

June 11, 2012

Via Electronic Filing

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

Re: Notice of Ex Parte Communication CC Docket No. 96-45; CC Docket No. 01-92; WC Docket No. 03-109; WC Docket No. 05-337; WC Docket No. 07-135; WC Docket No. 10-90; GN Docket No. 09-51

Ms. Dortch,

On June 7, 2012, Greg Rogers of Bandwidth.com, Inc. (“Bandwidth”), the undersigned, on behalf of Bandwidth, Erin Boone and Michael Shortley of Level 3 Communications, LLC (“Level 3”), and John Nakahata of Wiltshire & Grannis, LLP, as counsel to Level 3, met with Victoria Goldberg, John Hunter, Randy Clarke, and Elizabeth Alexander of the Wireline Competition Bureau (“WCB”). Deena Shetler of the WCB also participated by phone.

The purpose of the meeting was to discuss one IXC’s overbroad interpretation of the Commission’s February 27, 2012 Clarification Order that has been used as the basis to violate the VoIP symmetry rule and withhold payment for end office switching. In particular, both Bandwidth and Level 3 stated that they faced non-payment of end office access charges by carriers claiming that they could not charge end office access charges because neither Bandwidth/Level 3 or their respective VoIP provider customers provided last mile transmission (rather than utilizing an end user’s Internet access service to provide an “over-the-top” VoIP service). This is exactly the argument that AT&T raised at Sunshine prior to the issuance of the *CAF Order*, and that the FCC correctly rejected.¹ Bandwidth and Level 3 stated that they had no issue with the February 27, 2012 Clarification Order’s holding that a LEC could not levy access charges for functions performed by neither the LEC or its affiliated or unaffiliated VoIP partner. However, the February 27, 2012 Clarification Order has been asserted by some parties (notably including AT&T) to mean that last mile transmission is a core function necessary for a LEC to levy end office local switching and related transport charges.

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¹ See Letter of John T. Nakahata, Counsel to Level 3 Communications, LLC to Marlene H. Dortch, Secretary, FCC (filed Oct. 24, 2011).
<http://apps.fcc.gov/ecfs/document/view?id=7021723002>

Bandwidth and Level 3 therefore asked the Bureau to clarify that “equivalent functionality” for end office switching does not require a CLEC and its affiliated or unaffiliated VoIP partner to provide the last mile facility to the end user. Nor does it require the CLEC and its affiliated or unaffiliated VoIP partner to provide the router that is closest to the end user customer, such as the ISP’s router that directs Internet traffic to and from a broadband subscriber. Rather, the equivalent functionality of end office switching is the intelligence and infrastructure that manages the interaction with the end user’s telecommunications or VoIP service and that initiates call set-up and takedown. For example, if a CLEC, its affiliated or unaffiliated VoIP provider partner or the two acting together connect a trunk side port to a line side port, the two will have performed local switching, and thus the CLEC can bill for end office local switching. Neither the last mile loop nor the broadband Internet access provider’s router that merely transits traffic to/from the end user performs functionality equivalent to end office switching because it does not manage the end user’s interaction and initiate call set-up and takedown.

The Commission considered and rejected proposals that would have required the CLEC and its VoIP partner to be facilities-based or use specific technology. The USF/ICC Transformation Order adopted a symmetrical framework for VoIP-PSTN traffic to ensure that providers who pay lower rates for VoIP-PSTN traffic are restricted to charging the same lower rates. Although Comcast *et al* had proposed language for the VoIP symmetry rule that would have applied to entities - “including but not limited to facilities-based” VoIP,² the Commission did not adopt any such language that could have implied a limitation. The USF/ICC Transformation Order amended section 61.26 of the Commission’s rules and added section 51.913 to permit CLECs to bill access charges for switched access functions that are provided by “an affiliated or unaffiliated provider of interconnected VoIP services,” provided there is no double-billing. A CLEC who, together with its VoIP partner, provides the functional equivalent of the access services defined in 51.903 is “entitled to assess and collect the full Access Reciprocal Compensation charges.”³ Section 51.903 defines “End office access service” to include “the 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.*”⁴

It is important not to confuse the functionality of local switching with the equipment and technology used to provide that functionality. Whether end users are connected to the PSTN by dedicated facilities or shared facilities (including the public Internet) is irrelevant to determining whether the LEC serving them is providing the functional equivalent of end office access service.

² See Letter from Mary McManus, Comcast Corporation, to Marlene H. Dortch, *Connect America Fund*, WC Docket No. 10-90 et al. (filed Oct. 5, 2011).

³ 47 C.F.R. § 51.913(b).

⁴ 47 C.F.R. § 51.903(d)(2) (emphasis added).

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CLECs (and their VoIP partners) provide the functional equivalent of local switching for calls that originate from or terminate to end users of over-the-top VoIP services. The CLEC assigns the NPAC number and provides the connection between the end user and all other carriers and end users connected to the PSTN. Together, the CLEC and its VoIP partner manage the end user's interaction with his or her telecommunications or VoIP service and provide the capability to make or receive calls.

Providers of broadband Internet access services do not provide the intelligent functionality to manage the end user's interaction with his or her telecommunications or VoIP service and provide the capability to make or receive calls. Rather, they route IP packets to a specific host address based on the packet header instructions and are technically incapable of creating a voice path between an end user and IXC. The broadband Internet access service provider does not perform end office switching functionality and does not bill the IXC for any functions it performs.

The Commission's rules do not distinguish between facilities-based and over-the-top VoIP providers and neither Bandwidth nor Level 3 have the means to do so given that their customers include both types of VoIP providers. Bandwidth and Level 3 urged the Commission to clarify that the February 27 Clarification Order did not determine that a CLEC and its over-the-top VoIP partner are categorically not providing the functional equivalent of end office switching. Although Bandwidth and Level 3 do not believe any such interpretation is consistent with the rules, they urged the Commission to clarify what constitutes "equivalent functionality" for local switching so that disputes over compensation for VoIP traffic do not continue to vex the industry with non-payment and litigation that the USF/ICC Transformation Order was designed to bring to an end.

Level 3 distributed a copy of its October 24, 2011 ex parte to the meeting participants.

Respectfully submitted,

/s/

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cc: Deena Shetler
Victoria Goldberg
John Hunter
Randy Clarke
Elizabeth Alexander
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