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May 17, 2013

VIA ELECTRONIC SUBMISSION

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

Re: *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*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208

Dear Ms. Dortch:

On May 15th, Hank Hultquist, Gary Phillips, Brian Benison, and I of AT&T Services, Inc. and David Lawson of Sidley and Austin, LLP on behalf of AT&T, met with Kalpak Gude, Randy Clarke, Alec MacDonell, Rhonda Lien and Don Sussman of the Wireline Competition Bureau and separately we met with Richard Welch, James Carr and Marcus Maher of the Office of General Counsel. In the meetings, AT&T addressed arguments in the record by Level 3 and Bandwidth.com that the Commission's access charge rules permit CLECs to assess local end office switching charges for their limited role in partnering with various "over-the-top" VoIP providers to route to the public Internet calls to the VoIP providers' end users.

The attached presentations formed the basis of the discussions but in particular, AT&T explained that where a CLEC has lawfully tariffed charges for access functions provided by it or its retail VoIP partner, AT&T pays those charges without dispute. Here, however, the CLECs have billed AT&T substantial charges for end office switching services that neither they nor their over-the-top VoIP partners provide, in clear violation of the Commission's rules and the "long standing policy" that LECs "should charge only for those services that they provide"¹—a policy the Commission expressly reaffirmed when it recently amended its access charge rules.² We noted that the limited functionality provided by the CLECs in the middle of those over-the-top VoIP calls more closely resembles tandem switching, and we

¹ *Connect America Fund et al.*, 26 FCC Rcd 17663, 18026, n.2020 (2011) ("*Connect America Order*"), quoting *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*, CC Docket No.96-262, CCB/CPD File No. 01-19, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9118-19, ¶ 21 (2004).

² *Connect America Order*, 26 FCC Rcd at 18026, ¶ 970; see also *AT&T Corp. v. YMax Commc'ns*, 26 FCC Rcd 5742 (2011).

emphasized that AT&T is and has been paying the CLECs for this traffic at the tandem switching rate.

In addition, AT&T reiterated that terminal adapters or other customer premises equipment do not perform end office switching for which a carrier may assess access charges. Indeed, any such ruling would be at odds with decades of precedent that CPE is not part of the network and effectively would transform end users into (unlicensed) providers of (untariffed) exchange access services.³

If you have any questions or need additional information, please do not hesitate to contact me. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,



Christi Shewman

Attachments

cc: Kalpak Gude
Randy Clarke
Alec MacDonell
Rhonda Lien
Don Sussman
Richard Welch
James Carr
Marcus Maher

³ See, e.g., 47 U.S.C. § 153(14) (defining CPE as “equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.”); 47 C.F.R. § 64.702(e) (“the carrier provision of customer premises equipment used in conjunction with the interstate telecommunications network may be offered in combination with the provision of common carrier communications services, except that the customer premises equipment shall not be offered on a tariffed basis.”); *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, ¶¶ 159-61 (1980); *id.* at ¶ 159 (“We find that CPE is a severable commodity from the provision of transmission services.”); *id.* at ¶ 160 (“Trends in technology enable CPE to function as an enhancement to basic common carrier services and many enhanced service applications involve interaction with sophisticated terminal equipment. The uses to which these devices may be put are under the user’s, not the carrier’s control. *** Thus, the deregulation of CPE fosters a regulatory scheme which separates the provision of regulated common carrier services from competitive activities that are independent of, but related to, the underlying utility service.”).



at&t

Switched Access Functions and VoIP

May 15, 2013

Background

- Two CLECs (Level 3 and Bandwidth.com) recently sought further clarification of the Commission's rules that prohibit CLECs serving VoIP providers from assessing access charges for functions performed by neither of them.
- In particular, clarification that neither access to last mile facilities nor access to a router anywhere near the end user is a necessary component of end office switching.
- They argue instead that end office switching consists of "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," and that "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 equivalent of end office access."
- Their arguments are inconsistent with longstanding Commission practice and precedent, and with the recent reform order and subsequent clarification.

The rules are clear

- As the Commission said in its landmark reform order
 - “...our rules do not permit a LEC to charge for functions performed neither by itself or its retail service provider partner.” Report and Order, October, 2011

- When Ymax sought virtually the same clarification as the CLECs here, the Bureau rejected its request and reiterated that
 - “Section 51.913(b) expressly states that ‘this rule does 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 [VoIP service].’” Clarification Order, February, 2012

- The Commission previously rejected the argument that the Internet itself could represent the line-side connection associated with end office switching
 - “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.” AT&T vs YMAX Order, April, 2011

“Call management” is not call routing

- These CLECs would have the Commission reduce end office services to the “[the infrastructure] that manages the interaction with the end user’s telecommunications or VoIP service.”
- But the Commission’s rules require, at a minimum, that a CLEC or its VoIP partner perform “the routing of interexchange telecommunications traffic to or from the called party’s premises.”
- Here the routing of voice communications to and from the called party’s premises is performed not by the CLEC or the VoIP provider, but by the called party’s Internet Service Provider (ISP).
- The call management functions that the CLECs point to (including call setup and takedown) are signaling functions, not the routing of voice packets that comprise the actual conversation.

End office switching includes the point of switching (or routing) nearest to the end user

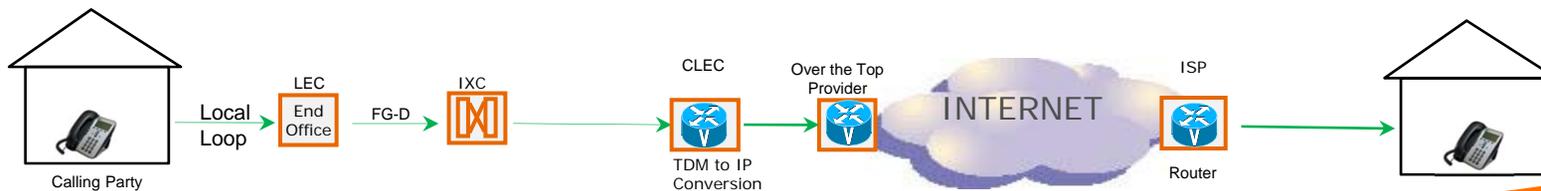
PSTN To PSTN Customer



PSTN To Cable VoIP Customer



PSTN To Over-the-Top VoIP Customer



LEVEL 3 AND BANDWIDTH PERFORM THE SAME FUNCTIONS AS YMAX

- Like YMax, Level 3, Bandwidth.com and their VoIP partners take calls coming in from the PSTN, convert them to IP and provide SIP signaling, and then dump the voice packets in an undifferentiated stream onto the public Internet.
- They have no idea where or how the calls are ultimately terminated and the voice packets may travel thousands of miles through many networks before delivery to called parties.

LEVEL 3 AND BANDWIDTH ARE MAKING THE SAME ARGUMENTS AS YMAX

- YMax: “The essence of end office switching is not connection to a loop, but rather comprises the signaling, call setup, call tear-down, and other functions . . . that permit a telephone call to originate or terminate on the public switched network.” YMAX Initial Brief, File No. EB-10-MD-005 (filed February 4, 2011) at 18.
- Level 3/Bandwidth: “[T]he core function of an end office switch cannot and should not rationally be defined by the line to which it connects . . . The end office switch provides the intelligence surrounding the call—its set-up, conduct, and take-down—which are the core functions of the end office switch.” April 15, 2013 Ex Parte Letter at 1.

THE COMMISSION’S PRECEDENTS FORECLOSE THE CLECS’ POSITION

- Decades of Commission precedent establish that the *sine qua non* of end office switching functionality is actual local switching – *i.e.*, using the switching matrix to interconnect trunks and local lines that serve end user premises. *Access Charge Reform*, 12 FCC Rcd 15982, ¶ 123 (1997) (“The local switch connects subscriber lines both with other local subscriber lines and with interoffice dedicated and common trunks”).
- In the very *RAO 21* proceeding upon which Level 3 and Bandwidth have relied, the Commission stressed that “interconnection, *i.e.*, *the actual connection of lines and trunks*, is the characteristic that distinguishes switches from other central office equipment.” *RAO 21 Reconsideration Order*, 12 FCC Rcd. 10061, ¶ 11 (1997)
- The Commission rejected YMax’s theory that it can be deemed to perform “local” switching in the middle of the call flow because the entire Internet can be considered a “virtual” loop: “the ‘virtual loops’ YMax claims to provide . . . could extend thousands of miles via numerous intermediaries throughout the country (or even the world) 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.” *AT&T Corp. v. YMax*, 26 FCC Rcd. 5742, ¶ 44 (2011).
- The *Connect America* rules expressly state: “[t]his rule does 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 or non-interconnected VoIP.” 47 C.F.R. § 51.913(b); *Connect America Order* ¶ 970.

- When YMax filed a petition for clarification complaining that the new rules might foreclose the imposition of access charges when “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*),” the Commission denied the petition and reaffirmed that its rules do “not permit a local exchange carrier to charge for functions not performed” by the LEC or its VoIP partner. *Connect America Clarification Order* ¶¶ 4-5.

THE CLECS’ INTERPRETATION OF THE RULES IS NOT COHERENT

- Under the CLECs’ view of either Rule 51.903(d)(2) or (d)(3), as long as they are performing call set-up and other signaling functions anywhere in the world, they are performing the core “local” switching functions and can charge the full end office switching charges.
- Their interpretation would negate the rule that a LEC and its partner may not charge for functions that they do not provide. Whether delivered by circuit switch (§ 51.903(d)(1)) or IP router (§ 51.903(d)(2)), the rules state that the LEC (or its VoIP partner) must actually switch/route the call “to or from the called party” and “functional equivalence” (§ 51.903(d)(3)) equally demands the provision of this core interconnection function.

THE CLECS’ ALTERNATIVE CLAIMS BASED ON THE INDIVIDUAL RATE ELEMENTS OF END OFFICE SWITCHING ALSO FAIL

- Inteliquent’s suggestion that local switching costs associated with interconnecting trunks and lines are recovered in the Carrier Common Line charge is wrong. The Carrier Common Line charge recovers costs of the loop itself. *Access Charge Reform*, 12 FCC Rcd. 15982, ¶ 37 (1997).
- The CLECs point out that the Commission’s rules permit a separate per-message charge for costs associated with call-setup and other signaling functions, but, as the Commission has recognized, any such charge would necessarily be a small fraction of the per-minute local switching charge the CLECs instead seek to assess. *Id.* ¶¶ 137-39 & 143 n.184.

THE CLECS’ POSITION WOULD CREATE DISINCENTIVES FOR BROADBAND INVESTMENT AND SYSTEM-WIDE ECONOMIC DISTORTIONS

- If the Commission endorses the CLECs’ position, it will have created a blueprint for economic distortion. Given that the Commission will have established that a CLEC/VoIP partnership can have one “end office” to serve the entire country (and the world), a thousand YMax’s will bloom.
- Rather than investing to build broadband networks, the CLECs’ requested ruling would invite companies to set up shop as over-the-top “end office” service providers. With a negligible investment in a rack of equipment in a single “end office,” such providers could collect massive amounts of end office local switching charges merely by processing SIP messages and dumping IP traffic on to the public Internet.

THE RULES CANNOT BE “CLARIFIED” TO ALLOW RETROACTIVE ASSESSMENT OF LOCAL SWITCHING CHARGES

- Under D.C. Circuit law, agencies must “deny retroactive effect” when there is “a substitution of new law for old law that was reasonably clear.” *Verizon Telephone Co. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001). Here, for all of the reasons discussed above, existing law is at least “reasonably clear” that the CLECs cannot charge for local switching under these circumstances. And agencies are routinely reversed when they impose new obligations retroactively “under the guise of interpreting a regulation.”¹
- But even if the current rule were ambiguous, the courts could not defer to the “clarification” the CLECs seek. In its *Christopher* decision last Term, the Supreme Court held that “if an agency’s announcement of its interpretation is preceded by a very lengthy period of conscious inaction” – as is the case here – “the potential for unfair surprise is acute,” and to permit substantial liability to be imposed retroactively based on a sudden “clarification” would “seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’” *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012). The Court responded to the “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.’” *Id.* at 2168. “It 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. *Id.* at 2168.
- Here, thirty years of precedent establish that local switches are used for local switching – *i.e.*, to interconnect trunks with the local lines that serve end user premises, and the *Connect America Order* confirmed that CLECs can assess access charges for the functions they or their VoIP partners actually provide. The Commission has consistently reaffirmed the common sense conclusion that these CLECs cannot assess end office local switching charges when they merely provide call set-up and other signaling in the middle of a call and that they cannot avoid that outcome by treating the Internet as a local loop. The Commission has taken no action against carriers that have not paid access charges based on these interpretations. In light of this history, the Commission cannot retroactively apply a contrary view through “clarification”: even if the rules were ambiguous, carriers were justified in interpreting the rules in light of this unbroken line of precedents, which the Commission’s lengthy period of inaction confirmed.

¹ See, e.g., *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000); *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012); *Hardy Wilson Memorial Hosp. v. Sebelius*, 616 F.3d 449 (5th Cir. 2010); *Casares-Castellon v. Holder*, 603 F.3d 1111 (9th Cir. 2010).