

June 17, 2013

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

Dear Ms. Dortch:

On June 13, 2013, Greg Rogers of Bandwidth.com, Inc. (“Bandwidth”), along with the undersigned, as counsel to Bandwidth, Joe Cavender of Level 3 Communications, LLC (“Level 3”), and John Nakahata of Wiltshire & Grannis, LLP, as counsel to Level 3, met separately with (1) Rebekah Goodheart, Legal Advisor to Acting Chairwoman Mignon Clyburn and (2) Kalpak Gude, Chief, Pricing Policy Division, Rhonda Lien, and Alec MacDonell of the Pricing Policy Division. Andrea Pierantozzi and Mack Greene of Level 3 participated in the meeting by phone.

Bandwidth and Level 3 argued that a speedy resolution to the VoIP symmetry rule debate is readily available because the Commission already considered and rejected proposals that would have required the CLEC’s VoIP partner to provide the last mile broadband facility to end-users in order to be compensated for end office switching. 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,¹ the Commission did not adopt any such language that could have implied a limitation.

AT&T’s and Verizon’s argument that over-the-top (“OTT”) VoIP calls completed through CLEC-VoIP partnerships should not be entitled to end office switching compensation runs counter to the policies underlying the VoIP symmetry rule. First, the Commission adopted the VoIP symmetry rule as part of an overall resolution of VoIP intercarrier compensation issues that expressly established a LEC’s ability to collect access charges for VoIP – but at interstate access rate levels – and to make compensation symmetrical, thereby prospectively resolving

¹ 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).

Boston
Frankfurt
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Washington

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

T +1.202.373.6000
F +1.202.373.6001
bingham.com

long running uncertainty concerning VoIP intercarrier compensation. This provided clear rules that providers could rely on when deciding whether to invest in IP equipment upgrades and networks. AT&T's and Verizon's dispute simply ignores the Commission's intent and recreates the uncertainty of asymmetric VoIP compensation which the rules were designed to end. Second, the Commission intended to encourage investment in IP infrastructure. IP-based networks require more than just last-mile transmission, but also an IP voice infrastructure to handle call set-up, routing, transport, interconnection and traffic exchange. If providers are compensated for TDM end office switching but not for certain types of IP end office switching, the rule would discourage carriers from upgrading from TDM to IP switches. Facilities-based ISPs are compensated for their loop distribution through charges for broadband access that permit customers to send and receive information. If facilities-based VoIP providers and their CLEC partners are compensated for end office switching functions necessary to complete calls, but OTT VoIP providers and their CLEC partners are not, the rule also would discourage investment in over-the-top services, which themselves drive consumer demand for more broadband connections. Third, the Commission wants to promote IP interconnection. In Bandwidth's and Level 3's experience, these efforts to recreate uncertainty about compensation under the VoIP symmetry rule is hindering business negotiations for IP interconnection.

It is important to recognize that the infrastructure that handles origination or termination of OTT VoIP is not special-purpose infrastructure. Neither Bandwidth nor Level 3 is readily able to distinguish between facilities-based and OTT VoIP given that their customers include both types of VoIP providers. The fact that Bandwidth and Level 3 use the same IP switching infrastructure for facilities-based VoIP, OTT VoIP, and TDM end users shows that the core switching functionalities do not vary with the physical type of end-user connection.

Verizon selectively quotes from the *RAO Reconsideration Order*, omitting the example of what constitutes switching calls from trunks to loops: "If [] a piece of [] equipment is capable of interconnecting lines or trunks, *i.e.*, **if it has the switching matrix required for call interconnection,**" it is classified as a switch.² The function on which AT&T and Verizon fixate most directly—the connection to a loop—is not a function of an ILEC's end office switch that is covered by the end office local switching charge. That function is part of the common line and compensated by common line rate elements. As of 1997 for price cap LECs and 2001 for rate-of-return LECs, costs for the line port—and hence charges for the line port functionality to connect the switch to the loop—were explicitly reassigned from local switching to common line and recovered through the

² *Petitions for Reconsideration and Applications for Review of RAO 21*, Order on Reconsideration, 12 FCC Rcd 10061, ¶ 11 (1977) (emphasis added).

combination of the End User Common Line Charge and Carrier Common Line Charge.³ As such, the line port function cannot be a core function of local switching.

When an end user seeks to place a call in a traditional PSTN network, some piece of equipment in the network must determine that the subscriber is seeking to place a call. That function is performed by the end office switch. The call must then be received and processed so that it can be sent through the network for delivery. That receipt and processing function is performed by the end office switch. On the terminating end, some part of the network alerts the called party that someone is trying to set up a call. That function is also performed by the end office switch. And some part of the legacy network monitors the call to determine when the call terminates so that the communications path can be broken and the other party alerted that the call is over. Without these functions performed by the end office switch, there could be no call of any type, whether intraswitch, intraexchange or interexchange. Regardless of the underlying technology, these functions are the unique functions of the end office, and are performed nowhere else in the network, irrespective of whether the wires connected to the subscriber's side of the switch are high capacity facilities or a single twisted pair. It is these functions that distinguish the end office switch from tandem switches and interexchange switches. These are functions that Level 3 and Bandwidth (and other similarly-situated CLECs) perform together with their OTT VoIP partners, for which the VoIP Symmetry Rule and the *USF/ICC Transformation Order* requires they be compensated through access charges "regardless of whether the functions performed or the technology used correspond precisely to those use under a traditional TDM architecture."⁴

Finally, Bandwidth and Level 3 requested that the Bureau issue an order clarifying that the current rules – which make no distinction between Over-the-Top VoIP and forms of VoIP in which the VoIP provider supplies the loop facility – permit CLECs that have Over-the-Top VoIP partnerships to collect applicable end office switching charges. Such an interpretation is consistent with the text,

³ See *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, First Report and Order, FCC 97-158, 12 FCC Rcd. 15982, ¶ 125 (1997) (assigning line port recovery to Common Line rate elements) (“1997 Access Reform Order”); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, Fifteenth Report and Order, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return From Interstate Services of Local Exchange Carriers*, Report and Order, FCC 01-304, 16 FCC Rcd 19613, ¶¶ 90-91 (2001) (“MAG Order”) (moving recovery of line ports to common line for rate-of-return carriers).

⁴ *USF/ICC Transformation Order*, at 18026 ¶ 970.

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policy, and legislative history of the *USF/ICC Transformation Order* and the structure of Part 69 access rate elements.

Respectfully submitted,

/s/

Tamar E. Finn

Counsel to Bandwidth.com, Inc.

cc: Rebekah Goodheart
 Kalpak Gude
 Rhonda Lien
 Alec MacDonell
 John Nakahata