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May 24, 2013

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
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 May 22, 2013, Curtis L. Groves, and Alan Buzacott of Verizon met with Kalpak Gude, Randy Clarke, Rhonda Lien, Don Sussman, and Anjali Vohra of the Wireline Competition Bureau to discuss *ex parte* filings in which Level 3 and others have argued that they are entitled to assess local end office switching charges when they route over-the-top VoIP traffic over the public Internet.¹ We explained in the meeting that the Commission has settled this issue and has determined that CLECs cannot assess local end office switching charges in this situation. We also discussed a recent decision from the U.S. District Court for the Eastern District of Virginia, which relied on the Commission's determination and held that CoreTel could not assess end-office switching charges in precisely this scenario.² If the Commission intends a different outcome prospectively, the Commission would have to change its existing rules.

In its discussion of VoIP-PSTN intercarrier compensation in the *USF-ICC Transformation Order*, the Commission reiterated its rule that carriers cannot charge for access

¹ See, e.g., Letter from John T. Nakahata, counsel for Level 3 Communications, *et al.*, to Marlene H. Dortch, FCC, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 05-337; CC Docket Nos. 01-92 & 96-45 (Dec. 17, 2012).

² See *CoreTel Va., LLC v. Verizon Va. LLC*, No. 1:12-cv-741, 2013 U.S. Dist. LEXIS 58649 (E.D. Va. April 22, 2013) ("*CoreTel*").

services they do not perform.³ And in the *YMax Order*, the Commission had previously made clear that an over-the-top provider does not provide end-office switching.⁴

Shortly after the Commission issued the *USF-ICC Transformation Order*, YMax asked the Commission to clarify that YMax was entitled to charge the equivalent of full ILEC switched access rates – in other words, to charge the end office switching rate in addition to the tandem switching rate and other elements.⁵ YMax explained that in its situation, “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)...”.⁶ Responding to YMax’s request, the Commission in the *Clarification Order* disagreed with YMax’s position and reiterated again that “section 51.913(b) expressly states that “[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 service or non-interconnected VoIP service.”⁷

In response to a question from staff, we explained that section 51.913(b)’s cross-reference to section 51.903 does not, by itself, entitle CLECs that do not provide end-office switching to charge for that function. To the contrary, as noted above, section 51.913(b) clearly states that “[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 service or non-interconnected VoIP service.”⁸ And companies like Level 3, YMax, and CoreTel do not perform end office switching when they route over-the-top VoIP calls over the public Internet for termination. We observed that, as the FCC has long held, the defining characteristic of end office switching is the “actual connection of [subscriber] lines and

³ “[T]he right to charge does not extend to functions not performed by the LEC or its retail service partner.” *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 970 n.2028 (2011) (“*USF-ICC Transformation Order*”).

⁴ See *AT&T Corp. v. YMax Commc’ns*, Memorandum Opinion and Order, 26 FCC Rcd 5742, ¶¶ 36-45 (rejecting the argument that YMax, by routing traffic from its switch to its customers over the Internet is providing end office switching); ¶ 44 (rejecting the argument that the Internet is a local loop or its functional equivalent); ¶ 41 (noting that multiple entities other than YMax and its VoIP partner, MagicJack, “must provide physical transmission facilities to complete” a call to a MagicJack customer); and ¶ 40 (explaining that “end office switching rates are among the highest” switched access rates because of the “substantial investment required to construct the tangible connections between [LECs] and their customers”) (2011) (“*YMax Order*”).

⁵ See Letter from John B. Messenger, YMax, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90, 05-337, 07-135 & 03-109; GN Docket No. 09-51; CC Docket Nos. 01-92 & 96-45; WT Docket 10-208 (Feb. 3, 2012).

⁶ *Id.* at 2.

⁷ *Connect America Fund, et al.*, Order, 27 FCC Rcd 2142, ¶ 4 (2012) (“*Clarification Order*”), quoting 47 C.F.R. § 51.913(b) (emphasis added in the *Clarification Order*).

⁸ 47 C.F.R. § 51.913(b).

trunks”⁹. Unlike facilities-based VoIP providers who typically provide this functionality, Level 3 and other CLECs that partner with over-the-top VoIP providers do not do this. Instead, like YMax, they simply hand off voice packets to Internet Service Providers (ISPs). There may be many ISPs standing between the CLEC and the called party, depending on how the call routes through the cloud. It is those ISPs’ routers, not the CLEC or its over-the-top VoIP partner, that route voice packets to the line serving the called party. In this scenario, we explained that Level 3 is not performing end office switching, and neither is its retail VoIP partner.

In *CoreTel*, the U.S. District Court for the Eastern District of Virginia held last month that CoreTel could not assess end-office switching charges when routing over-the-top VoIP traffic over the public Internet. As was the case in *AT&T v. YMax*, the EDVA case turned on whether CoreTel “actually terminates end user lines in any of its switches.”¹⁰ The Court relied heavily on the *YMax Order* and held that CoreTel did not, and that it did not provide Verizon with end-office switching. The Court found that like YMax, “CoreTel uses the internet, or the ‘IP cloud,’ to route calls from its switches to its customers and therefore does not utilize a physical transmission facility.”¹¹ As a result, relying upon the FCC’s holding that this does not constitute the “termination” of an “end user line,” the Court granted Verizon summary judgment and held that CoreTel was not entitled to assess the end-office switching component of switched access charges.¹² *CoreTel* further underscores that the Commission has answered the question Level 3 and others continue to raise. The Commission’s rules and orders do not permit carriers to charge end-office switching when they route over-the-top VoIP calls for termination over the public Internet. A change in that policy would require a prospective rule change.

We also discussed the brief that the Commission filed with the Third Circuit in March 2012 as *amicus curiae* in *PAETEC v. MCI*.¹³ That case, like *CoreTel*, involved a CLEC attempting to charge a composite switching rate when it did not provide one of the components that made up that composite rate. The contested charges in *PAETEC* were for tandem switching, and the Commission unambiguously asserted that, “if a CLEC does not provide tandem switching functionality, the CLEC may not include a tandem-switching charge in the interstate switched access rates it levies on IXCs for calls to and from the CLEC’s end-user customers.”¹⁴ The Commission correctly called this a “common-sense interpretation” of its rules.¹⁵ And while *PAETEC* involved different facts, the core conclusion is the same. A CLEC cannot charge for an access function it does not provide.

⁹ *Petitions For Reconsideration and Applications For Review of RAO 21*, 12 FCC Rcd 10061, ¶ 11 (1977) (“RAO Recon Order”)

¹⁰ *CoreTel* at *13.

¹¹ *Id.* at *13.

¹² *See id.* at *16.

¹³ *See PAETEC Commc’ns. et al. v MCI Commc’ns. et al.*, No. 11-2268 (3rd Cir. dismissed with prejudice Oct. 1, 2012) (“*PAETEC*”).

¹⁴ Brief of Amicus Curiae-FCC at 12, *PAETEC Commc’ns. v MCI Commc’ns.*, No. 11-2268 (3rd Cir. Mar. 14, 2012).

¹⁵ *Id.*

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Finally, we explained that permitting a CLEC to charge for functions that are not provided by the CLEC or its partner would be at odds with the *USF-ICC Transformation Order's* goal of transitioning away from the legacy access charge regime. Allowing a CLEC to charge for functions that are provided in the IP cloud by the unrelated ISPs standing between the CLEC and the called party would actually *expand* the scope of the legacy access charge regime to the public Internet, contrary to the *USF-ICC Transformation Order's* intent. There is nothing in the *USF-ICC Transformation Order* to suggest that the Commission intended that result.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan Beyers". The signature is written in a cursive, slightly slanted style.

cc: Kalpak Gude
Randy Clarke
Rhonda Lien
Don Sussman
Anjali Vohra