and Order*, and CLECs will still be prohibited from charging end office switching when they do not provide those functions and instead hand calls off to other carriers. And the Commission presumably will not overrule its YMax decisions (or call into question the Fourth Circuit’s recent *CoreTel* decision), and thus carriers like YMax will still be prohibited from charging end office switching

to implement the Supreme Court’s long-standing principle of equity in *Chenery*. Cf. *Level 3 12/10/14 Ex Parte* at 2.

⁴⁶ *Verizon*, 269 F.3d at 1109; see also *Qwest*, 509 F.3d at 539.

⁴⁷ See, e.g., *Level 3 11/3/14 Ex Parte* at 5; cf. *Qwest*, 509 F.3d at 540 (“The mere possibility that a party may have relied on its own (rather convenient) assumption that unclear law would ultimately be resolved in its favor is insufficient” to establish a manifest injustice).

⁴⁸ Cf. *Level 3 12/10/14 Ex Parte* at 2 (suggesting that D.C. Circuit caselaw requires “reasonable” reliance).

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when their tariffs claim only they are interconnecting trunks and loops, as ILEC end offices do. Parties like AT&T thus reasonably relied on “settled law contrary to the rule established in the adjudication”⁴⁹ in interpreting the *Connect America* rules. Although the Commission may now wish to apply those terms and concepts differently for reasons specific to the *Connect America* context, it must still acknowledge that these are much broader and looser applications of these concepts that constitute an exception to, and upset, settled expectations as to how the Commission applies those terms.

What is important here is that the Commission simply used these well-established terms and formulations and did not signal, either in the *Connect America Order* or the text of the rules, that it intended regulated parties to assign completely different understandings to those terms than the ones the Commission had adopted in all other contexts. There is a presumption in the law that the same terms are to be given the same meanings when they appear in different parts of a statutory scheme,⁵⁰ and thus it was reasonable for parties to assume that the Commission would give the same meaning to the key words and phrases in the *Connect America* rules as it had in other similar regulatory contexts. Indeed, Level 3 and its supporters, by contrast, cannot point to *any* decision in their favor, either from the Commission or other authorities, that might have put parties on notice that these rules might incorporate a different and novel standard. Under general principles of administrative law, if the Commission intended these terms to be understood differently in this context, it was incumbent on the Commission to expressly acknowledge this difference in the *Connect America Order* and explain why the well-settled meanings would not be applied.⁵¹ The Commission may be able to supply the missing acknowledgement and explanation now in a declaratory ruling, but under *Chenery* and its progeny it cannot equitably apply that ruling retroactively.

Equally important, regulated entities were entitled to rely on decades of consistent precedent and industry understandings of what functions an end office switch performs. As explained above, parties were not reading the new *Connect America* rules in a vacuum; certain parties, such as YMax, had actually implemented the types of arrangements at issue and sought rulings from the Commission as to whether end office switching charges would be appropriate for such services. Although, as Level 3 notes, these issues came up in closely related contexts (such as how to construe YMax’s tariff) rather than as formal interpretations of the *Connect America* rules themselves, the Commission and other independent authorities nonetheless

⁴⁹ *Qwest*, 509 F.3d at 540.

⁵⁰ *See, e.g., Brown v. Gardner*, 513 U.S. 115, 118 (1994).

⁵¹ *See, e.g., West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) (“[i]t is textbook administrative law that an agency must ‘provide[] a reasoned explanation for departing from precedent or treating similar situations differently’”) (quoting *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995)).

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consistently held that such functions were *so far removed* from the functions an end office switch performs that such carriers could not plausibly charge end office switching rates. Indeed, the Commission did not treat this as a borderline case; it specifically noted that if YMax’s softswitch were an end office such that the worldwide Internet were a “loop,” then “the term ‘loop’ has lost all meaning.”⁵² Parties could not reasonably have been expected to understand that the Commission intended its rules to be interpreted as Level 3 now requests, when the Commission and other authorities were holding that such an interpretation of the very concept of an end office switch and loop would strip those terms of “all meaning.”⁵³ And, of course, a reviewing court owes an agency no deference when reviewing a decision whether to apply a new interpretation retroactively, and will examine *de novo* what impact decisions such as these had on settled expectations.⁵⁴

Level 3 claims that the D.C. Circuit’s *Qwest* decision is dispositive, but this case is nothing like *Qwest*. The issue in *Qwest* involved the vague statutory concept of “common carriage” in a context – new menu-driven prepaid cards – that the Commission had never addressed at all. Accordingly, the lack of clarity in *Qwest* was complete, and the Commission itself had instituted a proceeding to resolve what it acknowledged was uncertainty – a fact that the court found central to its finding of no reasonable reliance and no manifest injustice.⁵⁵ Here, by contrast, the Commission purported to resolve the question at issue in the *Connect America Order*, using terms of art that have universally understood meanings in the industry, and the Commission has never even hinted at any continuing uncertainty. The only source of controversy has come from self-interested parties like Level 3 that have filed *ex parte* letters asking the Commission to adopt a different, more expansive interpretation of the rules. The D.C.

⁵² See, e.g., *YMax Order* ¶ 44 (“If this exchange of packets over the Internet is a ‘virtual loop,’ then . . . the term ‘loop’ has lost all meaning”).

⁵³ Level 3 continues to miss the point in suggesting that AT&T is arguing that the *YMax Order* established the “rule” that would be changed here. See *Level 3 12/10/14 Ex Parte* at 3. The *Connect America Order*, by using terms that have extraordinarily well-settled meanings, established the standard that a declaratory ruling would modify here. The fact remains, however, that the Commission did *hold* in the *YMax Order* that under “established” meanings in the industry the Internet could not rationally constitute the “loop” for an end office switch – a ruling that the Commission presumably would not overrule in any declaratory ruling here – but the Commission did not acknowledge or attempt to distinguish that ruling in the *Connect America Order* and indeed appeared to reaffirm that understanding as it related to the *Connect America* rules in the *Clarification Order*.

⁵⁴ See, e.g., *Maxcell*, 815 F.2d at 1554.

⁵⁵ *Qwest*, 509 F.3d at 540 (“once the issue was ‘expressly drawn into question ... we do not see how the Commission could possibly find that [those objecting to retroactive application] reasonably relied upon [their view of the law]”) (quoting *Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996)).

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Circuit has recognized that retroactivity is inappropriate where (as here) the agency has “confronted the problem before,” as opposed to situations (as in *Qwest*) in which the agency acts in the “very absence of a previous standard” and because of the “nature of its duties” must “exercise the ‘function of filling in the interstices of the Act.’”⁵⁶

Even if this case represented only a clarification of existing law, as Level 3 claims, retroactive application of the proposed declaratory ruling would still be inappropriate, because retroactive enforcement of Level 3’s interpretation of the rules in the face of a mountain of contrary indications would rise to the level of a “manifest injustice.” Although Level 3 attempts to distinguish this isolated precedent and that isolated precedent,⁵⁷ Level 3 simply ignores that this case involves an extraordinary and consistent weight of precedents, stretching back decades, all of which point in the same direction of rejecting claims that arrangements like Level 3’s could be considered the “functions” of an “end office switch.” Under any conceivable standard governing retroactivity, AT&T *reasonably relied* on these “settled” and consistent understandings, and it would be manifestly unjust to apply Level 3’s interpretation retroactively.⁵⁸

Finally, contrary to Level 3’s claims, the Supreme Court’s recent *Christopher* decision is directly on point. The Court there explained that if “an agency’s announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction” – as is the case here – “the potential for unfair surprise is acute,” and to permit substantial liability to be imposed retroactively based on such a sudden “clarification” would “seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’”⁵⁹ As AT&T previously explained, the Commission took no enforcement action for years prior to the *Connect America Order* against carriers that refused to pay end office switching charges for the type of traffic at issue here,⁶⁰ and the Commission has continued to take no action of any kind under its new rules, even though Level 3 and its allies have been filing letters on this issue for more than two years. It would be starkly inequitable suddenly to accept Level 3’s interpretation and apply it retroactively after such a long period of inaction; if Level 3’s interpretation of the existing rules were so clearly correct or supportable, the

⁵⁶ *Retail, Wholesale*, 466 F.2d at 390 (quoting *Chenery*, 332 U.S. at 202-03).

⁵⁷ See, e.g., *Level 3 12/10/14 Ex Parte* at 3.

⁵⁸ Cf. *Qwest*, 509 F.3d at 540

⁵⁹ *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012); see also *id.* at 2168 (deference to agencies’ interpretations of ambiguous rules “creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby ‘frustrating the notice and predictability purposes of rulemaking’”) (quoting *Talk America*, 131 S. Ct. at 2266 (Scalia, J. concurring))).

⁶⁰ See *AT&T 1/17/13 Ex Parte* at 15-16.

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Commission could have cleared that up a long time ago, rather than stand by and allow potential liability to mount. As the Supreme Court noted, “[i]t is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the ... interpretation[] in advance or else be held liable” when the new “interpretation[is announced] for the first time in an enforcement proceeding” or otherwise outside the process of notice and comment.⁶¹ But that is especially true here, where regulated parties are expected to “divine” that the Commission will interpret terms with well-settled meanings contrary to the manner in which they have been consistently understood in decades of precedent.

Sincerely,

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⁶¹ *Christopher*, 132 S. Ct. at 2168.