BINGHAM

Ronald W. Del Sesto, Jr.
Direct Phone: +1.202.373.6023
Direct Fax: +1.202.373.6421
r.delsesto@bingham.com

July 12, 2012

VIA E-MAIL AND OVERNIGHT COURIER

Luly Massaro
Commission Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: Docket No. 3735 - In the Matter of YMax Communications Corp.'s Application for Authority to Operate as a Competitive Local Exchange Carrier (CLEC)

Dear Ms. Massaro:

Enclosed please find for filing in the above-referenced Docket, an original and nine (9) copies of YMax Communications Corp.'s ("YMax") Objection to the Motion of the AT&T Entities to Reopen the Proceeding of YMax Regarding the Automatic Approval of the Tariff Application. An electronic copy of this filing has also been sent to you via E-mail.

Please acknowledge receipt of the enclosed by date stamping and returning the extra file copy to me in the attached self-addressed, postage-prepaid envelope.

Should you have any questions regarding the filing, please do not hesitate to contact me at the above E-mail address or phone number.

Sincerely yours,

Ronald W. Del Sesto, Jr.

Enclosure

cc: See attached Certificate of Service

Beijing
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

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PUBLIC UTILITIES COMMISSION

In the matter of:	)	
YMax Communications Corp.'s	)	Docket No. 3735
Application for Authority to Operate as a	)	
Competitive Local Exchange Carrier (CLEC)	)	

OBJECTION TO THE MOTION OF THE AT&T ENTITIES TO REOPEN THE PROCEEDING OF YMAX COMMUNICATIONS CORP. REGARDING THE AUTOMATIC APPROVAL OF THE TARIFF APPLICATION

YMax Communications Corp. ("YMax") objects to the Motion of the AT&T Entities (collectively "AT&T") to Reopen the Proceeding of YMax Regarding the Automatic Approval of the Tariff Application ("Motion"), which was filed with the Rhode Island Public Service Commission ("Commission") on June 29, 2012. As demonstrated below, the Commission should deny AT&T's Motion because the Motion is procedurally defective, AT&T has failed to meet its burden to support reopening the proceeding, and AT&T's substantive arguments have no merit.

I. Background

On June 1, 2012, YMax filed revisions to its Rhode Island Tariff No. 2 (Switched Access Services) with the Commission. This filing contained revised tariff pages that incorporated the requirements of the Federal Communications Commission's ("FCC") *CAF Order*[1] regarding the treatment of Toll VoIP-PSTN traffic. In the revised tariff pages, YMax also reduced its intrastate rates to the same level as the interstate rates contained in its FCC Tariff No. 2. The revised tariff pages were scheduled to take effect on July 1, 2012. On June 4, 2012, the Rhode Island Division

---

[1] *In re Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) ("*CAF Order*"), *petitions for recon. pending, petitions for review pending, In re FCC 11-161*, No. 11-9900, *et al.* (10th Cir.).

of Public Utilities and Carriers issued a memorandum recommending against suspension of this tariff filing. On June 29, 2012, AT&T filed its Motion seeking to reopen the automatic approval of YMax's revised tariff pages and have them suspended and further investigated. Because the Commission did not issue an order suspending these revised tariff pages, they went into effect on July 1, 2012 pursuant to Commission Rule 1.9.[2]

II. Legal Standard and Burden for Reopening a Proceeding

Commission Rule 1.26(a) specifies the legal standard and burden a movant must satisfy in requesting the reopening of a proceeding. Specifically, Rule 1.26(a) states in pertinent part:

> at any time after the conclusion of a hearing in a proceeding, but before the issuance of the written order, any party to the proceeding may, for good cause shown, move to reopen the proceedings for the purpose of taking additional evidence. Copies of such motion shall be served upon all participants or their attorneys of record, and shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceedings, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing, and shall in all other respects conform to the applicable requirements of Rule 1.5 through 1.7, inclusive.

In seeking to have a proceeding reopened, the Commission has acknowledged that there must be a showing of good cause which requires that the requesting party set forth material changes in fact that occurred since the conclusion of the hearing.[3] In addition, the requesting party must be a "party to the proceeding" and have filed a "motion to intervene" as required by Commission Rule 1.13.

---

[2] Commission Rule 1.9(c)(3) states that "[i]n the absence of an order approving or suspending the tariff advice, the tariff advice not suspended or approved goes into effect thirty (30) days after notice or on the proposed effective date, whichever is later. If a tariff advice is suspended, the Commission will *open a formal proceeding* and treat the tariff advice as an application." *Id.* (emphasis added); *see also* Commission Rule 1.9(d)(3).

[3] *See In Re National Grid's Tariff Advice Filing to Amend R.I.P.U.C. No. 2006 Qualifying Facilities Purchase Rate*, Docket No. 3999, Report and Order, 2009 R.I. PUC LEXIS 14, *33-34 (R.I. P.U.C. Mar. 11, 2009) ("*National Grid*").

III. The Commission Should Deny AT&T's Motion Because the Motion is Procedurally Defective, AT&T has Failed to Meet Its Burden to Support Reopening the Proceeding, and AT&T's Substantive Arguments have No Merit

As discussed below, AT&T's Motion should be denied on procedural grounds and because AT&T has not satisfied its burden to have the proceeding reopened. Moreover, AT&T's substantive criticisms of YMax's revised tariff pages have no merit.

First, AT&T's Motion is procedurally defective. YMax's revised tariff pages have gone into effect and the Commission never suspended the pages or opened (or otherwise initiated) a "formal" proceeding to address them as Commission Rule 1.9(c)(3) specifies. Thus, AT&T's motion is defective because there is no Commission proceeding or investigation to be "reopened". Although AT&T filed its Motion in Docket No. 3735, that is not a proceeding to address the revised tariff pages.[4] But, even if it were, Commission Rule 1.26 only permits a "party to the proceeding" to request the reopening of proceedings, and AT&T is not a "party to the proceeding" in Docket No. 3735. It never filed a motion to intervene pursuant to Commission Rule 1.13 and therefore cannot request reopening the proceeding pursuant to Commission Rule 1.26. Accordingly, the relief AT&T seeks is not available to it and can be denied on procedural grounds alone.

Second, apart from filing a procedurally improper Motion, AT&T does not satisfy its burden under Commission Rule 1.26 to have the proceeding reopened. Rule 1.26 states that reopening may be sought for the "purpose of taking additional evidence" and that the motion for reopening "shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceedings, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing...." While AT&T's Motion criticizes YMax's revised tariff pages in various respects, AT&T fails to assert "material changes of fact or of law alleged to have oc-

[4] Docket No. 3735 was opened in March of 2006 to address YMax's application for authority to operate as a Competitive Local Exchange Carrier.

curred" between the time YMax filed its revised tariff pages on June 1, 2012 and the filing of the Motion 28 days later. Consistent with the Commission's decision in *National Grid*,[5] because AT&T has not shown any grounds justifying its request, the Commission should deny AT&T's Motion.

Third, contrary to AT&T's claims, YMax's revised tariff pages do not include "language that is inconsistent with the FCC's Orders on the appropriate compensation for VoIP-PSTN traffic." AT&T Motion at 5. AT&T incorrectly asserts that YMax seeks to charge for functions it does not perform. Specifically, AT&T wrongly claims that YMax's revised definition of "End Office Switch" would permit YMax to "charge for end office switching in situations where the VoIP service provider customer obtains connectivity to the VoIP service provider (*i.e.*, the functional equivalent of the loop) by purchasing service from a third, unrelated provider." AT&T Motion at 5-6 (citing Exhibit B First Revised Sheet 7). AT&T also falsely claims that section 2.9.3.A.2 of YMax's revised tariff pages would allow YMax to charge for services it does not perform and that the FCC has rejected YMax's position. AT&T Motion at 6-7.

AT&T's interpretation of the tariff is absurd on its face. YMax is billing AT&T for switching, not for loops; so the relevant question is whether YMax is providing switching, not whether it is providing loops. AT&T is arguing that YMax should not be permitted to bill for one function because it does not perform a *different* function.

Furthermore, contrary to AT&T's false argument, the FCC has never ruled that a LEC must provide connections over loop facilities between its switch and its customers in order to bill

---

[5] *See National Grid*, Docket No. 3999, 2009 R.I. PUC LEXIS 14, *34 (explaining that "The Commission reviewed its Rule 1.26(a) and determined that the motions did not adequately 'set forth clearly the facts claimed to constitute grounds requiring reopening of the proceedings, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing....' Therefore, the Commission, finding that the movants had not met their burden, denied the Motions to Reopen.").

local switching charges. The FCC did not say this in the *YMax Order*;[6] it only held that the YMax tariff language then in effect (which YMax has since amended, without any objection from AT&T or the FCC) did not support the charges being billed. It also did not say this in the *Clarification Order,* which was issued by FCC staff.[7] That order, by its plain language, was interpreting the FCC's new rules, not applying the interpretation to any particular set of facts. Although the *Clarification Order* discussed the prohibition on charging for "functions not actually provided,"[8] contrary to AT&T's claims, the FCC's staff did not determine what functions YMax does or does not "actually provide." The order does not even contain any factual discussion about YMax's services.

Indeed, AT&T's "tangible connections" theory has no support in the FCC's access charge rules. These rules divide switched access service into a number of discrete elements, including common line, local switching, and local transport. *See* 47 C.F.R. § 69.301(b). The "common line" element recovers the cost of local loop connections between a LEC switch and an end user, the "local switching" element recovers the cost of the switch itself, and the "local transport" elements recover costs of connections between the LEC switch and the IXC's network.

Section 61.26 of the FCC's rules clearly permits a CLEC, like YMax, to bill switched access charges whenever it, or an affiliated or unaffiliated provider of VoIP services, performs the "functional equivalent" of an element of ILEC switched access service. YMax operates multiple Class 5 end office switches that connect to AT&T and others via TDM. These switches perform the functional equivalent of ILEC end office switching, which is the function of setting

---

[6] *AT&T Corp. v. YMAX Communications Corp.*, 26 FCC Rcd 5742, ¶ 34 (2011) ("*YMax Order*"), *petition for recon. pending.*

[7] *In re Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Order, 27 FCC Rcd 2142, DA 12-298, ¶ 4 (rel. Feb. 27, 2012) ("*Clarification Order*").

[8] *Clarification Order*, ¶ 4.

up and maintaining a switched voice path between an end user and an interexchange carrier for the duration of a call, including necessary signaling between the switch and the end user and between the end office switch and switches of other carriers. YMax only bills for functions it does perform, switching and transport. Because it does not provide "common lines" or loops, it does not charge for that function. AT&T's theory is that a carrier that *does* provide switching cannot bill for *that* function unless it also provides the *separate* common line function. The FCC rules and orders simply say no such thing.

AT&T's challenge of YMax's tariff is nothing more than a transparent attempt to evade paying access charges associated with intercarrier toll VoIP-PSTN traffic, despite the FCC's explicit decision in the *CAF Order* that Local Exchange Carriers may tariff such charges, through both federal and state tariffs, and be compensated for such traffic.[9] This is exactly the kind of gamesmanship, evasion, and arbitrage that the FCC was trying to stop in the *CAF Order*. The FCC sought to promote certainty and equity by ensuring that both TDM carriers and IP-based carriers were treated equally and subject to the same intercarrier compensation rules. AT&T itself is one of the very largest VoIP providers that originates and terminates calls "over the top."

AT&T is talking out of both sides of its mouth, because its ILECs continue to bill and collect switched access charges from other carriers for calls using "over the top" VoIP to different subsidiaries it owns. AT&T's subsidiaries are even separately certificated. It uses both femtocells/microcells to carry wireless traffic over its customers' ISP/Internet "over the top" too.

---

[9] *See, e.g., CAF Order*, ¶¶ 933-34, 944, 968-971. *See also Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Second Order on Reconsideration, 27 FCC Rcd 4648, FCC 12-47, ¶¶ 27-42 (rel. Apr. 25, 2012).

To take this a step further, AT&T switches the same customers around its various subsidiaries to game the system and make a mockery of what the FCC has done in access reform.

AT&T's criticisms of YMax's revised tariff pages are not new; they are similar to AT&T challenges against YMax's tariff filings in other states, including Alabama, Colorado, Georgia, Kentucky, Maine, Maryland, Ohio and West Virginia. YMax has responded to AT&T's flawed arguments in Maryland and in a June 21, 2012 letter to the FCC, both of which are attached hereto as Exhibits A and B, respectively. Also attached as Exhibit C is a letter from Level 3 Communications, LLC and Bandwidth.com to the FCC, which likewise disputes the positions taken by AT&T. As demonstrated above and in the attached, AT&T's substantive arguments have no merit and should be rejected.

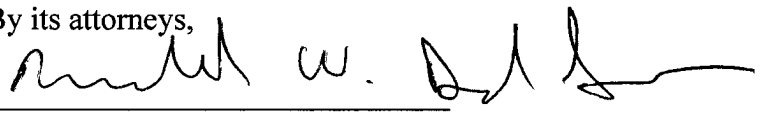
IV. Conclusion

For the foregoing reasons, the Commission should deny AT&T's Motion.

Respectfully submitted,

YMAX COMMUNICATIONS CORP.

By its attorneys,



Ronald W. Del Sesto (RI Bar No. 5925)
r.delsesto@bingham.com
BINGHAM MCCUTCHEN LLP
2020 K Street NW
Washington, DC 20006-1806
Tel: 202.373-6000
Fax: 202.373.6001

Date: July 12, 2012

Exhibit A

BINGHAM

Russell M. Blau
Direct Phone: +1.202.373.6035
Direct Fax: +1.202.373.6001
russell.blau@bingham.com

June 12, 2012

Via E-File and Overnight Delivery

Mr. David J. Collins
Executive Secretary
Public Service Commission of Maryland
William Donald Schaefer Tower
6 St. Paul St., 16th Floor
Baltimore, MD 21202-6806

Re: ML No. 138987: YMax Communications Corp.'s Tariff Revisions to Implement the Access Provisions of the FCC's Intercarrier Compensation Order

Dear Mr. Collins:

This letter responds, on behalf of YMax Communications Corp. ("YMax"), to the Complaint filed with the Commission by AT&T Communications of Maryland, LLC, and TCG Maryland ("AT&T") on May 17, 2012 (M.L. #139367), and the letter supporting AT&T's Complaint filed with the Commission by Verizon on May 30, 2012 (M.L. #139619). For the reasons explained below, the comments of AT&T and Verizon should be dismissed and YMax's tariff revisions should be permitted to take effect on July 1, as scheduled.

YMax submitted revisions to its MD Tariff No. 2 on April 30, 2012, in order to comply with the new requirements of the FCC's Intercarrier Compensation reform order[1] governing VoIP–PSTN traffic. This tariff transmittal incorporated numerous revisions designed to implement the FCC's requirement that VoIP–PSTN traffic be billed at interstate access rates, and the FCC's VoIP symmetry rule. As AT&T itself acknowledges, the FCC stated clearly its intention that local exchange carriers should be entitled to receive access charges on traffic terminated over VoIP facilities to the same extent as on traffic terminated over traditional TDM networks. (AT&T Complaint at para. 4, page 3.)

Unfortunately, AT&T and Verizon are actively starting to undermine the VoIP symmetry rule by refusing to pay access charges for calls that originate or terminate on VoIP networks. This is particularly surprising because AT&T and Verizon themselves are two

[1] *In re Connect America Fund, etc.*, FCC 11-161, 26 FCC Rcd 17633 (2011) ("*FCC Reform Order*").

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

T +1.202.373.6000
F +1.202.373.6001
bingham.com

of the very largest VoIP providers themselves who originate and terminate calls "over the top." These two companies are talking out of both sides of their mouths, because their ILECs continue to bill and collect switched access charges from other carriers for calls that they terminate using IP technology to different subsidiaries, often separately certificated. To take it a step further, they switch their customers around their various subsidiaries to game the system and make a mockery of what the FCC has done in access reform.

AT&T and Verizon do not even address, much less protest, most of the tariff revisions submitted by YMax. Their arguments focus entirely on a single sentence in section 2.2.6(A)(2): "As long as the Company is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, then the provision by the Company of any portion of the transport or termination of VoIP-PSTN Access Traffic shall be considered the functional equivalent of the access service typically provided by an incumbent local exchange carrier, regardless of the technology or network structure employed by the Company or the VoIP Service provider to perform that function." AT&T and Verizon both claim that this sentence is inconsistent with the declaratory ruling issued by the FCC's Wireline Competition Bureau on February 27, 2012.[2]

In order to avoid any doubt as to the legality of its tariff, YMax is willing to remove the sentence quoted above, although it will continue to rely on the FCC's rules stating that a local exchange carrier's ability to impose access charges does *not* depend on the technology or network structure employed by the carrier or by a VoIP service provider to perform the functions associated with access service. As the FCC stated, its rules "focus specifically on whether the exchange of traffic occurs in TDM format (and not IP format), *without specifying the technology used to perform* the functions subject to the associated intercarrier compensation charges."[3] YMax attaches hereto a proposed revised tariff page 9-1 that replaces this one provision.

With this modification, YMax's tariff revisions are substantially identical to those previously filed by numerous other carriers and permitted to take effect without suspension or investigation, including Bandwidth.com (tariff revisions filed Feb. 8, 2012; eff. Mar. 10, 2012), Comcast Phone of Northern Maryland, Inc. (tariff revisions filed Dec. 14, 2011, ML #135990; eff. Jan. 11, 2012), Global Crossing Local Services, Inc. (tariff revisions filed Feb. 24, 2012; eff. Mar. 25, 2012), and tw telecom of Maryland llc (tariff revisions filed Jan. 13, 2012).

The FCC's rules are clear that a CLEC, like YMax, is entitled to bill switched access charges whenever it, or an affiliated or unaffiliated provider of VoIP services, performs the "functional equivalent" of an element of ILEC switched access service. YMax

---

2 *In re Connect America Fund, etc.*, DA 12-298 (released Feb. 27, 2012).

3 *FCC Reform Order*, para. 969 (emphasis added).

operates a network of Class 5 end office switches nationwide, including one in Baltimore, that connect to AT&T, Verizon and others via TDM. These switches perform the functional equivalent of ILEC end office switching, which is the function of setting up and maintaining a switched voice path between an end user and an interexchange carrier for the duration of a call, including necessary signaling between the switch and the end user and between the switch and other switches in the network. Sometimes, but not always, an ILEC provides the "common line" element of switched access service, which is a dedicated loop facility between the end office switch and the end user. These loop facilities are being used less and less as more modern technologies are deployed. The common line, however, is a separate and distinct element of switched access service, which YMax neither employs nor bills for. YMax only bills for those elements (end office and transport) that it does provide.

YMax's tariff should be permitted to become effective like each of the other filings noted above, and AT&T's and Verizon's protests should be dismissed. In the alternative, if the Commission believes that AT&T or Verizon has presented any issue that still needs to be investigated even after YMax has voluntarily revised its tariff as described above, then YMax requests that the Commission schedule an evidentiary hearing on such issues as quickly as possible so that any doubt as to the legality of its proposed tariff provisions can be resolved.

YMax also wants the Commission to know that it will ask the FCC to intervene on matters such as this with the States. Bandwidth.com and Level 3 Communications have recently asked the FCC to intervene on very similar matters, and to reject AT&T's erroneous interpretation of the VoIP traffic rules.

Sincerely yours,

Russell M. Blau
Counsel for YMax Communications Corp.

cc: Carlos Candelario
Juan Carlos Alvarado
Theresa Czarski
Philip S. Shapiro
Jeffrey A. Rackow

Exhibit B

June 21, 2012

Via Email and Hand Delivery

Mr. James Carr
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Jim:

Thank you for the opportunity to meet recently with you and other staff of the Office of General Counsel ("OGC") and Wireline Competition Bureau ("WCB" or "Bureau") to discuss MagicJack's and YMax Communications Corporation's[1] concerns regarding AT&T's appeal of the *USF/ICC Transformation Order*, as well as AT&T's and Verizon's positions in pending civil litigation in the Northern District of California.

The FCC's defense of the VoIP symmetry rule adopted in the *USF/ICC Transformation Order*, paras. 968-971, against AT&T's appeal is crucial to the ongoing development of the VoIP sector and the transition to all-IP networks. If IP-based networks (including physical interconnection via TDM with Bell Operating Companies) are not entitled to the same regulatory status as TDM networks, including the same rights to receive compensation, then incumbent carriers will have a heightened incentive to drag their feet in rolling out IP technology and our country's telecommunications networks will take many steps backwards.

Unfortunately, AT&T and Verizon are not even waiting for the outcome of the appeal, but are already actively starting to undermine the VoIP symmetry rule by refusing to pay access charges for calls that originate or terminate on VoIP networks. This is particularly surprising because AT&T and Verizon themselves are two of the very largest VoIP providers themselves who originate and terminate calls "over the top." These two companies are talking out of both sides of their mouths, because their ILECs continue to bill and collect switched access charges from other carriers for calls using "over the top" VoIP to different subsidiaries they own. These subsidiaries are even separately certificated in at least AT&T's case. They both use femtocells/microcells to carry wireless traffic over their customers' ISP/Internet "over the top" too. To take it a step further, they switch the same customers around their various subsidiaries to game the system and make a mockery of what the FCC

---

1 YMax Communications Corp. ("YMax") is a CLEC licensed to operate in approximately 49 states, and has filed interstate tariffs with the FCC as a non-dominant carrier. It is a subsidiary of magicJack VocalTec Ltd., a publicly-traded company (NASDAQ:CALL).

has done in access reform. We believe AT&T is flat out lying to the FCC and many State Commissions and are also charging for what they say we should not collect ourselves. Besides our request below, we feel it is necessary that the FCC investigate this unlawful behavior of AT&T.

This is exactly the kind of gamesmanship, evasion, and arbitrage that the Commission was trying to stop in the *USF/ICC Transformation Order*. The Commission sought to promote certainty and equity by ensuring that both TDM carriers and IP-based carriers were treated equally and subject to the same intercarrier compensation rules. Verizon's and AT&T's actions are already making a shambles of the whole intercarrier compensation reform, and halting the transition to all-IP networks. The Commission should take a strong public position on this issue to prevent it from erupting into yet another resource-sapping round of litigation that is beating down smaller competitors who cannot collect access charges they are entitled to, and is stopping the Commission from achieving the goals of access charge reform.

As requested, I will have our counsel send you a selection of pleadings from the two District Court cases we discussed, which are *YMax Communications Corp. v. AT&T Corp. and BellSouth Long Distance, Inc.*, Case No. 10-CV-04115 CW, and *YMax Communications Corp. v. MCI Communications Services, Inc. d/b/a Verizon Business Services*, Case No. 10-CV-04298 CW. Although the two cases were filed separately in September 2010, they have been assigned as related cases to Judge Claudia Wilken. AT&T and Verizon have jointly filed a motion to dismiss YMax's claims in this case, and we will be in touch with your office concerning your possible participation as an *amicus*.

I also wanted to make you aware that AT&T, with Verizon's connivance, has started an aggressive campaign against IP-based carriers in general, and against YMax especially, by refusing to pay access charges and challenging access tariffs for VoIP-PSTN services in front of state public utility commissions. Recently, YMax filed tariff revisions with the Colorado Public Utilities Commission ("CO PUC") to update its tariff, consistent with the *USF/ICC Transformation Order* rules, to provide for charges equal to interstate access charges for origination and termination of VoIP-PSTN traffic.[2] In response, AT&T filed a Protest in which it falsely claims that the FCC has determined that YMax is not entitled to collect some or all elements of access charges on calls originating from or terminating to YMax end-users over VoIP technology. The FCC has said no such thing, and AT&T's argument transparently

---

[2] The full CO PUC docket is available online at https://www.dora.state.co.us/pls/efi/EFI_Search_UI.search, by searching for Proceeding Number: 12AL-461T.

misstates the FCC's rules and decisions with lies and diversions. Further, these carriers are billing and collecting for exactly what they say we should not.

AT&T's argument relies on the fact that YMax filed a request for clarification of the *USF/ICC Transformation Order* on a minor issue, and that the Bureau issued an order on February 27, 2012 clarifying one minor thing. However, AT&T distorted the meaning of the Bureau's Order and made up something out of thin air to produce a result that the Bureau clearly never intended. The Bureau's primary justification for refusing to interpret the rules as requested by YMax was to prevent double billing.

First of all, neither AT&T nor anyone else has actually claimed that they have been double-billed on any traffic originated or terminated by YMax. You can review the record before the FCC record, File No. EB-10-MD-005, and you will see that although AT&T's claims against YMax included practically everything, but the proverbial kitchen sink, they did *not* allege any double-billing.

Second, the Bureau's ruling that a LEC may not charge for "functions not performed by the local exchange carrier itself" or the VoIP provider necessarily implies that a LEC *may* charge for those functions that it or the VoIP provider *does* actually perform. We have recently found out that we were not singled out on this issue, but AT&T and Verizon essentially fabricated their own version of the Bureau's February 27, 2012 Order and are refusing to pay any Carriers using VoIP. Attached hereto as Attachment A is a copy of the Bandwidth.com and Level 3 ex parte letter filed with the FCC on June 11, 2012, since you may have not been directly involved.

AT&T seems to think that the last point can be skipped over – its Protest says that YMax is taking the "position that local exchange carriers may charge access rates regardless of whether the carrier actually performs the end-office function ...." This is nonsense. YMax performs the end-office function on VoIP-PSTN traffic that originates from or terminates to its end-users, and therefore is entitled to bill access charges for that function. YMax switches traffic in the same fashion AT&T and Verizon do in many instances and exactly like other Carriers do; however, AT&T and Verizon refuse to pay.

The Bureau's Order does not address what specific acts or services of YMax (or any other VoIP provider) constitute the "functional equivalent" of ILEC end office services for purposes of section 61.26 of the Commission's rules. Nor did the Commission address this issue in resolving AT&T's complaint against YMax.[3] Again, YMAX performs exactly the same functions as other carriers who use VoIP perform.

---

[3] *AT&T Corporation v. YMax Communications Corp.*, File No. EB-10-MD-005, Memorandum Opinion and Order, FCC 11-59, 26 FCC Rcd 5757 (rel. April 8,

Because of AT&T's lies and distortion to the staff of the CO PUC, the CO PUC suspended YMax's tariff based on AT&T's protest without even waiting for a response from us. As a result, YMax withdrew that tariff filing and re-submitted it without the particular provisions that the CO PUC staff asked to change. AT&T continues not to back away from these lies and has even protested YMax's latest revisions in Colorado. Now AT&T has been emboldened by its success in deceiving the CO PUC staff concerning these fake interpretations and is filing similar protests in numerous other states, including Maryland, Oklahoma, Ohio, and Alabama. Verizon has chimed in to support AT&T's filing in Maryland, consistent with its cooperation with AT&T's litigation position in California. In these filings, AT&T misrepresents the Bureau's Order in the same way it did in Colorado, and falsely claims that the FCC has "disallowed" YMax from billing access charges. In its Ohio protest, AT&T has expressly taken the position that end office access charges can never apply unless the CLEC, or its affiliated VoIP provider, is providing physical transmission facilities to the end user's premises, although the FCC has clearly never adopted such a preposterous rule. YMax is preparing to respond to AT&T's protests and feels an amicus filing from your office in one or more cases is clearly needed at this point. Without this being challenged by the FCC, YMax knows AT&T and Verizon, who represent the great majority of access charges being billed will grow to be even more dominate and pushing any competition further into the gutter. Sprint, T-Mobile, Frontier, YMax, XO, Bandwidth.com, Level 3, and many others were unable to turn a profit last year because of this type of dominance and not abiding by the rules. How can it be, they don't even want to pay access charges? Why should we carry Toll Free calls destined for AT&T customers if they don't want to pay for these calls to be delivered to them? Why should we pay any bills they give us, if they don't want to pay the most basic bill from us?

Clearly, AT&T and Verizon are going on a campaign before the State commissions because they have not been able to get what they want from the FCC, namely a ruling preventing *all* VoIP providers from collecting access charges. That is why AT&T is appealing the *USF/ICC Transformation Order*, and that is why it is disputing LEC access bills around the country.

2011); the Commission dismissed AT&T's claims under the "functional equivalent" rule and emphasized that "this Order addresses *only the particular language in YMax's Tariff* and the specific configuration of YMax's network architecture, as described in the record." *Id.*, para. 1 n.7 (emphasis supplied). The Commission's decision in that case was limited to the issue of whether YMax's services were offered in accordance with the specific terms of its then-effective interstate access tariff, which YMax has since amended and was approved after the FCC reviewed it.

This is despite the fact that the Commission reaffirmed its VoIP symmetry policy in strong terms just over a month ago in its Second Order on Reconsideration.[4] As the Second Order on Reconsideration explains, the Commission in the *USF/ICC Transformation Order* "adopted measures to ensure that its approach to VoIP intercarrier compensation was symmetrical to minimize marketplace distortions. This symmetrical approach seeks to provide all LECs the opportunity to collect intercarrier compensation under the same VoIP intercarrier compensation framework for the functions they (and/or their retail VoIP provider partner) perform in originating and/or terminating VoIP traffic."[5] The Second Order on Reconsideration reaffirmed the symmetry principle, stating that the Commission "adopted the symmetry requirement in the *USF/ICC Transformation Order* to avoid 'marketplace distortions that give one category of providers an artificial regulatory advantage in costs and revenues relative to other market participants.'"[6]

That artificial regulatory advantage is exactly what AT&T is seeking – it wants to be able to originate and terminate its interexchange calls on VoIP networks without having to pay *anything* for the privilege. If AT&T could convince state commissions that YMax is not entitled to collect for its end-office switching functions (despite the fact that YMax owns and operates numerous end office switches and AT&T and Verizon both charge and collect for exactly what they say they should not pay for), just because its end users connect via the Internet instead of over dedicated private facilities, then the same conclusion would necessarily apply to all other VoIP providers, and the VoIP symmetry policy would be nullified.

YMax believes that the FCC must take strong and prompt action to prevent AT&T and Verizon from continuing to lie, distort, and make a mockery of FCC orders, and from undermining the principle of VoIP symmetry on a state-by-state and case-by-case campaign of attrition. Obviously, AT&T and Verizon have far more resources than YMax, or any other competitor, to conduct this kind of campaign. They feel they only have upside when employing lies and distorting the truth to the FCC and the States. The FCC must stop this while it is in a position to do so. There are now so few companies in a profitable position to compete against these behemoths and it is getting worse.

YMax also wants the State Commissions to know that the FCC will intervene on matters such as this to stop carriers from inventing their own rules to avoid paying access charges. Bandwidth.com and Level 3 Communications have recently asked

---

4 FCC 12-47, released April 25, 2012.

5 *Id.*, para. 28 (footnotes omitted).

6 *Id.*, para. 42, quoting *USF/ICC Transformation Order*, para. 942.

the FCC to intervene on very similar matters, and to reject AT&T's erroneous interpretation of the VoIP traffic rules.

Please feel free to contact me if you have any questions about the matters discussed above.

Sincerely,

Daniel Borislow
President and Chief Executive Officer

Exhibit C

BINGHAM

June 11, 2012

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

Ms. Dortch,

On June 7, 2012, Greg Rogers of Bandwidth.com, Inc. ("Bandwidth"), the undersigned, on behalf of Bandwidth, Erin Boone and Michael Shortley of Level 3 Communications, LLC ("Level 3"), and John Nakahata of Wiltshire & Grannis, LLP, as counsel to Level 3, met with Victoria Goldberg, John Hunter, Randy Clarke, and Elizabeth Alexander of the Wireline Competition Bureau ("WCB"). Deena Shetler of the WCB also participated by phone.

The purpose of the meeting was to discuss one IXC's overbroad interpretation of the Commission's February 27, 2012 Clarification Order that has been used as the basis to violate the VoIP symmetry rule and withhold payment for end office switching. In particular, both Bandwidth and Level 3 stated that they faced non-payment of end office access charges by carriers claiming that they could not charge end office access charges because neither Bandwidth/Level 3 or their respective VoIP provider customers provided last mile transmission (rather than utilizing an end user's Internet access service to provide an "over-the-top" VoIP service). This is exactly the argument that AT&T raised at Sunshine prior to the issuance of the *CAF Order*, and that the FCC correctly rejected.[1] Bandwidth and Level 3 stated that they had no issue with the February 27, 2012 Clarification Order's holding that a LEC could not levy access charges for functions performed by neither the LEC or its affiliated or unaffiliated VoIP partner. However, the February 27, 2012 Clarification Order has been asserted by some parties (notably including AT&T) to mean that last mile transmission is a core function necessary for a LEC to levy end office local switching and related transport charges.

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

[1] *See* Letter of John T. Nakahata, Counsel to Level 3 Communications, LLC to Marlene H. Dortch, Secretary, FCC (filed Oct. 24, 2011). http://apps.fcc.gov/ecfs/document/view?id=7021723002

Bandwidth and Level 3 therefore asked the Bureau to clarify that "equivalent functionality" for end office switching does not require a CLEC and its affiliated or unaffiliated VoIP partner to provide the last mile facility to the end user. Nor does it require the CLEC and its affiliated or unaffiliated VoIP partner to provide the router that is closest to the end user customer, such as the ISP's router that directs Internet traffic to and from a broadband subscriber. Rather, the equivalent functionality of end office switching is 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. For example, if a CLEC, its affiliated or unaffiliated VoIP provider partner or the two acting together connect a trunk side port to a line side port, the two will have performed local switching, and thus the CLEC can bill for end office local switching. Neither the last mile loop nor the broadband Internet access provider's router that merely transits traffic to/from the end user performs functionality equivalent to end office switching because it does not manage the end user's interaction and initiate call set-up and takedown.

The Commission considered and rejected proposals that would have required the CLEC and its VoIP partner to be facilities-based or use specific technology. The USF/ICC Transformation Order adopted a symmetrical framework for VoIP-PSTN traffic to ensure that providers who pay lower rates for VoIP-PSTN traffic are restricted to charging the same lower rates. 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,[2] the Commission did not adopt any such language that could have implied a limitation. The USF/ICC Transformation Order amended section 61.26 of the Commission's rules and added section 51.913 to permit CLECs to bill access charges for switched access functions that are provided by "an affiliated or unaffiliated provider of interconnected VoIP services," provided there is no double-billing. A CLEC who, together with its VoIP partner, provides the functional equivalent of the access services defined in 51.903 is "entitled to assess and collect the full Access Reciprocal Compensation charges."[3] Section 51.903 defines "End office access service" to include "the routing of interexchange telecommunications traffic to or from the called party's premises, either directly or via contractual or other arrangements with an affiliated or unaffiliated entity, *regardless of the specific functions provided or facilities used.*"[4]

It is important not to confuse the functionality of local switching with the equipment and technology used to provide that functionality. 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 functional equivalent of end office access service.

---

2 *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).

3 47 C.F.R. § 51.913(b).

4 47 C.F.R. § 51.903(d)(2) (emphasis added).

CLECs (and their VoIP partners) provide the functional equivalent of local switching for calls that originate from or terminate to end users of over-the-top VoIP services. The CLEC assigns the NPAC number and provides the connection between the end user and all other carriers and end users connected to the PSTN. Together, the CLEC and its VoIP partner manage the end user's interaction with his or her telecommunications or VoIP service and provide the capability to make or receive calls.

Providers of broadband Internet access services do not provide the intelligent functionality to manage the end user's interaction with his or her telecommunications or VoIP service and provide the capability to make or receive calls. Rather, they route IP packets to a specific host address based on the packet header instructions and are technically incapable of creating a voice path between an end user and IXC. The broadband Internet access service provider does not perform end office switching functionality and does not bill the IXC for any functions it performs.

The Commission's rules do not distinguish between facilities-based and over-the-top VoIP providers and neither Bandwidth nor Level 3 have the means to do so given that their customers include both types of VoIP providers. Bandwidth and Level 3 urged the Commission to clarify that the February 27 Clarification Order did not determine that a CLEC and its over-the-top VoIP partner are categorically not providing the functional equivalent of end office switching. Although Bandwidth and Level 3 do not believe any such interpretation is consistent with the rules, they urged the Commission to clarify what constitutes "equivalent functionality" for local switching so that disputes over compensation for VoIP traffic do not continue to vex the industry with non-payment and litigation that the USF/ICC Transformation Order was designed to bring to an end.

Level 3 distributed a copy of its October 24, 2011 ex parte to the meeting participants.

Respectfully submitted,

/s/

Tamar E. Finn
Counsel to Bandwidth.com, Inc.

cc: Deena Shetler
Victoria Goldberg
John Hunter
Randy Clarke
Elizabeth Alexander
John Nakahata

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2012 I have served a copy of YMax Communications Corp.'s ("YMax") Objection to the Motion of the AT&T Entities to Reopen the Proceeding of YMax Regarding the Automatic Approval of the Tariff Application along with the transmittal and Exhibits to this filing upon all parties in the manner as listed below:

Luly Massaro
lmassaro@puc.state.ri.us
Commission Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888
(Via E-mail and Overnight Courier)

Leo Wold, Esq
lwold@riag.ri.gov
(Via E-mail)

Cynthia Wilson-Frias
cwilson@puc.state.ri.us
Senior Legal Counsel
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888
Tel: 401-780-2147
Fax: 401-941-1691
(Via E-mail and Overnight Courier)

Brian Kent
bkent@ripuc.state.ri.us
(Via E-mail)

Michael R. Dolan
Brown Rudnick LLP
mdolan@brownrudnick.com
10 Memorial Boulevard
Providence, Rhode Island 02903
Tel: 401.276.2600
(Via E-mail and Overnight Courier)

Ronald W. Del Sesto