

October 4, 2012

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: *Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *High Cost Universal Service Support*, WC Docket NO. 05-337; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal State Joint Board on Universal Service*, CC Docket No. 96-45.

Dear Ms. Dortch:

On October 2, 2012, Greg Rogers of Bandwidth.com, Inc. (“Bandwidth”), Tamar Finn, of Bingham McCutchen on behalf of Bandwidth.com, Andrea Pierantozzi, Mack Greene, Michael Shortley, and Erin Boone, all of Level 3 Communications, LLC (“Level 3”), and I, on behalf of Level 3, met with Victoria Goldberg, Randy Clarke, Robin Cohn, and Rhonda Lien, all of the Wireline Competition Bureau’s (“WCB”) Pricing Policy Division, Alec MacDonnell of WCB’s Industry Analysis and Technology Division, and Maureen Flood of the Office of General Counsel. I also separately spoke with Randy Clarke on October 3, 2012. In these meetings and conversations, we discussed Level 3’s and Bandwidth’s ex parte letter of September 10, 2012, filed in the above-referenced dockets, which is incorporated by reference herein in its entirety.

Under 47 C.F.R. § 51.913—also known as the “VoIP Symmetry Rule”—a CLEC serving an affiliated or unaffiliated provider of interconnected or non-interconnected VoIP service may “assess and collect the full Access Reciprocal Compensation charges,” so long as the interconnected or non-interconnected VoIP provider does not itself assess access charges for those functions and the charges are not leveled “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.”<sup>1</sup> This provides for symmetric access charges when calls are terminated by a TDM-based LEC as when they are terminated by the combination of a CLEC and interconnected/non-interconnected VoIP provider.

The principal dispute with AT&T has been with respect to end office local switching access charges: AT&T takes the position that CLECs serving over-the-top VoIP providers are

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<sup>1</sup> 47 C.F.R. § 51.913(b).

only entitled to charge tandem switching access and may not assess end office local switching because, in AT&T's view, the final routing is performed by the underlying facilities-based ISP's router, and not by the CLEC or its partner VoIP provider. Reduced to its essence, the present dispute centers upon the classification of the functions performed by the ISP's router, on the one hand, and the equipment of the CLEC and its VOIP partner, on the other hand. If AT&T is correct, then no entity may charge local switching access in an over-the-top configuration because, according to AT&T, the ISP is performing the local switching function but is not a carrier that is able to file an access tariff. If Level 3 and Bandwidth are correct, then the functions performed by the ISP are akin to common line functions and those performed by the combination of the CLEC and its VOIP partner are the functional equivalent of local switching for which the CLEC may assess a local switching charge provided that the VoIP provider does not. AT&T's view is factually wrong and is, for that reason, inconsistent with the VOIP Symmetry Rule. Level 3 and Bandwidth's position is factually supported and therefore implements, rather than renders illusory, the VOIP Symmetry Rule.

47 C.F.R. § 51.903(d) defines "End Office Access Service" and sets out three alternative tests for meeting that definition.<sup>2</sup> While interexchange traffic from an interexchange carrier transmitted to a CLEC for ultimate delivery to the customer of an over-the-top VoIP provider meets each of the three alternative tests, any of which is sufficient, Paragraph 51.903(d)(3) is the clearest. It defines End Office Access Service as "[a]ny functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier," specifically including incumbent LEC Local Switching access rates assessed pursuant to 47 C.F.R. § 69.106.<sup>3</sup> It also specifically states, "End office Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access service."<sup>4</sup>

47 C.F.R. § 51.903(d) does not itself enumerate the specific functional criteria to be evaluated in determining functional equivalence. The access charge rules (Part 69), which govern ILEC access charges, distinguish, as relevant here, between local switching and carrier common line. 47 C.F.R. § 69.106 describes local switching, while 47 C.F.R. § 69.154 describes carrier common line charges for price cap carriers.<sup>5</sup> 47 C.F.R. § 69.106 makes clear that the functions for which local switching access charges can be assessed are call set-up and takedown, the switching function itself, and, when used, a common or dedicated trunk port. In contrast, 47 C.F.R. § 69.106 does not cover loop transmission, including remote terminal and line port functionality, which are covered under 47 C.F.R. § 69.154 (carrier common line charges).

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<sup>2</sup> See 47 C.F.R. § 51.903(d).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> 47 C.F.R. § 69.105 described carrier common line charges for non-price cap carriers, but those ceased to exist after June 30, 2003. See 47 C.F.R. § 69.105.

The Commission made these distinctions clear—and further delineated the core functions that constitute local switching in Revised Responsible Accounting Officer (“RAO”) Letter 21.<sup>6</sup> Issued by the Common Carrier Bureau’s Accounting and Audits Division in 1992 and affirmed by the full Commission in 1997, Revised RAO 21 was issued specifically with the purpose of differentiating the core functions of a switch from functions performed by a remote terminal. This was not a small or insubstantial matter. As the Commission noted when it upheld Revised RAO 21:

Costs recorded in Part 32 accounts are the basis for allocation of investment between regulated and nonregulated activities, jurisdictional separations, and universal service support. It is essential that the ILECs record their investments in network plant in the proper Part 32 accounts so that the Commission's regulatory processes can operate as the Commission intended. Serious distortions can result if ILECs apply our accounting rules inconsistently. For example, if, under our rules, a certain type of equipment should be recorded in a switch account but a number of ILECs record this equipment in a transmission account, the nationwide average loop cost may be overstated. This average cost is the basis for sizing the Commission's Universal Service Fund (USF) program. Overstating the average loop cost could reduce the USF draws of many small ILECs, potentially jeopardizing their ability to provide quality service at reasonable rates.<sup>7</sup>

Revised RAO 21 accordingly enumerated eight basic switching functions, which it then applied to differentiate a remote switch, which had to be accounted for as central office switching plant (a portion of which would be recovered through local switching access charge rates), from a remote terminal, which had to be accounted for as loop plant (a portion of which would be recovered through the various access charge mechanisms for recovering loop costs).<sup>8</sup>

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<sup>6</sup> See Classification of Remote Central Office Equipment for Accounting Purposes, RAO Letter 21, 7 FCC Rcd. 6075 (Com.Car.Bur.1992) (“Revised RAO 21”) (differentiating a remote terminal from a remote switch); *Petitions for reconsideration and applications for review denied*, Order on Reconsideration, FCC 97-241, 12 FCC Rcd. 10,061 (1997) (“Revised RAO 21 Order”).

<sup>7</sup> *Revised RAO 21 Order*, 12 FCC Rcd at 10,063 ¶ 3 (citations omitted). Revised RAO 21 remains applicable and important today with respect to rural ILECs regulated under rate-of-return regulation and which receive High Cost Loop Support.

<sup>8</sup> These eight basic switching functions are: “1) Attending - monitors for off-hook signals; 2) Control - determines call destination and assigns call to available line or trunk, 3) Busy testing - determines whether the called line/trunk is busy; 4) Information receiving - receives control and busy test results; 5) Information transmitting - transmits control and busy test results to tell the alerting and interconnection functions whether to complete the call; 6) Interconnection - connects subscriber line to subscriber line or subscriber line to trunk; 7) Alerting - rings the called subscriber’s line or other signalling [sic] means if the call is destined for another exchange; 8) Supervising-monitors for call termination so the line can be released.” *Revised RAO 21*, at n.1.

Attachment A to Level 3 and Bandwidth's September 10, 2012 ex parte letter demonstrates how each of the core switching functions outlined in Revised RAO 21 is performed by the CLEC or its VoIP partner, and not by the facilities-based broadband ISP through which the VoIP provider interacts with its customer. This demonstrates that, for an over-the-top VoIP service, it is the CLEC and VoIP provider that provide the functions equivalent to those provided by an incumbent LEC when it assesses local switching charges pursuant to 47 C.F.R. § 69.106. Accordingly, CLECs such as Level 3 and Bandwidth are entitled, under 47 C.F.R. § 51.913, to assess local switching access charges on interexchange carriers such as AT&T for access traffic that terminates to a subscriber of Level 3's or Bandwidth's VoIP provider partner, so long as that partner does not itself assess such charges.

47 C.F.R. § 51.913 applies, by its terms, to both interconnected VoIP and non-interconnected VoIP. Interconnected VoIP includes both service in which the VoIP provider or its affiliate also provides the last mile transmission facilities, as well as "over-the-top" services in which the VoIP provider communicates with its subscriber through broadband Internet access service that its subscriber obtains from a third party. In the case of both interconnected and non-interconnected VoIP, the VoIP provider in and of itself does not have a right to obtain interconnection with telecommunications carriers in order to send or receive communications with users of the Public Switched Telephone Network. As such, as the Commission noted when it adopted the VoIP Symmetry Rule, VoIP providers and their CLEC partners are situated differently than CMRS providers, which the Commission barred from filing interstate access tariffs (and for which Section 332 of the Communications Act precludes state rate regulation), because CMRS providers have a statutory right pursuant to Section 251 of the Communications Act to obtain interconnection with other telecommunications carriers.<sup>9</sup> Indeed, the regulatory regimes governing CMRS providers and CLECs are fundamentally different. Unlike a CMRS provider, a CLEC is entitled to file, on a permissive basis, an interstate access tariff so long as that CLEC is in compliance with the Seventh and Eighth Reports and Orders<sup>10</sup> in the *CLEC Access Charge Reform* proceeding. And, under the VOIP Symmetry Rule, where the CLEC/VOIP provider combination is providing the local switching function – as delineated above – the CLEC may charge for local switching so long as there is no double-billing.

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<sup>9</sup> See *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*; Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17,663, 18,026 ¶ 970 and n. 2024 (2011) ("USF/ICC Transformation Order").

<sup>10</sup> See *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146, 16 FCC Rcd. 9923 (2001); *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Petition of Z-Tel Communications, Inc., for Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, Eight Report and Order and Fifth Order on Reconsideration, FCC 04-110, 19 FCC Rcd. 9108 (2004).

Level 3 and Bandwidth accordingly requested that the Bureau or Commission issue an order clarifying that a CLEC may assess local switching access charges for over-the-top VoIP services when its VoIP partner is not also doing so, but together they are providing the core switching functionalities as delineated in Revised RAO 21. As with its February 27, 2012 Order,<sup>11</sup> the Bureau has the authority to do so, and can issue such a letter based on the information already in the docket.

Sincerely,



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<sup>11</sup> See *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; Order*, DA 12-298, 27 FCC Rcd. 2142, 2143-4 ¶¶ 2-5 (2012).