



1200 18TH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.WILTSHIREGRANNIS.COM

ATTORNEYS AT LAW

August 6, 2013

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th 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 an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45

Dear Ms. Dortch:

Level 3 Communications, LLC (“Level 3”) and Bandwidth.com, Inc. (“Bandwidth”), submit this ex parte to reiterate their request that the Commission issue a declaratory ruling clarifying that Sections 51.903(d), 51.913(b), and 69.106 of the Commission’s Rules permit CLECs to collect end office switching access charges for over-the-top (“OTT”) VoIP calls when providing the functional equivalent of end office switching but not a physical loop. Such a clarification is supported by the Commission’s transitional VoIP-PSTN access rules and policy objectives.

As a preliminary matter, Rule 1.2 provides that “[t]he Commission may . . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.” Given the extensive record on this issue, and the lack of any need for further comment, the Commission should act expeditiously under that authority to promptly address the following existing and material controversy. Whether:

- (1) When a CLEC and its over-the-top VoIP partner perform all the functions performed by a TDM end office switch, they perform the core functions of an end office switch and the CLEC is therefore entitled to charge a local switching access charge (Level 3 and Bandwidth’s view); or

- (2) A CLEC and its VoIP Partner can *only* assess an end office local switching charge, even if they perform all of the core functions of an end office switch, if they *also* separately provide the physical loop used to reach the end user's customer's premises (AT&T and Verizon's view).

I. The Purposes and Structure of the *ICC Reform Order's* VoIP-PSTN Provisions

The Commission adopted its transitional VoIP-PSTN framework, known as the VoIP Symmetry Rule, to provide certainty and minimize future disputes.¹ The Commission recognized that “the lack of clarity regarding the intercarrier compensation obligations for VoIP traffic has led to significant billing disputes and litigation,” leading to myriad different, irreconcilable resolutions—and in some cases no resolution at all.² The Commission also acknowledged concerns relating to asymmetrical compensation in which one carrier collects intercarrier compensation but does not pay equivalent charges for the same traffic, which creates “marketplace distortions that give one category of providers an artificial regulatory advantage in costs and revenues relative to other market participants.”³ Moreover, the Commission explained, the existing uncertainty about compensation was “likely deterring innovation and introduction of new IP services to consumers.”⁴ “Against this backdrop,” the Commission concluded, action by the Commission was necessary to foreclose such questions over future compensation for VoIP-PSTN traffic.⁵

The Commission's resolution to these problems was rooted in its determination to ensure competitive equality for those providers that had invested in modern IP networks, and not disadvantage them as compared to those providers that continued to offer circuit-switched services.⁶ As the Commission explained, one of the concerns providers had expressed was that “absent Commission clarification, certain LECs that provide wholesale inputs to retail VoIP services might not be able to collect all the same intercarrier compensation charges as LECs relying entirely on TDM networks.”⁷ Under such circumstances, providers would have had an incentive to refrain from investing in modern IP facilities. But that was the opposite of the

¹ *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17663, ¶ 935 (2011) (“*ICC Reform Order*”).

² *ICC Reform Order* ¶ 937.

³ *Id.* ¶¶ 937-38, 942.

⁴ *Id.* ¶ 939.

⁵ *Id.*.

⁶ *See id.* ¶ 968.

⁷ *Id.*.

Commission's goal. Rather, the Commission emphasized, "[o]ne of the goals of our reform is to promote investment in and deployment of IP networks."⁸ "Consequently," the Commission concluded, "we allow providers that have undertaken or choose to undertake such deployment the same opportunity, during the transition, to collect intercarrier compensation under our prospective VoIP-PSTN intercarrier compensation regime as those providers that have not yet undertaken that network conversion."⁹

To further ensure competitive equality, the Commission clarified that its framework would apply symmetrically to *all* VoIP-PSTN traffic, whether the traffic originated in IP or terminated in IP.¹⁰ That is, the Commission's framework not only removed any doubt that LECs supporting VoIP service could *collect* intercarrier compensation in connection with VoIP-PSTN traffic, which carriers previously had varying degrees of success in collecting, but also simultaneously established that those same LECs would be required to *pay* intercarrier compensation for VoIP-PSTN traffic, which some LECs had previously refused to pay.

The Commission's rules also took aim at disputes that had arisen because LECs would partner with separate retail VoIP service providers to offer VoIP service, rather than the LECs offering such services themselves.¹¹ Though AT&T pressed the Commission to refuse to permit LECs to collect access charges for functions performed by a retail VoIP partner,¹² the Commission rejected that approach. Instead, in furtherance of its goals to ensure competitive equality and not discourage carriers from upgrading their networks or disadvantage those that already had, the Commission expressly permitted LECs to assess access charges for toll VoIP for functions performed either by the LEC or its VoIP partner.¹³

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* ¶ 942.

¹¹ *Id.* ¶ 968.

¹² See Letter from Robert W. Quinn, Jr., AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135, GN Docket No. 09-51, at 2-3 & n.9 (filed Oct. 21, 2011) ("Oct. 21, 2011 AT&T Ex Parte"). See also Letter from Mary McManus, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337 & 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92 & 96-45, at Attachment (filed Oct. 5, 2011) (inviting the Commission to adopt rules to specify that LECs partnering with facilities-based VoIP providers would be permitted to charge intercarrier compensation).

¹³ 47 C.F.R. § 51.913(b).

As the Commission explained, LECs supporting VoIP service could collect compensation for VoIP-PSTN “regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture.”¹⁴ The only limitation to this broad rule, the Commission explained, was that the LEC could not charge for functions that neither it nor its retail VoIP partner performed.¹⁵ Notably, despite AT&T’s urging, the Commission declined to limit its rule to “only those situations where the CLEC delivers the call directly to an affiliated, facilities-based provider that directly serves the end user”—*i.e.*, to limit the rule to situations involving providers like cable operators, but to exclude arrangements involving OTT VoIP such as those at issue here.¹⁶ Accordingly, as adopted, the Commission’s transitional VoIP-PSTN framework, *Order*, and rules do not distinguish between IP network investments to support OTT VoIP and VoIP implementations in which the VoIP provider provides the subscriber’s loop facilities. The rules apply equally to both situations.

II. Level 3 and Bandwidth’s Reading of the VoIP Symmetry Rule Best Comports with the Commission’s Policy Objectives.

Under Level 3/Bandwidth’s reading, access charges are *symmetric* for OTT VoIP, loop-facilities-based VoIP, and TDM services, just as the Commission intended. All are compensated at interstate rate levels, with the only exception being that CLECs and their OTT VoIP partners cannot charge loop-based access charges (*i.e.*, CCL) for OTT VoIP, because the end user (through its purchase of ISP service), as opposed to either the CLEC or the OTT VoIP partner, provides the loop facility. As was the Commission’s objective, this symmetrical framework avoids “marketplace distortions that give one category of providers an artificial regulatory advantage in costs and revenues relative to other market participants.”¹⁷ In contrast, under AT&T/Verizon’s view, charges are always *asymmetric* in an OTT VoIP-PSTN traffic exchange, with CLECs serving OTT VoIP providers constantly at an artificial regulatory disadvantage respecting costs and revenues as compared to both TDM-based providers and facilities-based VoIP providers.

Level 3/Bandwidth’s reading also results in greater simplicity in the transitional access charge system, achieving the Commission’s objective of reducing disputes. Like uses of the same switching equipment for toll traffic should result in like access charges, implementing the Commission-endorsed principle that “comparable uses of the network should be subject to

¹⁴ ICC Reform Order ¶ 970.

¹⁵ *Id.*.

¹⁶ See Oct. 21, 2011 AT&T Ex Parte at 6 n.24.

¹⁷ *ICC Reform Order* ¶ 942.

comparable intercarrier compensation charges.”¹⁸ Likewise, OTT VoIP, cable-based VoIP, and TDM voice provisioned over the same Level 3 or Bandwidth infrastructure assess the same terminating local switching access charges. In contrast, under AT&T/Verizon’s view, Level 3 and Bandwidth would be required to track whether the call is bound for an OTT VoIP termination or a cable-based/TDM termination in order to know whether local switching charges apply—no in the former, yes in the latter—even though identical equipment performs identical functions in all cases. Aside from violating the principle that comparable network uses should be subject to comparable intercarrier compensation charges, the AT&T/Verizon view would also create a multiplicity of new disputes where the Commission’s goal was to reduce them.

Level 3/Bandwidth’s reading of the VoIP Symmetry Rule also removes access charges as a consideration in the transition of switching infrastructure to IP. All uses of the IP switching infrastructure are treated the same, irrespective of the facility (or type of facility) used to deliver a call to the called party. This encourages (or at least does not discourage) investment in and movement to IP switching infrastructures and innovation in over-the-top services, furthering the Commission’s express goal to that effect.

III. The Commission Can and Should Issue a Declaratory Ruling Terminating this Controversy.

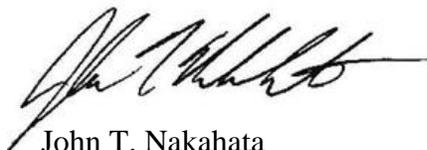
AT&T failed to persuade the Commission not to adopt the VoIP Symmetry Rule as it was eventually adopted. It failed to persuade the Commission to disallow compensation for functions performed by a LEC’s VoIP partner. And it failed to persuade the Commission to limit compensation to situations where the VoIP provider owned the physical facilities connecting to the retail subscriber. That should have been the end of the dispute—certainly the Commission must have thought it was when it adopted its rules aimed at resolving such disputes. Yet now AT&T claims that even though the Commission declined to adopt the rule AT&T proposed on this very point, it is not required to pay (and is currently withholding) end office switching charges to LECs when the LEC and its retail VoIP partner perform all the functions of an end office switch, if they do not also control the physical connection to the end user. AT&T is apparently betting that the Commission will not stand by its rules and that the costs and uncertainties of litigating technical matters in court will leave it in a better position than simply accepting that it fought this battle and lost almost two years ago.

The extensive record here is complete. The Commission does not need to ask for additional comment—indeed, doing so would only compound the disruption in the market. Resolution of this issue must be a priority so that all parties can move forward with certainty. The Commission has authority under Section 1.2 to issue a declaratory ruling interpreting its

¹⁸ *Id.* ¶ 949.

rules, terminating this controversy, and ending uncertainty. The VoIP Symmetry Rule is not an ancient rule with a long history of agency inaction, but a rule of recent vintage still being implemented. The Commission, and not district courts around the country, should be the arbiter of what its rules mean and how they apply. This will reduce litigation costs, consistent with the purposes of the Commission's PSTN-VoIP transitional access rules.

Sincerely,



John T. Nakahata
WILTSHIRE & GRANNIS, LLP
1200 18th Street, NW, Suite 1200
Washington, D.C. 20036
(202) 730-1320
jnakahata@wiltshiregrannis.com

Tamar Finn
BINGHAM MCCUTCHEN LLP
2020 K Street NW
Washington, D.C. 20006

Counsel for Bandwidth.com, Inc.

Counsel for Level 3 Communications, LLC

Greg Rogers
Deputy General Counsel
BANDWIDTH.COM, INC.
900 Main Campus Drive
Raleigh, NC 27606
(919) 439-5399
grogers@bandwidth.com

Joseph C. Cavender
Vice President, Federal Regulatory Affairs
LEVEL 3 COMMUNICATIONS, LLC
1220 L Street, NW, Suite #660
Washington, DC 20005
(571) 730-6533

Cc: Rebekah Goodheart
Nicholas Degani
Priscilla Argeris
Julie Veach
Deena Shetler
Kalpak Gude
Victoria Goldberg
Randy Clarke
Rhonda Lien