Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	

DECLARATORY RULING

Adopted: February 2, 2015 **Released: February 11, 2015**

By the Commission: Chairman Wheeler issuing a separate statement; Commissioners Pai and O'Rielly dissenting and issuing separate statements.

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Heading Paragraph #

I. INTRODUCTION

1. In this document, on our own motion, we issue a declaratory ruling to ensure that the policies enacted by Congress and implemented by the Commission embrace modern communications networks, and encourage the deployment of, and transition to, IP-based networks and services.[1] The

[1] *See Technology Transitions et al.*, GN Docket No. 13-5 et al., Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, 29 FCC Rcd 1433, 1435, para. 1 (2014) (*2014 Technology Transitions Order*) (describing the "historic technology transitions that are transforming our nation's voice communications services – from a network based on time-division multiplexed (TDM) circuit-switched voice services running on copper loops to an all-Internet Protocol (IP) using copper, co-axial cable, wireless, and fiber as physical infrastructure." The Commission observed (continued…)

record in this proceeding reveals a dispute regarding the appropriate interpretation of the so-called "VoIP symmetry" rule that the Commission adopted in the 2011 *USF/ICC Transformation Order*. Importantly, the record suggests that the conflicting interpretations of the VoIP symmetry rule are hindering IP-to-IP interconnection negotiations.[2] To further the goals enacted by Congress and implemented by the Commission of promoting and protecting competition and increased access for voice services, we clarify that the VoIP symmetry rule applies in a technology- and facilities-neutral manner.

2. Specifically, this declaratory ruling terminates a controversy surrounding the assessment of end office switching charges under the VoIP symmetry rule as applied to VoIP-PSTN traffic.[3] Traditionally, end office switching charges are assessed by the local exchange carrier (LEC) that serves a particular customer. In its 2011 *USF/ICC Transformation Order*, the Commission addressed a situation that is becoming increasingly more common as customers migrate from legacy voice to VoIP services. In many cases now, customers purchase their voice services from interconnected VoIP providers, rather than LECs. Those VoIP providers, however, still in most cases rely upon LECs to deliver traffic to and from the public switched telephone network (PSTN). The majority of VoIP providers are "facilities-based," typically meaning that they provide the last-mile facility to the customer as well as the VoIP service (e.g., a cable provider that bundles VoIP services with video and broadband). But in some cases, the VoIP provider does not also provide the last-mile facility, and situations involving these "over-the-top" providers (e.g., Vonage) and the LECs they use to exchange traffic with the PSTN have generated disagreement about the intent of the Commission's rule. In the *USF/ICC Transformation Order*, the Commission stated that a LEC providing end office switching or its "functional equivalent" may assess Reciprocal Compensation Access Charges (access charges) for such services pursuant to the VoIP symmetry rule.[4]

3. In this declaratory ruling, we remove a question surrounding the VoIP symmetry rule[5] and confirm that it is technology and facilities neutral. It does not require, and has never required, an

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that modernized networks "dramatically reduce network costs, allowing providers to service customers with increased efficiencies that can lead to improved and innovative product offerings and lower prices," and can lead to "further investments in innovation that both enhance existing products and unleash new services, applications, and devices." *Id*. at 1435, para. 2).

[2] *See, e.g.,* Letter from Brita D. Strandberg, Counsel to Vonage Holdings Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1-2 (filed Feb. 12, 2014) (Vonage Feb. 12, 2014 *Ex Parte* Letter); *see also* Letter from Joseph C. Cavender, Vice President, Level 3, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 at 2 (filed May 16, 2014) (Level 3 May 16, 2014 *Ex Parte* Letter).

[3] *See* 47 C.F.R. § 1.2(a) ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."). The VoIP symmetry rule was adopted in the *USF/ICC Transformation Order*. *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, 18026-28, paras. 970-71 (2011) (*USF/ICC Transformation Order* or *Transformation Order*), *pets. for review denied sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). We use the following acronyms in a manner similar to their use in the *USF/ICC Transformation Order*: "VoIP" stands for "Voice over Internet Protocol"; "PSTN" stands for "Public Switched Telephone Network"; "IP" stands for "Internet Protocol"; and "TDM" stands for "Time Division Multiplexing." The Commission defines VoIP-PSTN traffic as "traffic exchanged over PSTN facilities that originates and/or terminates in IP format," and the definition is broad enough to include both interconnected and non-interconnected VoIP traffic. *See id.* at 18005-06, paras. 940-41 & n.1891 (explaining that VoIP-PSTN traffic in the *USF/ICC Transformation Order* includes "interconnected VoIP," and "PSTN" refers to traffic exchanged in TDM format).

[4] *USF/ICC Transformation Order*, 26 FCC Rcd at 18026-28, paras. 970-71.

[5] *See, e.g.*, Letter from Tamar Finn, Counsel to Bandwidth.com, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 2-3 (filed June 11, 2012) (Bandwidth June 11, 2012 *Ex Parte* Letter); Letter from Jack Zinman, General Attorney and Associate General Counsel, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45 et al., at 1-2 (filed July 16, 2012) (AT&T July 16, 2012 *Ex Parte* Letter); Letter from Tamar Finn, Counsel to
(continued…)

entity to use a specific technology or its own facilities in order for the service it provides to be considered the functional equivalent of end office switching.[6] Indeed, the record reflects no disagreement that a competitive LEC partnering with a facilities-based VoIP provider provides the "functional equivalent" of end office switching. As explained below, the same is true when the competitive LEC partners with an over-the-top VoIP provider to exchange traffic with interconnected carriers, and in both instances the competitive LECs may assess end office switching charges for such services.[7]

II. BACKGROUND

A. The *USF/ICC Transformation Order*

4. Prior to the *USF/ICC Transformation Order*, the Commission had declined to expressly address the intercarrier compensation obligations associated with VoIP traffic.[8] Some parties asserted that traffic originating or terminating in IP was subject to the same compensation as traditional voice traffic, while other carriers maintained that no compensation was due.[9] VoIP-PSTN traffic had been a particular source of intercarrier compensation disputes and litigation, with some states allowing providers to assess different access charges in various circumstances, with widely varying results.[10] Evidence in the record demonstrated asymmetric revenue flows for traffic exchanged between a traditional wireline LEC and a LEC partnering with a VoIP provider.[11] The Commission found that the existing intercarrier compensation system was "fundamentally in tension with and a deterrent to the deployment of IP networks," and was "riddled with inefficiencies and opportunities for wasteful arbitrage."[12] Finding that "current uncertainty and associated disputes" were "likely deterring innovation and introduction of new IP services to consumers," the Commission determined it appropriate, for the first time, to address intercarrier compensation for VoIP-PSTN traffic.[13]

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Bandwidth.com, and John Nakahata, Counsel to Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 5-10 (filed Sept. 10, 2012) (Level 3 and Bandwidth Sept. 10, 2012 *Ex Parte* Letter).

[6] *USF/ICC Transformation Order*, 26 FCC Rcd at 18026, para. 970.

[7] We interpret the filings that we address in this declaratory ruling to be premised on the fact that the LEC seeking to assess end office access charges also assigned the calling party telephone number as reflected in the database of the Number Portability Administration Center (NPAC). *See, e.g.*, Bandwidth June 11, 2012 *Ex Parte* Letter at 4 (noting that the competitive LEC assigns the NPAC number). We do not address the interpretation or application of our VoIP symmetry rule in cases where the LEC seeking to charge end office access charges does not assign the calling party telephone number. *Compare* Letter from Alan Buzacott, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 2 (filed Jan. 13, 2015) (Verizon Jan. 13, 2015 *Ex Parte* Letter) (arguing that the VoIP symmetry rule only applies if the competitive LEC is listed in the database of the NPAC as providing the calling party number), *and* Letter from Alan Buzacott, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 2 (filed Jan. 29, 2015) (Verizon Jan. 29, 2015 *Ex Parte* Letter) (asking the Commission to apply its ruling only if the competitive LEC is listed in the NPAC database as providing the calling party number), *with* Letter from Henry T. Kelly, Counsel to Peerless Network, to Ms. Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 et al., at 8-9 (filed Dec. 10, 2014) (Peerless Dec. 10, 2014 *Ex Parte* Letter) (stating that the payment of originating end office switched access charges is not limited to circumstances where the competitive LEC provides the ANI (automatic number identifier)).

[8] *See Connect America Fund et al.*, WC Docket No. 10-90 et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4746, para. 610 (2011) (*USF/ICC Transformation NPRM*).

[9] *Id*.

[10] *USF/ICC Transformation Order*, 26 FCC Rcd at 18003-04, para. 937.

[11] See *id.* at 18005, para. 938; *see also USF/ICC Transformation NPRM*, 26 FCC Rcd at 4746, para. 610 & n.920.

[12] *USF/ICC Transformation Order*, 26 FCC Rcd at 17669, para. 9.

[13] *Id.* at 18005, para. 939.

5. Accordingly, the Commission adopted a prospective transitional intercarrier compensation framework for VoIP-PSTN traffic.[14] In particular, the Commission determined that it was appropriate to adopt a "symmetric" framework.[15] The Commission explained that, under a symmetric approach, "providers that benefit from lower VoIP-PSTN rates when their end-user customers' traffic is terminated to other providers' end-user customers also are restricted to charging the lower VoIP-PSTN rates when other providers' traffic is terminated to their end-user customers."[16] It reasoned that a symmetrical approach best balanced its policy goals of encouraging migration to an all-IP network, reducing intercarrier compensation disputes, providing greater certainty to the industry regarding intercarrier compensation revenue streams, avoiding marketplace distortions and arbitrage that could arise from an asymmetrical approach to compensation, and advancing competitive and technological neutrality.[17]

6. To effectuate these goals, the Commission adopted rules that "permit a LEC to charge the relevant intercarrier compensation for functions performed by it and/or by its retail VoIP partner, regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture."[18] This rule is commonly referred to as the "VoIP symmetry rule." The rule ensures that VoIP providers and their LEC partners will have "the same opportunity, during the transition to bill-and-keep, to collect intercarrier compensation" for VoIP-PSTN traffic as providers that use traditional telecommunications infrastructure.[19] The Commission allowed, on a prospective basis, competitive LECs to charge the same intercarrier compensation as incumbent LECs under comparable circumstances for functions performed by them and/or their retail VoIP partners.[20] This rule was a departure from prior Commission policy that providers were allowed to charge for services that only they themselves provided.[21] The availability of these access charges is limited, however, as all terminating switched end office access charges will have transitioned to a bill-and-keep regime by 2020.[22]

7. The VoIP symmetry rule, codified in section 51.913(b) of the Commission's rules, specifies:

> Notwithstanding any other provision of the Commission's rules, a local exchange carrier shall be entitled to assess and collect the full Access

[14] *See id.* at 18026-27, para. 970; *see also* 47 C.F.R. §§ 51.913, 61.26(f). Specifically, this framework established default intercarrier compensation rates for toll VoIP-PSTN traffic equal to interstate access rates and default intercarrier compensation rates for other VoIP-PSTN traffic at otherwise applicable reciprocal compensation rates. *See USF/ICC Transformation Order*, 26 FCC Rcd at 18008, para. 944.

[15] *USF/ICC Transformation Order*, 26 FCC Rcd at 18026-28, paras. 970-71.

[16] *Id.* at 18007, para. 942.

[17] *Id.* at 18009-13, paras. 946-53.

[18] *Id.* at 18026-27, para. 970.

[19] *Id.* at 18025, para. 968.

[20] *Id.* at 18026-27, para. 970.

[21] Historically, the Commission's policy generally had been that carriers could assess charges only for services they themselves provided. *See Access Charge Reform*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9118-19, para. 21 (2004) (*Eighth Report and Order*). In 2004, the Commission extended this longstanding policy to competitive LECs. Thus, "the carriers needed both to provide the relevant access service and ensure that their access tariffs accurately identified the services provided." *Id*. at 9117, para. 18 ("access tariffs, like all other tariffs, must clearly identify each of the services offered and the associated rates, terms, and conditions"); *see also* 47 C.F.R. § 61.2(a).

[22] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17934-6, para. 801 & Figure 9. Under a bill-and-keep regime, "carriers look first to their subscribers to cover the costs of the network, then to explicit universal service support where necessary." *Id*. at 17676, para. 34.

> Reciprocal Compensation charges prescribed by this subpart that are set forth in a local exchange carrier's interstate or intrastate tariff for the access services defined in § 51.903 regardless of whether the local exchange carrier itself delivers such traffic to the called party's premises or delivers the call to the called party's premises via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect Access Reciprocal Compensation charges prescribed by this subpart for that traffic.[23]

8. Section 51.913(b) provides that a LEC is entitled to assess and collect access charges for services "defined in § 51.903."[24] Among the categories of services defined in 51.903 is End Office Access Services, which are defined as "the switching of access traffic at the carrier's end office switch and the delivery to or from of such traffic to the called party's premises."[25] Local switching is one of the rate elements of End Office Access Charges,[26] whereas there are separate common line charges that recover, as a general matter, the costs associated with the physical loop and line port.[27]

9. Pursuant to our rules, one of the permissible definitions of "End Office Access Service" is "any functional equivalent of the incumbent local exchange carrier access service."[28] Rule 51.903 also notes that "End Office Access Service rate elements" for a non-incumbent local exchange carrier may include "any functionally equivalent access service."[29] Thus, the definitions of both "end office access"

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[23] 47 C.F.R. § 51.913(b).

[24] *Id*. §§ 51.913(b), 51.903.

[25] *Id*. § 51.903(d)(1).

[26] *Id*. §§ 51.903(d)(3), 69.106. The Commission has noted that "end office switching rates are among the highest recurring intercarrier compensation charges." *AT&T Corp. v. YMax Communications Corp*., EB-10-MD-005, 26 FCC Rcd 5742, 5757, para. 40 (2011) (*YMax Complaint*).

[27] *See, e.g*., 47 C.F.R. §§ 54.901, 69.152-54, 69.104. Specifically, the line port provides the connection between the switch and the physical loop and is recovered through common line charges or universal service support. In 1997 and 2001, the Commission moved line port cost recovery from the local switching category to the common line categories. *See Access Charge Reform et al*., First Report and Order, CC Docket No. 91-213 et al., 12 FCC Rcd 15982, 16035, para. 125 (1997) (reassigning the line-side port costs from local switching rate element to the common line rate elements for price cap regulated carriers) (subsequent history omitted); *Multi-Ass'n Grp. (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 96-45 et al., Second Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19613, 19735, para. 303 (2001) (reallocating line port costs from local switching to the common line category for rate-of-return regulated carriers) (subsequent history omitted). Thus, costs associated with the line port are currently recovered through such common line charges as the End User Common Line (EUCL) charge, the Presubscribed Interexchange Carrier Charge (PICC), or the Carrier Common Line (CLL) charge. Except in the limited circumstances where a PICC or CCL is being charged, there is no danger that competitive LECs would be recovering these costs through benchmarked access charges.

[28] 47 C.F.R. § 51.903. *See id*. § 51.903(d)(3) ([End Office Access Service means] "Any functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier. End Office Access Service rate elements for an incumbent local exchange carrier include the local switching rate elements specified in § 69.106 of this chapter, the carrier common line rate elements specified in § 69.154 of this chapter, and the intrastate rate elements for functionally equivalent access services. End Office Access Service rate elements for an incumbent local exchange carrier also include any rate elements assessed on local switching access minutes, including the information surcharge and residual rate elements. End office Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access service.").

[29] *Id*. § 51.903.

service and "end office access" rate elements explicitly encompass "functionally equivalent" services. In the *USF/ICC Transformation Order*, the Commission also adopted measures to protect against double billing, and it clarified that the VoIP symmetry rule does not permit a LEC to charge for functions performed neither by itself nor its retail service provider partner.[30]

10. In adopting this rule, the Commission developed an approach designed to prevent the kinds of disputes arising from the "use of IP technology as well as the structure of the relationship between retail VoIP service providers and their wholesale carrier partners" that had arisen under the pre-existing intercarrier compensation regimes.[31] Whereas earlier decisions focused on switching functionality in the context of TDM networks,[32] the VoIP symmetry rule took the next logical step by allowing compensation for functionally equivalent services provided outside the TDM context. The Commission recognized that its approach to intercarrier compensation needed to evolve along with changing technologies and network functions.[33] Accordingly, the Commission determined that "VoIP calls will be on equal footing in their ability to obtain compensation for this traffic" during the multi-year transition of intercarrier compensation rates.[34]

B. Switching Functionality Guidance

11. Some parties have asserted that a competitive LEC partnering with an over-the-top VoIP provider cannot deliver the functional equivalent of end office switching,[35] and thus the competitive LEC is not entitled to assess and collect access charges for end office (or local) switching under the VoIP symmetry rule.[36] Parties rely on a number of Commission decisions, many of which were adopted prior to the *USF/ICC Transformation Order*, that address different aspects of switching and network architecture to identify the key end office switching functions, and therefore what the functional equivalent of end office switching may entail. We summarize these decisions below.

[30] *Id*. § 51.913(b); *USF/ICC Transformation Order*, 26 FCC Rcd at 18027, para. 970.

[31] *USF/ICC Transformation Order*, 26 FCC Rcd at 18025, para. 968.

[32] *See infra* Section II.B.

[33] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17670, paras. 10-11.

[34] *Id*. at 17678, para. 40.

[35] In 2005, the Commission stated that it "found it useful to divide VoIP providers into two general types: (1) facilities-based VoIP providers and (2) 'over-the-top' VoIP providers." *See Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18479, para. 87 (2005) (*Verizon/MCI Order*). Facilities-based VoIP providers, "including certain cable VoIP providers," are providers that "own and control the last mile facility" and "may own or lease the switching and transmission networks that are used to carry VoIP calls." *Id*. The other type of VoIP providers, called "over-the-top" VoIP providers, include "providers that require the end user to obtain broadband transmission from a third-party provider, and such VoIP providers can vary in terms of the extent to which they rely on their own facilities." *Id*. *See also SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18337-38, para. 86 (2005) (*SBC/AT&T Order*).

[36] *See*, *e.g.*, Letter from David L. Lawson, Counsel to AT&T, to Marlene H. Dortch, FCC, CC Docket No. 96-45 et al., at 1-13 (filed Jan. 17, 2013) (AT&T Jan. 17, 2013 *Ex Parte* Letter); Letter from Alan Buzacott, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45 at 1-2 (filed Feb. 28, 2013) (Verizon Feb. 28, 2013 *Ex Parte* Letter). Information filed in the record indicates that parties often use the terms "end office switching" and "local switching" synonymously. *See, e.g.*, AT&T Jan. 17, 2013 *Ex Parte* Letter at 6 ("A local, or end office, switch"); Level 3 and Bandwidth Sept. 10, 2012 *Ex Parte* Letter at 1; Bandwidth June 11, 2012 *Ex Parte* Letter at 1.

12. *RAO Letter 21, RAO Recon Order*. Several carriers cite to *RAO Letter 21* as an order that identifies the defining characteristics of switching functionality.[37] In 1992, the Common Carrier Bureau's Accounting and Auditing Division released *RAO Letter 21* to provide carriers with guidance about the correct accounting classification of remote switching equipment.[38] In an effort to distinguish between terminals that are part of the switching plant and terminals that are part of the loop plant, the Bureau identified a number of basic switching functions.[39] In response to petitions for reconsideration of the Bureau's letter, the Commission released the *RAO Recon Order*.[40] In that order, the Commission found that "interconnection, i.e., the actual connection of lines and trunks, is the characteristic that distinguishes switches from other central office equipment" in traditional circuit-switched networks.[41]

13. *YMax Complaint*. Several parties cite as dispositive a 2011 Commission-level decision concerning competitive LEC/over-the-top VoIP provider partnership functions. The *YMax Complaint* resolved a formal complaint between a competitive LEC named YMax and AT&T concerning disputed switched access charges.[42] YMax partnered with magicJack, a company that provided a device that plugged into a computer's USB port and a telephone jack on the other end.[43] Parties who wished to use the YMax-magicJack service had to agree to a service agreement requirement to "separately procure high speed Internet access service from a third-party ISP in order to use the magicJack device to place or receive calls."[44]

14. In the complaint, AT&T, in its role as an interexchange carrier (IXC), alleged that YMax violated the Act by assessing interstate switched access charges not authorized by its tariff.[45] The Commission examined YMax's tariff and noted that in its tariff definition, "end office switching" included "end office switches" where "station loops" that connect to end user premises are "terminated," and appeared to be "based on traditional ILEC tariffs, describing traditional networks."[46] The Commission held that, by construing these phrases together, "according to their common meaning in the industry," the phrases generally "refer to a physical transmission facility that provides a point-to-point

[37] *See, e.g.*, Level 3 and Bandwidth Sept. 10, 2012 *Ex Parte* Letter at 4-5; Letter from John T. Nakahata, Counsel to Level 3 et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 3-4 (filed Oct. 4, 2012) (Level 3 and Bandwidth Oct. 4, 2012 *Ex Parte* Letter). *But cf.* AT&T Jan. 17, 2013 *Ex Parte* Letter at 11 (asserting that the "Revised RAO 21 Letter do[es] not support the CLECs' claim").

[38] *Classification of Remote Central Office Equipment*, Letter, Responsible Accounting Officer, DA 92-1091, 7 FCC Rcd 5205 (Comm. Carr. Bur. 1992) (*RAO Letter 21*).

[39] *Id*. at 5205 n.1 ("The basic switching functions are: 1) Attending - monitors for off-hook signals; 2) Control - determines call destination and assigns call to available line or trunk; 3) Busy testing - determines whether the called line/trunk is busy; 4) Information receiving - receives control and busy test results; 5) Information transmitting - transmits control and busy test results to tell the alerting and interconnection functions whether to complete the call; 6) Interconnection - connects subscriber line to subscriber line or subscriber line to trunk; 7) Alerting - rings the called subscriber's line or other signaling means if the call is destined for another exchange; 8) Supervising monitors for call termination so the line can be released.").

[40] *See Petitions for Reconsideration and Applications for Review of RAO 21,* Order on Reconsideration, AAD 92-86, 12 FCC Rcd 10061 (1997) (*RAO Recon Order*).

[41] *See id.* at 10066-67, para. 11.

[42] *YMax Complaint*, 26 FCC Rcd 5742.

[43] *Id.* at 5744, para. 4.

[44] *Id.* at 5745, para. 5. The Complaint notes that "MagicJack . . . relies on YMax to obtain telephone numbers and interconnection to the public switched telephone network ("PSTN") for magicJack purchasers." *Id*. at 5744, para. 4.

[45] *Id.* at 5742, para. 1.

[46] *Id.* at 5755-56, para. 36 & n.108.

connection between an individual home or business and a telephone company office."[47] Because YMax did not provide a "physical transmission facility that provides a point-to-point connection," the Commission determined that YMax was not providing "end office switching" pursuant to its tariff.[48] The Commission declined to address, however, whether interconnected VoIP was "subject to intercarrier compensation rules and, if so, the applicable rate for such traffic."[49]

15. *YMax Clarification Order*. Several parties also rely on a 2012 Bureau-level decision that addressed a dispute over the recently-adopted VoIP symmetry rule. YMax sought clarification that it was entitled to charge the full benchmark level of access charges pursuant to the new VoIP symmetry rule "'whenever it is providing telephone numbers and some portion of the interconnection with the PSTN, and regardless of how or by whom the last-mile transmission is provided.'"[50] The Wireline Competition Bureau (Bureau) held that interpreting the rule in the manner proposed by YMax could enable double billing.[51] The possibility of double billing was an outcome that the Commission was careful to avoid in the *USF/ICC Transformation Order*.[52] Based on these potential outcomes, the Bureau disagreed with YMax's proposed interpretation of the VoIP symmetry rule.[53]

C. Nature of the Disputes

16. Numerous competitive LECs complain that two IXCs – AT&T and Verizon – are withholding payment for certain access elements when they partner with over-the-top VoIP providers.[54]

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[47] *Id.* at 5756-57, paras. 38-39.

[48] *Id.* at 5756-57, paras. 37-41.

[49] *Id.* at 5743 n.7.

[50] *Connect America Fund et al.*, WC Docket No. 10-90 et al., Order, 27 FCC Rcd 2142, 2144, para. 4 (Wireline Comp. Bur. 2012) (*Clarification Order*) (quoting Letter from John B. Messenger, VP-Legal & Regulatory, YMax, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (filed Feb. 3, 2012) (YMax Petition for Clarification)).

[51] *Id.* at 2144, para. 4.

[52] *Id.* (citing *USF/ICC Transformation Order*, 26 FCC Rcd at 18026-27, para. 970). YMax's interpretation could lead to double billing because, under that interpretation, YMax could charge the full benchmark access charge for providing "some portion" of the interconnection with the PSTN, but other entities involved in the last-mile transmission would also be able to charge the full benchmark access charge.

[53] *Id.* at 2144, para. 4.

[54] *See, e.g.*, Bandwidth June 11, 2012 *Ex Parte* Letter at 2-4; Level 3 and Bandwidth Sept. 10, 2012 *Ex Parte* Letter at 1-2, 14; Level 3 and Bandwidth Oct. 4, 2012 *Ex Parte* Letter at 1-2, 4-5. *See also* Letter from Jennifer P. Bagg, Counsel to Broadvox, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 2 (filed Dec. 21, 2012) (Broadvox Dec. 21, 2012 *Ex Parte* Letter); Letter from James C. Falvey, Counsel to CoreTel Virginia, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 2 (filed July 1, 2013) (CoreTel July 1, 2013 *Ex Parte* Letter); Letter from Michel Singer Nelson, Vice President of Regulatory and Public Policy, O1 Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1-2 (filed Aug. 22, 2013) (O1 Aug. 22, 2013 *Ex Parte* Letter); Letter from KC Halm, Counsel to TeleQuality Communications, to Ms. Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1 (filed March 22, 2013) (Telequality March 22, 2013 *Ex Parte* Letter); Letter from Lisa R. Youngers, Vice President and Assistance General Counsel, Federal Affairs, XO Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1-2 (filed Dec. 23, 2013) (XO Dec. 23, 2013 *Ex Parte* Letter). We find no evidence in the record that IXCs other than AT&T and Verizon are disputing local switching charges assessed by competitive LECs partnering with over-the-top VoIP providers. *See* Letter from Tamar E. Finn, Counsel to Bandwidth.com, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 et al., at 2 (filed Oct. 22, 2014) (Bandwidth Oct. 22, 2014 *Ex Parte* Letter) (asserting that other than AT&T, "[n]o other carrier disputed Bandwidth's end office switching charges under the VoIP symmetry rule until Verizon belatedly did so—nearly three years after the rule was adopted"); *see also* Letter from Christopher J. Wright, Counsel to Level 3 Communications, to Ms. Marlene H. Dortch, CC Docket No. 01-92 et al., at 4 n.16 (filed Dec. 10, 2014) (Level 3 Dec. 10, 2014 *Ex Parte* Letter).

AT&T and Verizon's refusal to pay is based on an assertion that neither the competitive LECs, nor their VoIP provider partners, provide either end office switching or the "functional equivalent" of end office switching, and thus neither party qualifies for access charges pursuant to the VoIP symmetry rule.[55] AT&T and Verizon claim that end office switching entails the "physical" work of connecting trunks to loops.[56] They argue that this physical work occurs only when a competitive LEC partners with a facilities-based VoIP provider because such a scenario provides the last-mile transmission into a home via an actual physical facility.[57]

17. The competitive LECs, in contrast, assert that they or their VoIP provider partner, when working together, provide the functional equivalent of end office switching and are eligible under the VoIP symmetry rule to charge end office switching for traffic that terminates to the VoIP provider's end user.[58] They argue that the position of AT&T and Verizon runs counter to the VoIP symmetry rule and the policy goals articulated in the *USF/ICC Transformation Order*.[59] Specifically, the competitive LECs observe that, in the *USF/ICC Transformation Order*, the Commission declined to adopt proposals that would apply VoIP-specific rates for only IP-originated or IP-terminated traffic, and that nothing in the *USF/ICC Transformation Order* or corresponding rules suggests that differences should exist in treatment between facilities-based VoIP providers and over-the-top VoIP providers.[60]

18. Level 3 urges this clarification of the VoIP symmetry rule pursuant to the Commission's authority under section 1.2 of its rules to issue a declaratory ruling interpreting rules, terminating controversies, and ending uncertainty.[61] Level 3 and Bandwidth also argue that such a declaratory ruling must be given retroactive effect.[62] AT&T and Verizon disagree and assert that the VoIP symmetry rule is clear that competitive LECs and their over-the-top VoIP provider partners may not assess intercarrier compensation charges for end office switching, and contend that if the Commission were to clarify rules to the contrary, it may only do so prospectively.[63]

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[55] *See* Bandwidth June 11, 2012 *Ex Parte* Letter at 2-3; Level 3 and Bandwidth Sept. 10, 2012 *Ex Parte* Letter at 1-2; AT&T July 16, 2012 *Ex Parte* Letter at 1-2. In 2013, Verizon met with Bureau staff to express its opposition to the competitive LECs' assertion that they are entitled to assess end office switching when they partner with over-the-top VoIP provider partners. *See, e.g.*, Verizon Feb. 28, 2013 *Ex Parte* Letter at 1-2; *see also* Letter from Alan Buzacott, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1-3 (filed May 6, 2013) (Verizon May 6, 2013 *Ex Parte* Letter); Letter from Alan Buzacott, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1-3 (filed May 24, 2013) (Verizon May 24, 2013 *Ex Parte* Letter).

[56] *See*, *e.g.,* AT&T Jan. 17, 2013 *Ex Parte* Letter at 5-6; Verizon Feb. 28, 2013 *Ex Parte* Letter at 1-2.

[57] *See*, *e.g.*, AT&T Jan. 17, 2013 *Ex Parte* Letter at 5-6; Verizon Feb. 28, 2013 *Ex Parte* Letter at 1-2, 16.

[58] *See*, *e.g.*, Bandwidth June 11, 2012 *Ex Parte* Letter at 2-3; Level 3 and Bandwidth Sept. 10 2012 *Ex Parte* Letter at 1-17; Bright House Feb. 1, 2013 *Ex Parte* Letter, Attach, 3-6; Inteliquent May 10, 2013 *Ex Parte* Letter, Attach, 3-4.

[59] *See*, *e.g.*, Level 3 and Bandwidth Sept. 10, 2012 *Ex Parte* Letter at 5-6.

[60] *See id*.

[61] *See* Letter from John T. Nakahata, Counsel to Level 3 Communications, and Tamar Finn, Counsel to Bandwidth.com, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 5-6 (filed Aug. 6, 2013) (Level 3 and Bandwidth Aug. 6, 2013 *Ex Parte* Letter) (citing 47 C.F.R. § 1.2).

[62] Letter from John T. Nakahata, Counsel to Level 3 Communications, to Ms. Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 6 (filed Nov. 3, 2014) (Level 3 Nov. 3, 2014 *Ex Parte* Letter); Letter from Tamar E. Finn, Counsel to Bandwidth.com, to Ms. Marlene H. Dortch, Secretary, FCC, CC Docket No. 10-92 et al., at 2 (filed Dec. 8, 2014 (Bandwidth Dec. 8, 2014 *Ex Parte* Letter). *See also* Peerless Dec. 10, 2014 *Ex Parte* Letter at 15.

[63] *See, e.g.*, AT&T *Ex Parte* Letter of Jan.17, 2013 at 15-16; Letter from Alan Buzacott, Executive Director, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 6 (filed Nov. 5, 2014) (Verizon Nov. 5, 2014 *Ex Parte* Letter).

III. DISCUSSION

19. For the reasons described below, we clarify that the Commission's VoIP symmetry rule does not require a competitive LEC or its VoIP provider partner to provide the physical last-mile facility to the VoIP provider's end user customers in order to provide the functional equivalent of end office switching, and thus for the competitive LEC to be eligible to assess access charges for this service.[64] It is apparent that some carriers may have interpreted the VoIP symmetry rule in a manner that is inconsistent with the Commission's intent in the *USF/ICC Transformation Order*. This misinterpretation is resulting in significant access charge disputes regarding legacy technological distinctions that were the subject of reform in the *USF/ICC Transformation Order*. As discussed below, such a result is contrary to both the language of the VoIP symmetry rule and the policies underlying its adoption. Moreover, the record suggests that this misinterpretation of the VoIP symmetry rule may be impacting negotiations concerning IP interconnection.[65] For these reasons, we find it necessary to address these issues and ensure that carriers are implementing our rules consistent with the *USF/ICC Transformation Order*.

A. The VoIP Symmetry Rule is Not Limited to Facilities-Based VoIP Services

20. In the *USF/ICC Transformation Order*, the Commission carefully considered various approaches to intercarrier compensation for VoIP-PSTN traffic.[66] Ultimately, it determined that a symmetrical approach would be most consistent with the Commission's policy goals.[67] The VoIP symmetry rule was adopted to effectuate the Commission's policy goals with an understanding that "competitive LECs should be entitled to charge the same intercarrier compensation as incumbent LECs do under comparable circumstances."[68] In particular, as noted above, the Commission stated that a competitive LEC may charge the relevant intercarrier compensation "for functions performed by it and/or its retail VoIP partner, regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture."[69] Thus, in adopting the VoIP symmetry rule, the Commission intended to provide similar, i.e., symmetric, intercarrier compensation rights for competitive LECs partnering with VoIP providers, and specifically where new and different technologies are used. There is nothing in the *USF/ICC Transformation Order* to suggest that the VoIP symmetry rule intended to draw any distinction between competitive LECs partnering with facilities-based VoIP providers and those partnering with over-the-top VoIP providers. That is, there is no explicit distinction made, nor is there analysis that implies such a distinction is appropriate. Rather, the discussion of the VoIP symmetry rule in the *USF/ICC Transformation Order* embraces the concept of compensation for new and non-traditional functionality.[70]

21. The language of the VoIP symmetry rule contemplates symmetrical compensation when providing VoIP services via new and different technologies. Section 51.913(b) provides that a LEC "shall be entitled to assess and collect the full Access Reciprocal Compensation charges" for access

[64] Because such charges ultimately are governed by applicable tariffs, however, we cannot conclude that access charges for end office switching are due in every circumstance. Assuming that the applicable tariff language contemplates charging for functionally equivalent services, a competitive LEC partnering with an over-the-top VoIP provider partner would presumably be entitled to collect for such charges.

[65] *See, e.g.*, Vonage Feb. 12, 2014 *Ex Parte* Letter at 1-2; *see also* Level 3 May 16, 2014 *Ex Parte* Letter at 2.

[66] *USF/ICC Transformation Order*, 26 FCC Rcd at 18003-05, 18009-13, paras. 936-39, 946-53.

[67] *Id.* at 18007, para. 942.

[68] *Id.* at 18026-27, para. 970.

[69] *Id*.

[70] *See, e.g.*, *id.* at 1813, 18025, 18026-27, paras. 953, 968, 970 ("we seek to ensure that our policies do not hinder the ongoing migration to all-IP networks;" "freeing up resources for investment and innovation;" "regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture").

services defined in § 51.903 whether the LEC carrier itself, or its affiliated or unaffiliated VoIP partner delivers the calls, as long as at least one member of the partnership provides the requisite functionality.[71] The rule places no restrictions on the types of VoIP providers with which competitive LECs may form partnerships.[72] Competitive LECs may partner with a variety of VoIP partners and collect symmetrical access charges for covered services as long as one of the partners jointly providing a call delivers the end office switching functionality. The final sentence of this rule emphasizes the flexibility allowed for functions provided by a LEC or its VoIP partner as part of transmitting telecommunications between designated points "using, in whole or in part, technology other than TDM" as long as the technology is used "in a manner that is comparable to a service offered by a local exchange carrier."[73] These phrases indicate an inherent flexibility in the rule and make clear that technology other than TDM can support similar compensation, as long as it is used in a comparable manner. Thus a competitive LEC/over-the-top VoIP provider partnership may use TDM technology or some other type of technology, so long as either the LEC or VoIP provider provides the functionally equivalent services at issue. Any prior Commission rules to the contrary were overridden by the VoIP symmetry rule.[74]

B. Application of the VoIP Symmetry Rule to Over-the-Top VoIP Furthers Commission and Congressional Policy to Embrace Modernized Networks and Services

22. The clarification provided here supports the goals articulated in the *USF/ICC Transformation Order* of encouraging the deployment of all-IP networks, protecting and promoting competition in the voice marketplace, reducing intercarrier compensation disputes, and avoiding marketplace distortions and arbitrage that could arise from an asymmetrical approach to compensation.[75] The clarification also supports the goals of the *2014 Technology Transitions Order* of "embracing[ing] modernized communications networks" that can "dramatically reduce network costs," while ensuring that the Commission's core statutory values remain, including "ubiquitous and affordable access" and competition.[76] Allowing more than just facilities-based VoIP providers to partner with competitive LECs to provide and collect access charges for the functional equivalent of end office switching will benefit consumers by broadening the number of innovative IP-based service offerings.[77] Clarifying when symmetry is required for compensation for VoIP-PSTN traffic under our rules further encourages migration to all-IP networks because such clarification eliminates asymmetry that some carriers may try to import into their IP-to IP interconnection negotiations informed by a misinterpretation or misapplication of that rule.[78] Finally, we expect that clarifying the Commission's intent concerning the

[71] 47 C.F.R. § 51.913(b).

[72] *Id.*

[73] *Id.*

[74] The first phrase of the rule is "notwithstanding any other provision of the Commission's rules." That phrase makes clear that the VoIP symmetry rule takes priority over potentially conflicting rules.

[75] *USF/ICC Transformation Order*, 26 FCC Rcd at 18009-13, paras. 946-53. In rejecting AT&T's challenge to the VoIP symmetry rule, the 10th Circuit held that it was "reasonable" for the Commission to adopt the rule in an effort to advance "the goal of promoting IP deployment." *In re FCC 11-161*, 753 F.3d at 1148.

[76] *2014 Technology Transitions Order*, 29 FCC Rcd at 1435, paras. 1-2.

[77] *See, e.g.*, *USF/ICC Transformation Order*, 26 FCC Rcd at 17671, para. 14 ("Those prior [reform] efforts helped usher in significant reductions in long distance rates and the proliferation of innovative new offerings . . . with substantial consumer benefits. We expect that today's ICC actions will have similar pro-consumer, pro-innovation results. . . . These benefits may take many forms, including . . . more innovative IP-based communications offerings."); *id.* at 17692, para. 78 (consumers "reap the benefits of the new technology and service offerings.").

[78] *See, e.g.*, *id.* at 18009-13, paras. 946-53.

proper application of the VoIP symmetry rule in the *USF/ICC Transformation Order* will reduce the intercarrier compensation disputes that have arisen over various interpretations of this rule.[79]

23. We also find that equal application of the rule furthers the goal of the *USF/ICC Transformation Order* to "reduce disputes and provide greater certainty to the industry regarding intercarrier compensation revenue streams."[80] Disputes and litigation divert critical carrier resources from the development of modern networks and services, thereby frustrating Commission and Congressional goals.[81] To implement the interpretation of the VoIP symmetry rule advanced by AT&T and Verizon, that is, to treat services differently based on the end-user's choice of broadband providers, would require AT&T and Verizon to distinguish between over-the-top VoIP services and other VoIP services.[82] Based on experience to date, we find it likely that treating over-the-top VoIP differently from facilities-based VoIP would only lead to additional intercarrier compensation disputes, costly litigation, and less certainty to the industry. Indeed, the record makes clear that the number of intercarrier compensation disputes regarding the VoIP symmetry rule arising from the very distinction that AT&T and Verizon support is rising.[83] Moreover, endorsing disparate treatment based on technological distinctions between facilities-based and over-the-top providers directly contradicts the advancement of "competitive or technological neutrality," as well as the ongoing migration to broadband networks through, among other things, competitive LEC-VoIP partnerships.[84]

24. We are not persuaded by AT&T's assertion that requiring symmetrical compensation for services provided jointly by a competitive LEC and its over-the-top VoIP provider partner is bad public

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[79] *See, e.g.*, *id.* at 18003, 18009, paras. 935, 946.

[80] *Id.* at 18020-22, para. 963 (discussing various ways in which carriers could distinguish VoIP-PSTN traffic during the transition, including the use of signaling, call detail information, or default or proxy mechanisms to account for such traffic).

[81] *See, e.g.*, Letter from Tamar E. Finn, Counsel to Bandwidth.com, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 et al., at 1 (filed Dec. 5, 2014) (Bandwidth Dec. 5, 2014 *Ex Parte* Letter); O1 Aug. 22, 2013 *Ex Parte* Letter at 1-2. *See also* Peerless Dec. 10, 2014 *Ex Parte* Letter at 7 (stating that a rejection of the IXCs' "categorical exclusion to compensation for end office switched access services will further encourage investment in IP infrastructure by giving the industry assurances that the functions and rate elements that they provide in IP will be compensated").

[82] *USF/ICC Transformation Order*, 26 FCC Rcd at 18020-21, para. 963.

[83] *See, e.g.*, Peerless Dec. 10, 2014 *Ex Parte* Letter at 2 (asserting that since the adoption of the VoIP symmetry rule, Verizon and AT&T began "to significantly increase the volume of disputes for Peerless access charges for the end office services provide[d] and its VoIP partners" and that they "not only refuse to pay access charges on VoIP OTT traffic, but [have] invented new disputes for access charges they had previously paid, resulting in a claimed 'claw back' of prior payments"); Bandwidth Oct. 22, 2014 *Ex Parte* Letter at 2 (asserting that Verizon has "belatedly" disputed "all previously paid tariffed end office charges in their entirety, and refused to pay all such charges prospectively," and that "the sums at issue in the dispute are significant"); Bandwidth Dec. 5, 2014 *Ex Parte* Letter at 1 (asserting that "[e]very month of delay in addressing this issue costs Bandwidth time and money in disputed and unpaid access bills, diverting resources from running and growing its business, unlocking IP innovation for well-established and emerging partners on the creative edge of IP user experiences"); XO Communications Dec. 23, 2013 Ex Parte Letter at 1-2 (stating that "AT&T's interpretation of access charges applicable to VoIP-PSTN traffic turns the VoIP symmetry rule on its head, increasing carrier disputes where AT&T has withheld payment of end office access charges that do not meet AT&T's criteria"); O1 Aug. 22, 2013 *Ex Parte* Letter at 1-2 (stating that it "has been attempting to resolve intercarrier compensation disputes without success . . . for years" with AT&T and Verizon, and that since January 2, 2012, "this issue alone has tied up millions of dollars . . . capital that O1 would like to invest into its network and the company"). *See also* Bandwidth June 11, 2012 *Ex Parte* Letter at 2; Bright House Feb. 1, 2013 *Ex Parte* Letter, Attach, 3; Broadvox Dec. 21, 2012 *Ex Parte* Letter at 2; CoreTel July 1, 2013 *Ex Parte* Letter at 2; Inteliquent May 10, 2013 *Ex Parte* Letter at 2; Level 3 and Bandwidth Sept. 10, 2012 *Ex Parte* Letter at 1-2; Telequality March 22, 2013 *Ex Parte* Letter at 1.

[84] *See USF/ICC Transformation Order*, 26 FCC Rcd at 18010, 18013, paras. 948, 953.

policy because "low barriers to entry" to over-the-top VoIP service will create a "blueprint for economic distortion" by allowing over-the-top VoIP entities who only need a "negligible investment in a rack of equipment" to form for the purpose of collecting access charges.[85] The Commission's goal in the *USF/ICC Transformation Order* was to facilitate the deployment of and transition to all-IP networks.[86] To that end, the Commission is in the process of transitioning to a default bill-and-keep framework where carriers look to their end users to cover the costs of the network.[87] The VoIP symmetry rule was adopted to bring VoIP-PSTN traffic within the framework adopted as part of its plan for addressing VoIP-PSTN traffic. The Commission stated that its prospective intercarrier compensation framework "best balances the relevant policy considerations,"[88] and that it did not want its policies during this transition, including symmetrical compensation for functionally equivalent services, to "hinder the ongoing migration to all IP networks."[89] Further, as discussed below, asymmetric compensation for over-the-top VoIP services raises policy concerns because such a framework may create marketplace distortions and perverse incentives for LECs to perpetuate legacy TDM technology.[90] Thus, consistent with the Commission's conclusions and overall policy goals in the *USF/ICC Transformation Order*, we find the VoIP symmetry rule as described herein will protect and promote competition for voice services, and facilitate the transition to an all IP network. Importantly, we retain jurisdiction to address any problems that may occur in the future under this framework.[91] Finally, as discussed above, the availability of these access charges is limited, as terminating switched end office access charges will have transitioned to bill-and-keep by 2020.[92]

25. Verizon expresses concern that the clarification adopted here would exacerbate both new and existing arbitrage schemes, especially with regard to originating 8YY traffic, and urges us to limit any clarification to terminating end office switching.[93] But Verizon presents no persuasive evidence to support its claim that such "schemes" are prevalent or will somehow proliferate under the clarification

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[85] Letter from Christi Shewman, General Attorney, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., Attach. 2 at 2 (filed May 17, 2013) (AT&T May 17, 2013 *Ex Parte* Letter) ("If the Commission endorses the CLECs' position, it will have created a blueprint for economic distortion . . . a thousand YMax's will bloom."). As an example of economic distortion, Verizon claims that allowing competitive LECs that partner with over-the-top VoIP providers to asses and collect end office switching will result in a "windfall, not symmetry," because neither provider has incurred "infrastructure investment." Verizon Nov. 5, 2014 *Ex Parte* Letter at 3; *see also* Letter from Alan Buzacott, Executive Director, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 3 (filed Nov. 10, 2014) (Verizon Nov. 10, 2014 *Ex Parte* Letter). The rationale underlying the VoIP symmetry rule was to give providers using IP networks and technology the same opportunity during the transition to collect intercarrier compensation as those providers that had not yet undertaken the transition. *See USF/ICC Transformation Order*, 26 FCC Rcd at 18025, para. 968. We agree with Level 3's assertion that the economic structure of ISP services is different than traditional PSTN services, and that the two should not be compared directly for investment recovery purposes. *See* Letter from Tamar Finn, Counsel to Bandwidth.com, and John Nakahata, Counsel to Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 6-7 (filed April 15, 2013) (Level 3 and Bandwidth April 15, 2013 *Ex Parte* Letter).

[86] *See, e.g.*, *USF/ICC Transformation Order*, 26 FCC Rcd at 18025-26, paras. 968-70.

[87] *See id.* at 17676, para. 34.

[88] *See id*. at 18009, para. 946.

[89] *See id.* at 18013, para. 953.

[90] *See infra* Section III.F (IP interconnection discussion). *See also* Vonage Feb. 12, 2014 *Ex Parte* Letter at 1-2; Level 3 May 16, 2014 *Ex Parte* Letter at 2.

[91] *See* 47 U.S.C. § 403.

[92] *See USF/ICC Transformation Order*, 26 FCC Rcd at 179034-6, para. 801 & Figure 9.

[93] Verizon Nov. 5, 2014 *Ex Parte* Letter at 2; *see also* Verizon Jan. 13, 2015 *Ex Parte* Letter at 2-3. *See also* Letter from James C. Falvey, Counsel to Broadvox, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 et al., at 2 (filed Nov. 6, 2014) (dismissing Verizon's traffic pumping claims as "fearmongering").

advanced here. And if parties do attempt to engage in any such 8YY originating arbitrage, the Commission has rules in effect specifically designed to address access stimulation.[94] The access stimulation rules as adopted in the *USF/ICC Transformation Order* apply to both originating and terminating traffic. To the extent there is any evidence of such abuses, such evidence should be presented to the Commission in the context of a complaint to determine whether there is a potential violation of our access stimulation rules. If Verizon believes that the current access stimulation rules are somehow insufficient to address such conduct, Verizon should present information and analysis supporting its contention to the Commission. Moreover, in the Further Notice portion of the *USF/ICC Transformation Order,* the Commission sought additional comment on issues related to originating access reform, including the appropriate treatment of 8YY originated minutes and whether it should distinguish between originating access reform for 8YY traffic and originating access reform more generally.[95] The arbitrage concerns raised by Verizon would arguably apply to all types of originating 8YY traffic and thus could be considered as part of the record on originating access reform more generally.

C. Functional Equivalency

26. The definition of "end office access service" in section 51.903 of the Commission's rules, as referenced in the language of the VoIP symmetry rule, allows for assessment of charges for services that are a "functionally equivalent access service."[96] By its terms, this "functionally equivalent" language applies to all VoIP traffic, but disputes have arisen regarding whether a competitive LEC and an over-the-top VoIP provider together provide the functional equivalent of end office switching. As discussed above, the Commission reasoned that a new functional equivalence approach to VoIP-PSTN traffic best balanced its policy goals of promoting competition in the voice marketplace, encouraging migration to all-IP networks, reducing intercarrier compensation disputes, providing greater certainty to the industry regarding intercarrier compensation revenue streams, and avoiding marketplace distortions and arbitrage that could arise from an asymmetrical approach to compensation.[97] This new approach takes a more holistic look at how calls are delivered to the end user, and represents a departure from prior Commission policy in which providers were allowed to charge access for services that only they themselves provided.[98]

27. Some parties to this dispute assert that the Commission should look to key physical switching functions identified in the TDM network, and attempt to identify similar physical functions in the IP network to determine whether the functional equivalent of end office switching occurs for competitive LECs partnering with over-the-top VoIP providers.[99] We decline to adopt such a constricted,

[94] *See* 47 C.F.R. § 61.26(g).

[95] *See USF/ICC Transformation Order*, 26 FCC Rcd at 18109-12, paras. 1296-1305.

[96] *See supra* Section II.A. *See also* 47 C.F.R. § 51.903(d)(3) ("End Office Access Service rate elements for an incumbent local exchange carrier also include any rate elements assessed on local switching access minutes, including the information surcharge and residual rate elements. End office Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access service.").

[97] *See supra* Section III.B.

[98] *See supra* Section II.A. Importantly, the Commission in the *USF/ICC Transformation Order* identified new considerations for determining functional equivalency in this specific context when it stated that the functions or technologies used under the VoIP symmetry rule do not need to "correspond precisely to those used under a traditional TDM architecture." *USF/ICC Transformation Order*, 26 FCC Rcd at 18026-7, para. 970. There is no reason to assume that preexisting, technology-specific, TDM-based guidance for determining functional equivalency would apply to the newly-adopted VoIP symmetry rule, particularly when the Commission emphasized in the *USF/ICC Transformation Order* that the functions or technologies used to provide VoIP are not constrained by traditional TDM architecture.

[99] *See, e.g.*, Level 3 and Bandwidth Sept. 10, 2012 *Ex Parte* Letter at 7-13. *See also* Letter from Christi Shewman, General Attorney, AT&T, to Ms. Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., Attach. (filed Mar. 14, 2013) (AT&T March 14, 2013 *Ex Parte* Letter); AT&T Jan. 17, 2013 *Ex Parte* Letter at 5-6.

narrow interpretation of "functionally equivalent." Direct comparisons between TDM network architecture and IP network architecture cannot be made precisely because IP-based networks do not involve the same types of physical connections as those found in traditional TDM networks. The fact that the two types of networks are different, however, does not mean that IP networks cannot deliver the functions that are equivalent to end office switching on TDM networks.[100] Indeed, the Commission's decision to consider the functions performed by competitive LECs and their over-the-top VoIP partners to be "functionally equivalent" to end office switching is consistent with longstanding Commission precedent regarding the nature of switching, as opposed to transmission or loop functions.

28. In *RAO Letter 21*, the Bureau identified a number of basic switching functions associated with a TDM call.[101] While not controlling in light of that decision's TDM focus and the intervening adoption of the *USF/ICC Transformation Order*, this enumeration of relevant functions is instructive. Together, these are an aggregation of functions that, solely for purposes of this decision, we will identify as call *control*, i.e., the functions necessary to ensure call set-up, conduct and take-down. Local switching ensures a connection from the transport (across the network) to the termination point (phone device). In the case of a traditional TDM call, this is accomplished by a local switch connecting the trunk to the termination line/end-point phone device.[102] In the case of a VoIP call, the call management system connects the packet stream crossing the Internet (transport) to the termination point (phone device).[103] In both cases, the connection between the transport and termination point is accomplished via call control functions. Thus, our application of the VoIP symmetry rule draws upon these call control functions when determining whether the functional equivalent of end office switching is provided, doing so in a manner consistent with the Commission's intent that its approach to intercarrier compensation evolve along with technological and marketplace changes.[104] The fact that an over-the-top VoIP provider and its competitive LEC partner perform functions different from those performed previously under a traditional TDM architecture does not mean that that they are not providing the functional equivalent of end office switching pursuant to the VoIP symmetry rule. Accordingly, we find that, under the VoIP symmetry rule, the functional equivalent of end-office switching exists when the intelligence associated with call set-up, supervision and management is provided.

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[100] The Commission has addressed the concept of functional equivalency in a variety of legal contexts and has concluded that functions do not need to be identical in order to be equivalent. These cases support our more holistic approach to functional equivalency as described above. *See supra* Section III.C. *See, e.g.*, *Ad Hoc Telecommunications Users Committee v. FCC,* 680 F.2d 790, 797 (D.C. Cir. 1982) ("The focus of the [functional equivalency] test should be practical, oriented to customers: what function or need do customers perceive to be satisfied by the services under examination? If customers perceive that two services perform the same function, price will govern choice. Sensibly, the functional equivalency test should be allowed to yield a determination that these services are 'like,' whether or not they are 'identical,' and we so hold.") (*Ad Hoc Telecommunications Users Committee*); *Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Fifth Report and Order, 17 FCC Rcd 21233, 21246, para. 27 (2002) ("Section 225 does not mandate identical payment methods, only functionally equivalent services at equivalent rates."); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act, as Amended, to Provide In-Region, InterLata Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20618, para. 139 (1997) ("equivalent access, as required by the Act and our rules, must be construed broadly to include comparisons of analogous functions between competing carriers and the BOC, even if the actual mechanism used to perform the function is different for competing carriers than for the BOC's retail operations."); *Policy and Rules Concerning Rates for Dominant Carriers,* CC Docket No. 93-197, Further Notice of Proposed Rulemaking, 10 FCC Rcd 7854, 7862, para. 38 n.106 (1995) ("Services need not be 'identical' to be functionally equivalent.").

[101] *See supra* Section II.B.

[102] *See generally* AT&T Jan. 17, 2013 *Ex Parte* Letter.

[103] *See* Level 3 and Bandwidth April 15, 2013 *Ex Parte* Letter at 1-6.

[104] *See* Level 3 and Bandwidth April 15, 2013 *Ex Parte* Letter at 1-2, 5.

29. The record indicates that competitive LECs and their over-the-top VoIP partners undoubtedly provide the call intelligence associated with call set-up, supervision and management.[105] Numerous filings detail the call control functions provided when delivering calls, including over-the-top VoIP calls.[106] Accordingly, we find that, under the VoIP symmetry rule, the call control functions provided jointly by a competitive LEC and its over-the-top VoIP partner are the functional equivalent of end-office switching.

30. AT&T contends that the defining function of end office switching is the actual connection of subscriber lines and trunks and that because that function is absent when competitive LECs and their over-the-top VoIP partners provide call control, they cannot be providing the equivalent of end office switching.[107] AT&T's argument, however, is inconsistent with the VoIP symmetry rule as adopted in the *USF/ICC Transformation Order* because it relies entirely on the technology used and ignores the functions provided. In a circuit-switched network the connection of trunks to lines is critical to call control because of the network architecture, which requires physical connections to be made between pieces of physical equipment. The Commission recognized this fact in the *RAO Recon Order*, when it found this connection fundamental to end office switching.[108] That is, absent the connection of trunks to lines on a circuit-switched network, there is no open line over which all the elements of call control can be exercised and a call can take place. In an IP world, the customer is separately paying for its broadband connection, which interconnects that customer to the Internet. This broadband service, whether purchased from an affiliate of the VoIP provider or a third party provider, is the facility over which the call transmission will take place. In order for an IP-based call to take place, broadband service must be operational. IP-based call control, the equivalent of end office switching, therefore does not require a physical connection of trunks to lines in order to provide the functional equivalent of end-office switching.[109]

31. AT&T and Verizon implicitly concede that competitive LECs partnering with *facilities-based* VoIP partners do provide the functional equivalent of end office switching.[110] The only significant

[105] *See* Letter from John T. Nakahata, Counsel to Level 3 Communications, and Tamar Finn, Counsel to Bandwidth.com, Inc. to Marlene H. Dortch, FCC, CC Docket No. 96-45 et al., at 7 (Aug. 8, 2013) (Level 3 and Bandwidth Aug. 8, 2013 *Ex Parte* Letter) (explaining that the functions performed by the switching equipment are the same for over-the-top VoIP calls as for all other calls). Specifically, the competitive LEC and VoIP partner determine call destination and directly code the call for receipt and decoding by the called party. *Id*. at 8. *See also* Level 3 and Bandwidth April 15, 2013 *Ex Parte* Letter at 1-2, 5.

[106] *See e.g.*, Bandwidth June 11, 2012 *Ex Parte* Letter at 2-4; Level 3 and Bandwidth Sept. 10, 2012 *Ex Parte* Letter at 2-4, 9-12; Level 3 and Bandwidth Aug. 8, 2013 *Ex Parte* Letter at 7-8; Level 3 and Bandwidth April 15, 2013 *Ex Parte* Letter at 1-2.

[107] *See* Letter from Christi Shewman, General Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 2 (filed Feb. 21, 2014) (AT&T Feb. 21, 2014 *Ex Parte* Letter) (citing *RAO Recon Order*, 12 FCC Rcd at 10062-63, para. 11).

[108] *RAO Recon Order*, 12 FCC Rcd at 10062-63, para. 11.

[109] Because we find that no physical connection is necessary, we likewise reject claims by Verizon that the media translation function in a VoIP originated or terminated call fails to provide the connection necessary to justify the imposition of end office switching charges. *See* Letter from Alan Buzacott, Executive Director, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 4 (filed Oct. 27, 2014) (Verizon Oct. 27, 2014 *Ex Parte* Letter).

[110] *See, e.g.*, Verizon Feb. 28, 2013 *Ex Parte* Letter at 2 ("[U]nlike facilities-based VoIP providers who typically provide this functionality, Level 3 and other competitive LECs that partner with over-the-top VoIP providers do not do this."); AT&T May 17, 2013 *Ex Parte* Letter at 1 ("[W]here a competitive LEC 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 competitive LECs have billed AT&T substantial charges for end office switch services that neither they nor their over-the-top VoIP partners provide . . . .'). *See also* AT&T Jan. 17, 2013 *Ex Parte* Letter at 5-6, 16 (claiming that end office switching entails the "physical" work of connecting trunks to loops, and that this physical work occurs

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difference in provisioning between facilities-based VoIP services and over-the-top VoIP services is whether the VoIP provider happens to own or control the transmission path over which the call is finally transmitted to the end user. Thus, a key distinction between facilities-based VoIP and over-the-top VoIP lies not in the switching or call control functionality, but rather in the ownership or leasing of the means of transmission to the customer premises.[111] This difference relates to transmission, which is distinct from end office switching,[112] and thus is not material to our determination that both facilities-based and over-the-top VoIP partnerships provide the functional equivalent of end office switching.[113] From the consumer's point of view, the issue of who owns the last-mile facility does not affect the perceived functionality.[114] Indeed, competitive LECs have explained that they "use the same switching plant to perform the same functions regardless of whether the call is sent to the called party over a TDM loop, a cable system owned by a loop-facilities-based VoIP partner, or an [over-the-top] VoIP partner."[115] If no difference exists in the *switching* functionality, then there is no reason under our rule why end office *switching* compensation can be provided in one case and denied in the other. As discussed above, the language of the VoIP symmetry rule contemplates compensation for new and different technology.[116] We therefore conclude that, under section 51.903 of our rules, a competitive LEC in conjunction with its over-the-top VoIP provider partner provides the functional equivalent of end office switching.

D. Precedent Revisited

32. AT&T and Verizon contend that we need not address this controversy because the Commission considered and rejected the competitive LECs' arguments in prior orders.[117] We disagree.

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only when a competitive LEC partners with a facilities-based VoIP provider because such a scenario provides the last-mile transmission into a home via an actual physical facility). No party disagrees with the concept that a competitive LEC/facilities-based VoIP provider partnership provides the functional equivalent of end office switching.

[111] *See, e.g.*, AT&T Jan. 17, 2013 *Ex Parte* Letter at 5-6. *See also supra* n.35 (Commission has found it useful to divide VoIP providers into two categories of providers, facilities-based and over-the-top, based on several factors, including whether the providers own or lease the last mile facility).

[112] The Commission's access charge rules recognize this difference: local switching and "carrier common line," or transmission and related services, are different rate elements. *See* 47 C.F.R. §§ 69.106, 69.154. Similarly, assertions that competitive LECs do not bear the cost of long transport between the switch and the end user's premises are not relevant to our determination of whether an over-the-top VoIP provider and its competitive LEC provider partner provide the functional equivalent of end office switching. *See, e.g.*, AT&T Jan. 17, 2013 *Ex Parte* Letter at 3-5.

[113] We also reject any suggestion that the "packet switching" referenced by AT&T is providing some type of control or intelligence function. *See* AT&T Feb. 21 *Ex Parte* Letter at 2 n.4. The packet switching described there can most accurately be described as IP network routing. As described in the article cited by AT&T, "'packet switching,' divides the input flow of information into small segments, or packets, of data which move through the network in a manner similar to the handling of mail but at immensely higher speeds." Lawrence G. Roberts, *The Evolution of Packet Switching* (Nov. 1978), *available at* http://www.packet.cc/files/ev-packet-sw.html (last visited Nov. 4, 2014). Thus, there is a distinction between packetized transmission or "packet switching" as referenced by AT&T and the call control functions discussed herein.

[114] *Cf. Ad Hoc Telecommunications Users Committee*, 680 F.2d at 797 ("The focus of the [functional equivalency] test should be practical, oriented to customers: what function or need do customers perceive to be satisfied by the services under examination?").

[115] Level 3 and Bandwidth Aug. 8, 2013 *Ex Parte* Letter at 7.

[116] *See supra* Section II.A.

[117] *See, e.g.*, AT&T Jan. 17, 2013 *Ex Parte* Letter at 8-9; Verizon May 6, 2013 *Ex Parte* Letter at 1 ("over-the-top VoIP providers do not provide end-office switching. That is why the Commission has ruled that competitive LECs cannot assess local end-office switching charges when they route over-the-top VoIP traffic over the public Internet.") (citing *YMax Complaint,* 26 FCC Rcd at 5742, paras. 36-45).

Below we discuss how the cases cited by these carriers are distinguishable from the facts before us or have been superseded by the changes adopted in the *USF/ICC Transformation Order*.[118]

33. *YMax Complaint*. Verizon argues that, in the *YMax Complaint*, "the Commission had . . . made clear that an over-the-top provider does not provide end office switching."[119] AT&T asserts that the Commission "recently and emphatically confirmed" in the *YMax Complaint* that "the Internet is *not* equivalent to a subscriber line, and the 'exchange of packets over the Internet' does not entitle a carrier [to] assess end office switching charges."[120] AT&T argues that this decision is "squarely on point" and refutes the competitive LECs' assertion that they may charge for end office switched access.[121] AT&T further alleges that competitive LECs partnering with over-the-top VoIP providers perform "the very same function that YMax was performing; they make the same arguments that YMax made; and the Commission's holdings that the central functionality of end office switching is connecting trunks to loops and that the exchange of packets over the Internet is not the connection of trunks to loops is as applicable to them as it was to YMax."[122] AT&T asserts that what the competitive LEC/over-the-top VoIP partnerships provide "more closely resembles tandem switching" than end office switching and states that it has been paying the competitive LECs for this traffic "at the tandem switching rate."[123]

34. AT&T and Verizon read the *YMax Complaint* decision too broadly. In that order, the Commission carefully restricted its findings to "the particular language in YMax's tariff and the specific configuration of YMax's network architecture."[124] YMax's tariff contained definitions and descriptions based on TDM-based functions and networks.[125] At the time the *YMax Complaint* was adopted, YMax (1) was not providing exchange access service using the technology described in its tariff, and (2) was prohibited from tariffing or otherwise recovering access charges for the services that it was providing in partnership with another company unless it provided the relevant functions itself. In contrast, the VoIP symmetry rule specifically provides that a competitive LEC may now (1) tariff and recover access charges for services that it provides in partnership with VoIP providers, and (2) charge the relevant intercarrier compensation regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture [126] The Commission also

[118] One of the decisions cited by AT&T is a proposed order issued by an administrative law judge of the Maryland Public Service Commission. *See* Letter from David L. Lawson, Counsel to AT&T, to Ms. Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 9 (AT&T Dec. 17, 2014 *Ex Parte* Letter) (discussing Proposed Order of Public Utility Law Judge, *In re Dispute between AT&T Commc'ns of Maryland, LLC, TCG Maryland and YMax Commc'ns Corp.*, Case No. 9295, at 11 (Oct. 26, 2012)). This proposed order is not a Commission precedent and does not represent the views of the Commission, and we therefore do not address it here. We note that this proposed order was ultimately set aside as moot by the Maryland Public Service Commission and therefore has no legal relevance even under Maryland law. *See Dispute between AT&T Commc'ns of Maryland, LLC*, TCG Maryland and YMax Commc'ns Corp., Slip Op., Case No. 9295, Order No. 85321, 2013 WL 265254 (Md. Pub. Serv. Comm. Jan. 18, 2013).

[119] Verizon Feb. 28, 2013 *Ex Parte* Letter at 1-2.

[120] AT&T Jan. 17, 2013 *Ex Parte* Letter at 2, citing *YMax Complaint,* 26 FCC Rcd at 5759, para. 44.

[121] AT&T Mar. 14, 2013 *Ex Parte* Letter at 3, citing *YMax Complaint*, 26 FCC Rcd at 5759, para. 44.

[122] *Id*. at 3, citing *YMax Complaint*, 26 FCC Rcd at 5759, para. 44.

[123] AT&T May 17, 2013 *Ex Parte* Letter at 1. *See also* AT&T Feb. 21, 2014 *Ex Parte* Letter at 1-2.

[124] *YMax Complaint,* 26 FCC Rcd at 5743 n.7 ("Moreover, we emphasize 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.").

[125] *Id.* at 5756 n.108.

[126] *See USF/ICC Transformation Order*, 26 FCC Rcd at 18026-27, para. 970. Additionally, the Commission's reference to prior orders, such as the *YMax Complaint*, in the VoIP symmetry section of the *USF/ICC Transformation Order* was part of a discussion of measures taken to prevent double billing under the new rule and in

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declined to make any conclusions about the functions that YMax provided at that time and whether such functions were the basis for a tariffed service, stating that "we express no view about whether or to what extent YMax's functions, if accurately described in a tariff, would provide a lawful basis for any charges."[127] Additionally, in the *YMax Complaint* the Commission looked to a number of "well established meanings within the telecommunications industry" for several terms because YMax's tariff did not contain definitions for those terms.[128] The Commission thus was not looking to those meanings for purposes of interpreting or applying the intercarrier compensation rules in place at that time, but for purposes of the tariff analysis. Noting that "it is well established" that "any ambiguity in a tariff is construed against the party who filed the tariff, in this case YMax,"[129] the Commission ultimately determined that it was "bound to resolve the [tariff term] ambiguities against YMax as the drafting party."[130] Consequently, insofar as industry-understood meanings of terms used in the tariff cut against YMax's proposed interpretation, that would be key to the tariff analysis.

35. Due to the narrow focus and holding of the *YMax Complaint*, we find that its narrow findings do not apply to the dispute before us. Even assuming *arguendo* that the *YMax Complaint* could be read more broadly, the VoIP symmetry rule adopted in the *USF/ICC Transformation Order* supersedes any potential limitation suggested by that decision with respect to traffic encompassed by that rule.[131] The *USF/ICC Transformation Order* changed the law with respect to the propriety of assessing access charges, and, as explained above, prospectively allowed competitive LECs to collect access charges for services that are functionally equivalent to TDM network functions and for functions performed in conjunction with their VoIP provider partners. While the Commission rule still exists that carriers must accurately describe services offered in their tariffs,[132] carriers are now allowed to charge for services that either they or their retail VoIP partners provide, as long as one of them provides the service and no double billing occurs.[133]

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no way suggested that the Commission was endorsing the reasoning underlying those prior decisions with respect to the new considerations adopted in the *USF/ICC Transformation Order:* that the functions or technologies used under the VoIP symmetry rule do not need to "correspond precisely to those used under a traditional TDM architecture." S*ee id*. at 18026-27, para. 970 & n.2028 (citing *YMax Complaint*, 26 FCC Rcd at 5757, 5758-59, paras. 41, 44 & n.120).

[127] *YMax Complaint*, 26 FCC Rcd at 5749 n.55.

[128] *See id.* at 5755-56, paras. 36-39.

[129] *See id.* at 5755, para. 33.

[130] *See id.* at 5758, para. 45.

[131] As discussed above, and contrary to the repeated objections of AT&T and Verizon, in the *YMax Complaint*, the Commission was careful to restrict its holdings to the facts of that case ("Moreover, we emphasize 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.") *YMax Complaint,* 26 FCC Rcd at 5743 n.7. *Contra* Letter from Christi Shewman, General Attorney, AT&T, to Ms. Marlene H. Dortch, WC Docket No. 10-90 et al., at 3-4 (filed Nov. 6, 2014) (AT&T Nov. 6, 2014 *Ex Parte* Letter) ("The mere fact that the case involved YMax's tariff provisions does not mean that the legal principles stated in that decision had application only to YMax. To the contrary, the Commission considered YMax's tariff with reference to Commission rules and policy."); Letter from Christi Shewman, General Attorney, AT&T, to Ms. Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 2-3 (filed Nov. 19, 2014) (AT&T Nov. 19, 2014 *Ex Parte* Letter); Verizon Nov. 10, 2014 *Ex Parte* Letter at 5-6 ("nothing in that [*YMax Complaint*] changed the Commission's longstanding view of the functions that constitute end office switching").

[132] 47 C.F.R. § 61.2(a).

[133] *See USF/ICC Transformation Order*, 26 FCC Rcd at 18026-7, paras. 970-71.

36. *Clarification Order*. We also disagree with those commenters who assert that the Commission previously considered and rejected these arguments in the *Clarification Order*.[134] As noted above, in 2012, YMax sought clarification that it was entitled to charge the full benchmark level of access charges pursuant to the new VoIP symmetry rule adopted in the *USF/ICC Transformation Order* "whenever it is providing telephone numbers and some portion of the interconnection with the PSTN, and regardless of how or by whom the last-mile transmission is provided."[135] The Bureau held that YMax's proposed interpretation of the VoIP symmetry rule "could enable double billing" as well as enable providers to charge "for functions not actually provided" due to the possibility of numerous carriers performing and charging for overlapping parts of end office switched access.[136] Because the Commission had been careful in the *USF/ICC Transformation Order* to avoid both double billing and charging for functions not performed, the Bureau denied YMax's requested interpretation.[137]

37. In the *Clarification Order*, the Bureau addressed the very narrow question of whether the provision of "telephone numbers and some portion of the interconnection with the PSTN" entitles a competitive LEC to charge the full symmetrical access charges.[138] In the dispute underlying this declaratory ruling, however, the competitive LECs do not claim to provide merely telephone numbers and "some portion of interconnection" with the PSTN. Rather, they claim that they are providing the functional equivalent of all of the end office switching functions, not just "some portion" of it.[139] Moreover, we find there is no indication in the record that double billing would occur if we issue this declaratory ruling.

38. *RAO Letter 21/RAO Recon Order*. Interested parties also cite the *RAO Letter 21* and *RAO Recon Order* to support their claims about end office switching functionality.[140] We recognize that elements of these decisions emphasize, among other things, the function of connecting lines and trunks in end-office switching. However, arguments based on these decisions are necessarily tied to TDM-based technologies.[141] Even under the preexisting access charge regime, the Commission declined to address

[134] *See, e.g.*, AT&T Jan. 17, 2012 *Ex Parte* Letter at 9.

[135] *Clarification Order*, 27 FCC Rcd at 2144, para. 4.

[136] *Id.*

[137] *Id.* (citing *USF/ICC Transformation Order*, 26 FCC Rcd at 18026-7, para. 970). YMax's interpretation could have led to double billing because, under its reading of the rule, YMax could charge the full benchmark access charge for providing "some portion" of the interconnection with the PSTN, but other entities involved in the last-mile transmission would also be able to charge the full benchmark access charge.

[138] *Id.* In the *Clarification Order*, the Bureau responded to the specific request therein: "YMax asks the Commission to confirm that under its new VoIP-PSTN 'symmetry' rule, a LEC is performing the functional equivalent of ILEC access service, and therefore entitled to charge the full 'benchmark' rate level, whenever it is providing telephone numbers and some portion of the interconnection within the PSTN, and regardless of how or by whom the last-mile transmission is provided." YMax Petition for Clarification at 1. We reject parties' attempts to infer findings outside of what was found in the *Clarification Order*. *See* AT&T Nov. 19 *Ex Parte* Letter at 3 (if the "Bureau intended CLECs to be able to assess local switching in these circumstances; it is inconceivable that it would have responded to YMax's request for clarification in the way that it did."); *see also* AT&T Nov. 6 *Ex Parte* Letter at 4; Verizon Nov. 10, 2014 *Ex Parte* Letter at 6-7; AT&T Nov. 19, 2014 *Ex Parte* Letter at 3. However these commenters or others might interpret YMax's request, the holdings in the *Clarification Order* were limited solely to the request as understood and characterized by the Bureau.

[139] *See, e.g.*, Level 3/Bandwidth June 4, 2012 *Ex Parte* Letter at 1-2.

[140] *See, e.g.*, AT&T Jan. 17, 2013 *Ex Parte* Letter at 6-15; Level 3 and Bandwidth Sept. 10, 2012 *Ex Parte* Letter at 7-13.

[141] *See generally RAO Letter 21*; *RAO Recon Order.*

whether or how that precedent applied in the context of IP networks.[142] In any case, the issue here is whether, under the holistic approach to interpreting the VoIP symmetry rule subsequently adopted in the *USF/ICC Transformation Order* described above, which is consistent with key elements of *RAO Letter 21* and the *RAO Recon Order*, an over-the-top VoIP provider provides the functional equivalent of end office switching.[143] We conclude that it does, and we find that the RAO precedents, although relevant, are not controlling to our findings here.

39. *CoreTel Virginia v. Verizon Virginia*. The Fourth Circuit recently issued an opinion that addressed a tariff billing dispute involving a competitive LEC's use of over-the-top VoIP to terminate traffic.[144] Verizon alleged that CoreTel, a competitive LEC, improperly billed for "end office switched access" because the service that CoreTel provided did not match the service described in CoreTel's tariff.[145] The court agreed, noting that CoreTel's state and federal tariffs provided that end office switching would include "terminations in the end office of end user lines."[146] The court observed that the Commission had interpreted this very phrase in the *YMax Complaint* and had held that it carried "a specific and established meaning: 'a physical transmission facility that provides a point-to-point connection between a customer premises and a telephone company office.'"[147] The court held that because CoreTel converts calls into an IP stream and delivers them over the Internet, it does not provide "the physical infrastructure over which calls are delivered from CoreTel's premises to its customers."[148] The court also noted that, although the general definition of switched access service in CoreTel's tariff made reference to IP technology, the tariff's specific definition of end office switched access did not, and that, because "the specific governs the general," the specific definition of end office switched access governed the dispute between CoreTel and Verizon.[149]

40. We find that this case does not impact the clarification provided here. Similar to the Commission's decision in the *YMax Complaint*, the CoreTel decision rests primarily on tariff language describing traditional TDM network architecture and functionality.[150] Many competitive LECs have incorporated tariff language that describes functionally equivalent services under the VoIP symmetry rule, either by explicitly reciting the VoIP symmetry rule, or by referring to the "functional equivalent" of TDM-based end office switching.[151] Because tariff language may now include compensation for

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[142] *See, e.g.*, *YMax Complaint*, 26 FCC Rcd at 5743 n.7 (declining to address whether interconnected VoIP was "subject to intercarrier compensation rules and, if so, the applicable rate for such traffic"); *id*. at 5749 n.55 ("we express no view about whether or to what extent YMax's functions, if accurately described in a tariff, would provide a lawful basis for any charges"); *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4745-46, para. 610 (stating that "the Commission has declined to explicitly address the intercarrier compensation obligations associated with VoIP traffic" and citing precedent).

[143] *See supra* Section III.A.

[144] *CoreTel Virginia v. Verizon Virginia, LLC*, 752 F.3d 364 (4th Cir. 2014) (*CoreTel*).

[145] *Id.* at 374.

[146] *Id.*

[147] *Id.* at 374, citing *YMax Complaint,* 26 FCC Rcd at 5742, para. 40.

[148] *Id.* at 374.

[149] *Id.*

[150] *See, e.g.*, *id.* at 374-75.

[151] *See, e.g.*, Level 3 Tariff, Tariff F.C.C. No. 4, Revised Page 6.1, Replaces Original Page 6.1 (effective Dec. 29, 2011) ("End Office Access Service" includes: "(3) Any functional equivalent of the incumbent local exchange carrier access service provided by Company including local switching, the carrier common line rate elements, and intrastate access services. End Office Access service rate elements for Company includes [sic] any functionally equivalent access service."); Broadband.com Tariff, FCC Tariff No. 1, Second Revised Page 36, Cancels First Revised Page 36 (effective Dec. 30, 2011) ("the Company will assess and collect switched access rate elements

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functional equivalent services provided by a competitive LEC or its VoIP provider partner under the VoIP symmetry rule, the CoreTel case does not necessarily preclude the application of end office switching charges in every case.

E. Retroactive Effect of the Declaratory Ruling

41. "'Retroactivity is the norm in agency adjudications,'" and our declaratory ruling regarding the interpretation of the VoIP symmetry rule in the context at issue here thus appropriately applies retroactively.[152] We reject AT&T and Verizon's argument that a "manifest injustice" would occur if the clarification adopted here was applied retroactively.[153] Manifest injustice results from reliance that is "reasonably based on settled law contrary to the rule established in the adjudication."[154] We find neither factor—departure from settled law nor reasonable reliance—present here.

42. In this declaratory ruling, we clarify the VoIP symmetry rule adopted in the *USF/ICC Transformation Order*; we do not depart from "settled law,"[155] nor do we substitute "new law for old law that was reasonably clear."[156] In particular, since shortly after the VoIP intercarrier compensation rules took effect, filings in the docket make clear that there was disagreement among some carriers regarding the interpretation of the VoIP symmetry rule in this context—first specific to traffic exchanged with AT&T, and later including Verizon.[157] These disputes involve the assertion by AT&T and Verizon that the VoIP symmetry rule contains a limitation or technical restriction that is not in the rule itself, nor the *USF/ICC Transformation Order*'s analysis, nor other subsequent precedent interpreting or applying that rule.[158] We agree with Level 3 that the "'mere lack of clarity in the law does not make it manifestly unjust

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under this tariff for access services, regardless of whether the Company itself delivers such traffic to the called party's premises or delivers the call to the called party's premises with contractual or other arrangements with an affiliated or unaffiliated provider of VoIP service. . . . [F]unctions provide[d] by the Company as part of transmitting telecommunications between designated points using, in whole or in party, technology other than TDM transmission in a manner that is comparable to a service offered by a local exchange carrier constitutes the functional equivalent of carrier access service.").

[152] *Qwest Services v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007) (*Qwest v. FCC*) (quoting *Am. Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (*AT&T v. FCC*)).

[153] *See, e.g.,* Level 3 Nov. 3, 2014 *Ex Parte* Letter at 5-6 (interpreting arguments made by AT&T as alleging a "manifest injustice" and citing *Qwest v. FCC*, 509 F.2d at 540).

[154] *Qwest v. FCC*, 509 F.3d at 540. *See also AT&T v. FCC*, 454 F.3d at 332; *Verizon Telephone Co. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2011)) (*Verizon v. FCC*).

[155] *Qwest v. FCC*, 509 F.3d at 540.

[156] *Verizon v. FCC*, 269 F.3d at 1109.

[157] *See, e.g.*, Bandwidth June 11, 2012 *Ex Parte* Letter ("the purpose of the meeting was to discuss one IXC's overbroad interpretation of" the *Clarification Order* and its interpretation of the VoIP symmetry rule); Level 3 and Bandwidth Sept. 10, 2012 *Ex Parte* Letter (discussing access charge dispute with AT&T); AT&T Nov. 15, 2012 *Ex Parte* Letter (discussing access charge dispute with AT&T). *See also* Telequality March 22, 2013 *Ex Parte* Letter at 1 (discussing access charge dispute with Verizon).

[158] For similar reasons, we reject numerous assertions by AT&T that our actions here represent "a sharp departure from prior practice and understandings," including well-settled terms and meanings. *See* AT&T Dec. 17 *Ex Parte* Letter at 3. As discussed herein, the "settled meanings" referenced by AT&T are either specific to TDM network functions and/or discrete circumstances where competitive LECs could only charge for services they themselves provided. *See, e.g., id.* at 5-6. Moreover, the "functional equivalence" description that AT&T contends establishes a general standard, *see id*. at 7, was specific to its circumstances and indisputably more constricted than the standard contained in the VoIP symmetry rule, which includes functions or technology that may not correspond precisely to TDM networks. *USF/ICC Transformation Order*, 26 FCC Rcd at 18026-7, para. 970. In light of these differences, we find that AT&T's alleged reliance on these "well-settled" meanings and understanding was not reasonable.

to apply a subsequent clarification of that law to past conduct.'"[159] Accordingly, we find that retroactive application of the VoIP symmetry rule as clarified in this declaratory ruling does not constitute a departure from a prior interpretation that was settled or reasonably clear.

43. We likewise reject any theory that our interpretation of the VoIP symmetry rule departs from reasonably clear law based just on our pre-*USF/ICC Transformation Order* precedent insofar as particular rules or decisions were not expressly disavowed in the *USF/ICC Transformation Order*. As described above, while certain older Commission precedent resolving issues arising in the context of TDM networks included criteria in the interpretation of end-office switching that are not all met in the context of VoIP services, prior to the *USF/ICC Transformation Order* the Commission expressly reserved judgment on the application of the prior legal framework to VoIP services.[160] As a general matter, then, there was no precise Commission interpretation of how prior access charge precedent applied to VoIP that the Commission necessarily would have expressly singled out and disavowed, particularly because the *USF/ICC Transformation Order* addressed intercarrier compensation associated with VoIP traffic on a purely prospective basis.[161] Moreover, the Commission recognized that the backdrop for its prospective VoIP intercarrier compensation rules was not just the disputed interpretations of its access charge rules but also reciprocal compensation precedent, which had operated in a different manner than its historical access charge rules in relevant respects.[162]

44. Rather than making incremental modifications to a particular, clearly applicable preexisting legal framework, the Commission thus was making a clean break from the intercarrier compensation regimes—and associated disputes—of the past in its prospective intercarrier compensation rules governing VoIP traffic. As a result, it only discussed specific ways in which the new framework departed from particular prior precedent to the extent it found it warranted by the record. In the case of the structure of LECs' relationships with VoIP providers, the Commission discussed in some detail how its new approach compared and contrasted with the various approaches reflected in prior access charge and reciprocal compensation precedent to emphasize how its VoIP symmetry rule would address the double-billing policy concerns underlying the prior access charge framework.[163] By comparison, the Commission addressed concerns arising from historical disputes about the relative operation of TDM and IP networks in a higher-level manner, but nonetheless indicated that the prospective approach it adopted was intended to ward off the types of disputes regarding IP networks and services that had occurred in the past under historical intercarrier compensation rules.[164] Consequently, we reject arguments for finding manifest injustice based on pre-*USF/ICC Transformation Order* precedent coupled with that *Order*'s failure to expressly disavow those particular decisions. Such arguments give undue weight to pre-

[159] *See* Level 3 Nov. 3, 2014 *Ex Parte* Letter at 5 (citing *Qwest v. FCC*, 509 F.2d at 540). *See also id*. at 5 (disputing AT&T and Verizon's assertion that "manifest injustice" would occur if the Commission were to allow retroactive application of the VoIP symmetry rule because such "injustice" would only result from a dramatic change from a preexisting rule, which "does not exist here."). Further, as stated in *Qwest v. FCC*, the "obvious fact that every loss that retroactive application of its . . . interpretation would inflict . . . is matched by an equal and opposite loss that non-retroactivity would inflict" on others." *Qwest v. FCC*, 509 F.2d at 540.

[160] *See supra* nn.8, 142.

[161] *See, e.g.*, *USF/ICC Transformation Order*, 26 FCC Rcd at 18008, para. 943.

[162] *See id.* at 18027-28, para. 971 & n.2029.

[163] *See id.* at 18026-28, paras. 970-71 (noting differences between the new approach and historical access charge rules and similarities between the new approach and the historical reciprocal compensation regime).

[164] *See id.* at 18025, paras. 968-69. *See also id*. at 18027-28, para. 971 n.2029 (comparing the VoIP symmetry rule to the historical reciprocal compensation framework, including among other things the fact that that framework "prohibits 'establishing with particularity the additional costs of transporting or terminating calls'") (citations omitted).

USF/ICC Transformation Order precedent in interpreting and applying the VoIP symmetry rule adopted in the *Order*.

45. Nor do we find evidence of reasonable reliance in the record here. Indeed, there is minimal evidence in the record of any reliance at all —reasonable or otherwise—on a contrary interpretation of the VoIP symmetry rule. Other than AT&T and Verizon, there is no record evidence of IXCs disputing payment for this traffic.[165] Insofar as the record does not reveal that AT&T and Verizon previously relied on a contrary interpretation of the VoIP symmetry rule, that counsels strongly against a finding of manifest injustice here.

46. We also do not find the evidence of reliance by AT&T and, later, Verizon to have been reasonable for purposes of the reliance component of the manifest injustice analysis. As to AT&T, as Level 3 observes, in a filing prior to the *USF/ICC Transformation Order*, AT&T recognized that a VoIP symmetry rule could lead to intercarrier compensation charges even in the case of over-the-top VoIP traffic.[166] For the reasons described above, we also do not find that the Commission precedent cited by AT&T provided a reasonable basis for it to rely on its contrary reading of the VoIP symmetry rule, given the language of the rule, the limits of the text of those prior decisions, and the ongoing disputes in the record regarding the interpretation of the rule as relevant here, which began shortly after the VoIP symmetry rule took effect. To the contrary, that collectively reveals a lack of clarity regarding how the issue here ultimately would be resolved. As the court explained in *Qwest v. FCC*, "[t]he mere possibility that a party may have relied on its own (rather convenient) assumption that unclear law would ultimately be resolved in its favor is insufficient to defeat the presumption of retroactivity when that law is finally clarified."[167] We thus likewise do not find any reliance by AT&T to have been reasonable, reinforcing our conclusion here that there is no manifest injustice from retroactive application of our interpretation of the rule to AT&T.

47. The record reveals that Verizon did not initially dispute payment for this traffic, and only began doing so in 2013, more than a full year after the relevant rules took effect.[168] By the time Verizon notified the Commission of its interpretation of the VoIP symmetry rule and decision to dispute these charges, the record before the Commission clearly revealed disagreements between AT&T and several competitive LECs regarding the interpretation of the VoIP symmetry rule.[169] Given that, coupled with the

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[165] *See, e.g.*, Bandwidth Oct. 22, 2014 *Ex Parte* Letter at 2 (asserting that other than AT&T, "[n]o other carrier disputed Bandwidth's end office switching charges under the VoIP symmetry rule until Verizon belatedly did so—nearly three years after the rule was adopted"); Level 3 Dec. 10, 2014 at 4 n.16.

[166] Level 3 Nov. 3, 2014 *Ex Parte* Letter at 6 (citing Letter from Robert W. Quinn, Jr., AT&T to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135, GN Docket No. 09-51 at 5 (filed Oct. 21, 2011)).

[167] *Qwest v. FCC*, 509 F.3d at 540.

[168] *See* Verizon Feb. 28, 2013 *Ex Parte* Letter; *see also supra* n.55. *See also* Telequality March 22, 2013 *Ex Parte* Letter at 2 (first discussion of access charge dispute with Verizon); Bandwidth Oct. 22, 2014 *Ex Parte* Letter at 2 (asserting that other than AT&T, "[n]o other carrier disputed Bandwidth's end office switching charges under the VoIP symmetry rule until Verizon belatedly did so—nearly three years after the rule was adopted"); Level 3 Dec. 10, 2014 *Ex Parte* Letter at 4 n.16.

[169] *See, e.g.*, Bandwidth June 11, 2012 *Ex Parte* Letter ("the purpose of the meeting was to discuss one IXC's overbroad interpretation of" the *Clarification Order* and its interpretation of the VoIP symmetry rule); AT&T July 16, 2012 *Ex Parte* Letter; Level 3 and Bandwidth Sept. 10, 2012 *Ex Parte* Letter. Indeed, the fact that Verizon paid end office switched access charges to competitive LECs partnering with over-the-top VoIP providers for years before it began disputing them, while other carriers paid the charges and AT&T simply has refused to pay the charges, highlights the controversy at issue here. *See* Bandwidth Oct. 22, 2014 *Ex Parte* Letter at 2 (asserting that "[n]o other carrier disputed Bandwidth's end office switching charges under the VoIP symmetry rule until several weeks ago, when Verizon belatedly did so – nearly three years after the rule was adopted" and that "Verizon now retroactively disputes all previously paid tariffed end office charges in their entirety and refuses to pay all such charges prospectively."); *see also* Broadvox Nov. 6, 2014 *Ex Parte* Letter at Attach, 6 (asserting that "AT&T and

(continued…)

other findings in our manifest injustice analysis above, we thus do not find any reliance by Verizon on a contrary interpretation to have been reasonable, and thus retroactive application to Verizon of our interpretation here would not be manifestly unjust.

48. For their part, AT&T and Verizon contend that the VoIP symmetry rule is "already clear" in that competitive LECs and their over-the-top VoIP retail partners may not assess end office switching charges, and accordingly, if the Commission were to "clarify" rules to the contrary, it must enact a rule change, which it may only implement on a prospective basis.[170] As an initial matter, for all the reasons discussed herein, we reject the assertion that our clarification constitutes a rule or policy change in light of prior precedent. As discussed above, the findings and conclusions in the *USF/ICC Transformation Order* do not support the limited application of the VoIP symmetry rule advanced by these parties.[171] Indeed, all of the policies underlying adoption of the transitional VoIP intercarrier compensation regime, including the VoIP symmetry rule, support the clarification advanced by the Commission here.[172] Additionally, as also discussed above, the description in the *USF/ICC Transformation Order* of how the rule would be applied and the text of the adopted rules support the clarification adopted herein. Further, the cases cited by AT&T and Verizon to support their proposed interpretation are distinguishable from the facts before us or have been superseded by the changes adopted in the *USF/ICC Transformation Order*.[173] Declaratory rulings are adjudicatory matters, in which retroactivity is presumed,[174] and clarifying the law and applying that clarification to past behavior are routine functions of adjudications.[175] Accordingly, we reject the contention that the clarification adopted in this declaratory ruling is a change in rule or change in interpretation that can only be applied prospectively.

49. AT&T and Verizon alternatively argue that, "even if the current rule were ambiguous," the Commission may not retroactively impose a "new, contrary interpretation" of the VoIP symmetry rule compared to the interpretation they have relied on up to this point; otherwise, an "unfair surprise" would result.[176] AT&T and Verizon suggest that an "unfair surprise" standard, which they draw from

(Continued from previous page)
Verizon cannot claim that the VoIP Symmetry Rule read clearly in their favor because for years Verizon interpreted it like Broadvox" and that "Verizon paid Broadvox's end office charges for services rendered for two whole years from January 2012 through January 2014" and that "it appears that Verizon only began disputing end office switching after it became aware of AT&T's self-help campaign"). This history contradicts any claim that the VoIP symmetry rule was settled before today.

170 *See, e.g.*, AT&T Jan. 17, 2013 *Ex Parte* Letter at 15-16 (asserting that "the current rules are already clear" and that the Commission "could only adopt the CLECs' change in policy through a new rulemaking" and "only prospectively"); Letter from Henry Hulquist, Vice President, Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., Attach. B at 3 (filed Oct. 3, 2014) (AT&T Oct. 3, 2014 *Ex Parte* Letter) (asserting that "agencies must 'deny retroactive effect' when there is 'a substitution of new law for old law that was reasonably clear'") (citing *Verizon v. FCC*, 269 F.3d at 1109); Verizon Oct. 27, 2014 *Ex Parte* Letter at 6-7 (asserting that the "plain text" of the VoIP symmetry rule in § 51.913 "precludes a LEC like Level 3 for charging for functions" like over-the-top VoIP/competitive LEC provider partner end office switching, and any "new interpretation" of 51.913 "would be a legislative rule and may only be applied prospectively").

171 *See supra* Section III.A.

172 *See supra* Section III.B.

173 *See supra* Section III.D.

174 *See, e.g.*, *AT&T v. FCC*, 454 F.3d at 332 (citations omitted). *See also Qwest v. FCC*, 509 F.3d at 536 ("there is no question that a declaratory ruling can be a form of adjudication") (citations omitted); 509 F.3d at 539 ("We start with the presumption of retroactivity for adjudications").

175 *See Qwest v. FCC*, 509 F.3d at 540.

176 *See* AT&T Oct. 3, 2014 *Ex Parte* Letter at Attach. 2 at 3, citing *Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2168 (2012) (*Christopher v. SmithKline*) (asserting that, as in this case, the "potential for unfair surprise is acute'"); Verizon Nov. 5, 2014 *Ex Parte* Letter at 8-11.

Christopher v. SmithKline, is applicable because they contend they reasonably relied on their contrary interpretation of the relevant precedent. As a threshold matter, we are not persuaded that *Christopher v. SmithKline's* discussion of "unfair surprise" is the appropriate standard here because that case dealt with questions of deference to an agency interpretation expressed in a brief, not the retroactivity of a decision an agency reaches in adjudication. Even if it were appropriate, we disagree that "unfair surprise" that would preclude any retroactive effect exists in this matter, and we find the case cited to support such assertion to be distinguishable.[177] As described above, we conclude that we are not changing our rules or our interpretation of them, and reject arguments that there was reasonable reliance on a contrary interpretation. Moreover, the *Christopher v. SmithKline* decision is distinguishable on a number of grounds. *Christopher v. SmithKline* involved 60-year old Fair Labor Standards Act rules, "decades-long practices of classifying" a type of sales team, and a "very lengthy period of conspicuous inaction" by the applicable regulatory body.[178] Unlike the facts in that case, there is no "long period of inaction" by the Commission, or "decades-long practices" regarding the interpretation and application of the VoIP symmetry rule to consider in the present dispute.[179] Additionally, all stakeholders on this issue, including both AT&T and Verizon, have debated the interpretation of this rule actively, both in written ex parte filings and in-person meetings, nearly since the adoption of the VoIP symmetry rule. Further, the dispute at issue in *Christopher v. SmithKline* involved a new interpretation of the relevant rule that only recently was put forward in agency *amicus* briefs, which involved rationales that evolved and changed as additional briefs were filed, ultimately persuading the Court that they were not entitled to deference.[180] In this declaratory ruling we do not change our VoIP symmetry rule or our interpretation of it. As a result, we find *Christopher v. SmithKline* inapplicable here.[181]

F. Effect on IP-to-IP Interconnection

50. Finally, the record suggests that some carriers have misinterpreted the nature and intent of the VoIP symmetry rule, resulting in intercarrier compensation disputes and asymmetric payments based on technological distinctions. This misinterpretation of the VoIP symmetry rule may be impacting negotiations concerning IP interconnection.[182] Parties allege that some providers will not enter into direct IP interconnection arrangements unless an "asymmetrical compensation structure" is adopted that tracks what such providers contend they are entitled to collect and obligated to pay for PSTN/over-the-top VoIP traffic.[183] IP interconnection arrangements that contain asymmetrical compensation schemes may create

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[177] AT&T Oct. 3, 2014 *Ex Parte* Letter at Attach. 2 at 3;Verizon Nov. 5, 2014 *Ex Parte* Letter at 8-11.

[178] *See Christopher v. SmithKline*, 132 S. Ct. at 2167-68.

[179] *See* Level 3 Nov. 3, 2014 *Ex Parte* Letter at 7. AT&T's claim that "the Commission took no enforcement action for years prior to the *Connect America Order*" is beside the point, since any such inaction predated the adoption of the VoIP symmetry rule that is at issue here. AT&T Dec. 17, 2014 *Ex Parte* Letter at 14. Similarly, AT&T's claim that the Commission has taken no action "for more than two years" after adoption of the VoIP symmetry rule, *id*., does not establish the kind of "very lengthy period of conspicuous inaction" that was at issue in *Christopher v. SmithKline*, 132 S. Ct. at 2168.

[180] *Christopher v. SmithKline*, 132 S. Ct. at 2165-67.

[181] For the same reasons, we reject AT&T's claim that equity requires prospective application of our interpretation of the VoIP symmetry rule. *See* AT&T Dec. 17, 2014 *Ex Parte* Letter at 2, 10 (citing *Retail, Wholesale & Dep't Store Union v*. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972)). Where, as here, an agency is not changing its rules or its interpretation of them, there was no reasonable reliance on a contrary interpretation or on any applicable settled law, and the proper interpretation of the relevant rule has been "the subject of active debate" since its adoption, equity is fully aligned with "the presumption of retroactivity for adjudications." *Qwest v. FCC*, 509 F.3d at 539, 540.

[182] *See, e.g*., Vonage Feb. 12, 2014 *Ex Parte* Letter at 1-2; Level 3 May 16, 2014 *Ex Parte* Letter at 2. *But see* AT&T Feb. 21, 2014 *Ex Parte* Letter at 3-4; Verizon Nov. 10, 2014 *Ex Parte* Letter at 10.

[183] *See, e.g*., Vonage Feb. 12, 2014 *Ex Parte* Letter at 1-2.

unbalanced compensation, marketplace distortions, and perverse incentives for LECs to perpetuate legacy TDM technology. We encourage parties to move toward all-IP networks and reiterate the important policy goals underlying the VoIP symmetry rule of advancing competition, moving toward an all-IP network, reducing intercarrier compensation disputes, and remaining technologically neutral.[184]

IV. CONCLUSION

51. For all the reasons discussed above, we clarify that the Commission's VoIP symmetry rule does not require a competitive LEC or its VoIP provider partner to provide the physical last-mile facility to the VoIP provider's end user customers in order to provide the functional equivalent of end office switching, and thus for the competitive LEC to be eligible to assess access charges for this service.

V. ORDERING CLAUSES

52. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 4(i), 201, 202, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201, 202, and 251, and sections 1.1 and 1.2 of the Commission's rules, 47 C.F.R. §§ 1.1, 1.2, this Declaratory Ruling in WC Docket No. 10-90 and CC Docket No. 01-92 IS ADOPTED.

53. IT IS FURTHER ORDERED that, pursuant to section 1.103 of the Commission's rules, 47 C.F.R. §1.103, this Declaratory Ruling SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[184] *See, e.g.*, *USF/ICC Transformation Order*, 26 FCC Rcd at 17669, 18009-13, paras. 9, 948-53. We also remind parties of their obligations to negotiate IP interconnection agreements in good faith. *See id.* at 17873, para. 652.

STATEMENT OF
CHAIRMAN TOM WHEELER

Re: *Connect America Fund*, WC Docket No. 10-90, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92.

Today, we adopt a declaratory ruling to ensure that the transition to IP-based networks and services is not impeded by outdated technological distinctions. In the *2011 USF/ICC Transformation Order*, the Commission adopted the VoIP symmetry rule as part of its effort to abandon outdated approaches to intercarrier compensation, eliminate competitive distortions, and encourage the transition to IP-based networks and services. The action we take today precludes carriers from advancing self-serving interpretations of this rule in an effort to skew the competitive landscape, today and into the future.

I continue to believe that technology transitions will be speeded by technology-neutral rules that promote, preserve, and protect the competitive choices that consumers expect. Today's decision will help maintain those competitive choices through symmetrical treatment of like services and additional regulatory certainty for all parties.

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Connect America Fund*, WC Docket No. 10-90, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92.

The FCC's rules allow a local exchange carrier (LEC) to charge other carriers for certain "access services" defined by our rules. At dispute here is whether a LEC may collect a particular kind of charge for an access service—an end office switching charge—when its VoIP partner transmits calls to an unaffiliated Internet service provider (ISP) for routing over the Internet. In this order, the Commission says yes. Because the order adopts a new rule that contravenes our precedent without first seeking comment, I dissent.

I.

Start with some basic background. A LEC may only collect access charges for intercarrier services actually performed.[1] And a LEC partnered with a VoIP provider may collect charges for services that either it or its VoIP provider actually perform.[2] A non-incumbent LEC and its VoIP partner need not perform precisely the same service as an incumbent; the LEC can perform the "functional equivalent."[3] And "using . . . technology other than [time-division multiplexing] transmission" counts so long as it is done "in a manner that is comparable" to traditional transmission.[4] Finally, for end office switching charges, the associated service is "end office access service," which our rules define in relevant part as "[t]he switching of access traffic at the carrier's end office switch."[5]

Putting this all together, a LEC may collect end office switching charges if and only if that LEC or its VoIP partner actually performs the functional equivalent of end office switching.

So what is the IP equivalent of end office switching? Our precedent makes clear that it is the interconnection of calls with last-mile facilities.

[1] *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, para. 21 (2004) ("[O]ur long-standing policy with respect to incumbent LECs is that they should charge only for those services that they provide" and "[w]e believe that a similar policy should apply to competitive LECs.").

[2] 47 C.F.R. § 51.913(b). Conversely, our rules do "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." *Id.*

[3] *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9981 (2001) (*Seventh Access Charge Reform Order*) (Appendix B) (adopting 47 C.F.R. § 61.26(a)(3) ("'Interstate switched exchange access services' shall include the functional equivalent of the ILEC interstate exchange access services . . . .")); *see also* 47 C.F.R. § 51.903(d)(3) (defining "end office access service" to include the "functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier").

[4] 47 C.F.R. § 51.913(b).

[5] 47 C.F.R. § 51.903(d)(1). No one, as far as I can tell, contends that the service performed by LECs and their over-the-top VoIP partners fits within another definition of "end office access service"—namely, the "routing of interexchange telecommunications traffic to or from the called party's premises." 47 C.F.R. § 51.903(d)(2). Nor could they, since there is no question in this case that the unaffiliated ISP routes the over-the-top VoIP call.

First, the Commission stated in 1997 that "interconnection, i.e., the actual connection of lines [or loops] and trunks, is *the* characteristic that distinguishes switches from other central office equipment."[6] Although a switch may also perform other functions—a Bureau-level order had previously identified eight[7]—the FCC reasoned that these other functions are in the end peripheral to end office switching: "units that interconnect lines and trunks . . .are capable of providing all of the essential features and capabilities of a switch."[8] Or as the FCC put it in the 2011 *YMax Order*, "[e]nd office switching charges were and are authorized by law to allow local exchange carriers to recover the substantial investment required to construct the tangible connections between themselves and their customers throughout their service territory."[9]

Second, the FCC's 2011 *Universal Service Transformation Order* made clear that when a LEC partners with a VoIP provider that itself interconnects with a customer's last-mile facilities, the LEC may collect end office switching charges: "We thus adopt rules making clear that origination and termination charges may be imposed . . . when an entity 'uses Internet Protocol facilities to transmit such traffic to [or from] the called party's premises.'"[10] That ruling was of course codified as part of the VoIP Symmetry Rule.

Third, the FCC's 2011 *YMax Order* considered and rejected the contention that an over-the-top VoIP provider performs end office switching by interconnecting virtual loops over the Internet.[11] As the Commission reasoned, if "the entire worldwide Internet . . . comprises a 'virtual' loop," then such loops "would be of indeterminate length and configuration" and "could extend thousands of miles via numerous intermediaries throughout the country (or even the world), or only a few miles via a couple of intermediaries in contiguous states. . . . 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."[12]

In short, our precedent makes clear that when a LEC and its VoIP partner merely transmit calls to an unaffiliated ISP for routing over the Internet, the LEC may not collect end office switching charges because it is not interconnecting with the customer's last-mile facilities.

None of this is to say that a LEC partnered with an over-the-top VoIP provider cannot collect *any* access charges. If such a partnership performs the functional equivalent of other intercarrier services, such as dedicated transport access service or tandem-switched access service,[13] it may collect the corresponding access charges. But the one thing our precedent makes clear is that transmitting calls to an unaffiliated ISP for routing over the Internet is not the functional equivalent of end office switching.

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[6] *Petitions for Reconsideration and Applications for Review of RAO 21*, AAD 92-86, Order, 12 FCC Rcd 10061, 10067, para. 11 (1997) (*RAO Recon Order*) (emphasis added); *id.* (A piece of equipment is a switch if and only if it "is capable of interconnecting lines or trunks, i.e., if it has the switching matrix required for call interconnection . . . .").

[7] *See Classification of Remote Central Office Equipment*, Letter, Responsible Accounting Officer, 7 FCC Rcd 5205, 5205, n.1 (Comm. Carr. Bur. 1992) (*RAO Letter 21*), *revised by Classification of Remote Central Office Equipment*, Letter, Responsible Accounting Officer, 7 FCC Rcd 6075, 6075, n.1 (Comm. Carr. Bur. 1992) (*Revised RAO Letter 21*).

[8] *RAO Recon Order*, 12 FCC Rcd at 10067, para. 12. As the FCC noted at the time, the other functions are not unique to switches since other equipment "can perform a number of functions historically associated with switches, such as attending, information receiving, and alerting." *Id.* at 10066–67, para. 11.

[9] *AT&T Corp., Complainant, v. YMax Communications Corp., Defendant*, File No. EB-10-MD-005, Memorandum Opinion and Order, 26 FCC Rcd 5742, 5757, para. 40 (2011) (*YMax Order*) (footnote omitted).

[10] *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, 18025, para. 969 (2011) (*Universal Service Transformation Order*).

[11] *YMax Order*, 26 FCC Rcd 5742.

[12] *Id.* at 5758–59, para. 44.

[13] 47 C.F.R. § 51.903(c), (i).

II.

With that background, to the order we go. Instead of following the precedent described above, the order decides that "solely for purposes of this decision" the test for whether a LEC and its VoIP partner perform end office switching is whether they provide "the intelligence associated with call set-up, supervision and management," also known as "call *control*."[14] The order primarily defends this decision by pointing to the VoIP Symmetry Rule adopted in the *Universal Service Transformation Order*,[15] which says:

> Notwithstanding any other provision of the Commission's rules, a local exchange carrier shall be entitled to assess and collect the full Access Reciprocal Compensation charges prescribed by this subpart that are set forth in a local exchange carrier's interstate or intrastate tariff for the access services defined in § 51.903 regardless of whether the local exchange carrier itself delivers such traffic to the called party's premises or delivers the call to the called party's premises via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect Access Reciprocal Compensation charges prescribed by this subpart for that traffic. 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 interconnected VoIP service or non-interconnected VoIP service. For purposes of this provision, functions provided by a LEC as part of transmitting telecommunications between designated points using, in whole or in part, technology other than TDM transmission in a manner that is comparable to a service offered by a local exchange carrier constitutes the functional equivalent of the incumbent local exchange carrier access service.[16]

The order apparently interprets the VoIP Symmetry Rule to (a) "supersede[]" the *YMax Order*,[17] (b) adopt a "new functional equivalence approach to VoIP-PSTN traffic" that "takes a more holistic look at how calls are delivered to the end user,"[18] and (c) suggest that a LEC and its over-the-top VoIP partner *must* be able to collect end office switching charges because "the language of the VoIP symmetry rule contemplates compensation for new and different technology"[19] and "places no restrictions on the types of VoIP providers with which competitive LECs may form partnerships."[20] These defenses do not withstand scrutiny.

First, the order cannot credibly claim that the VoIP Symmetry Rule superseded the *YMax Order*. The rule came only six months after the *YMax Order* and did not at any point suggest it was superseding that order. Although both addressed intercarrier compensation, the VoIP Symmetry Rule addressed two analytically distinct issues left open in the *YMax Order*: (1) whether a LEC could collect access charges

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[14] *Order* at para. 28 (emphasis in original).

[15] The order also claims that the precedent recited above, and in particular the *YMax Order*, is all "distinguishable from the facts before us," *Order* at para. 32, but then fails to explain how the "specific configuration of YMax's network architecture," *YMax Order*, 26 FCC Rcd at 5743 n.7—one of the two issues in the *YMax Order*—differs at all from the network architecture in dispute here. Indeed, as far as the record shows, YMax and its VoIP partners were and are providing the exact same functions as the LECs and their VoIP partners that sought clarification here.

[16] 47 C.F.R. § 51.913(b).

[17] *Order* at para. 35.

[18] *Order* at para. 26.

[19] *Order* at para. 31.

[20] *Order* at para. 21.

when it transmitted a call using a format other than time-division multiplexing (such as IP) and (2) whether a LEC could collect access charges for functions performed not only by itself but also by its VoIP partner.[21]

Far from undermining the *YMax Order*, the FCC specifically reaffirmed it in adopting the VoIP Symmetry Rule, citing the very portions quoted above in declaring that LECs cannot charge for services not performed.[22] Indeed, shortly after the FCC adopted the VoIP Symmetry Rule, YMax of the *YMax Order* returned to the FCC worried that this citation "might appear to be suggesting that if 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), then the LEC and its VoIP service partner are not performing the 'access' function and cannot charge for it."[23] In response, our staff rejected YMax's request that it need only perform "some portion of the interconnection"—rather than interconnection all the way to the last-mile facility—in order to assess end office switching charges.[24] In other words, the staff made explicit what was already implicit: The *YMax Order* and associated precedent survived the VoIP Symmetry Rule, hence a LEC-VoIP partnership must itself interconnect with last-mile facilities—the IP equivalent of end office switching.

Second, the order incorrectly states that the VoIP Symmetry Rule adopted a "new functional equivalence approach." One problem with this is that the VoIP Symmetry Rule did not adopt *any* test regarding functionality; it instead cleared up two separate issues as explained above. Perhaps more to the point, the functional equivalence approach codified in other rules[25] was nothing new; it was more than a decade old when the FCC adopted the VoIP Symmetry Rule.[26] And by adopting that time-tested approach, the FCC implicitly adopted its accompanying precedent—and explicitly endorsed the reasoning of the *YMax Order*.[27]

Third, the order incorrectly suggests that the language of the VoIP Symmetry Rule means that a LEC and its over-the-top VoIP partner *must* be able to collect end office switching charges. But when it adopted the VoIP Symmetry Rule, the Commission cautioned that "although access services might functionally be accomplished in different ways depending upon the network technology, the right to charge does not extend to functions not performed by the LEC or its retail VoIP service provider

[21] *Universal Service Transformation Order*, 26 FCC Rcd at 18025–26, paras. 968–70 ("In particular, providers cite disputes arising from their use of IP technology as well as the structure of the relationship between retail VoIP service providers and their wholesale carrier partners."). The VoIP Symmetry Rule makes clear that the answer to each of these questions is yes.

[22] *Universal Service Transformation Order*, 26 FCC Rcd at 18027, n.2028 (citing *YMax Order*, 26 FCC Rcd at 5757, 5758–59, paras. 41, 44 & n.120). Although the order tries to frame the *YMax Order* as having a "narrow focus and holding" about one particular party's tariff, *Order* at para. 35, the discussion quoted herein and cited in the *Universal Service Transformation Order* shows that the FCC indeed meant what it said in the *YMax Order*: Interconnecting virtual loops over the Internet is not the functional equivalent of end office switching.

[23] Letter from John B. Messenger, VP-Legal & Regulatory, YMax, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (filed Feb. 3, 2012).

[24] *Connect America Fund et al.*, WC Docket No. 10-90 et al., Order, 27 FCC Rcd 2142, 2144, para. 4 (Wireline Comp. Bur. 2012). Notably, this entire discussion was about interconnection precisely because "interconnection, i.e., the actual connection of lines [or loops] and trunks, is *the* characteristic that distinguishes switches from other central office equipment." *RAO Recon Order*, 12 FCC Rcd at 10067, para. 11 (emphasis added).

[25] *See, e.g.*, 47 C.F.R. § 51.903(d); 47 C.F.R. § 61.26.

[26] *See Seventh Access Charge Reform Order*, 16 FCC Rcd at 9981 (adopting 47 C.F.R. § 61.26(a)(3), which codifies the functional equivalence approach).

[27] *Universal Service Transformation Order*, 26 FCC Rcd at 18027, n.2028 (citing *YMax Order*, 26 FCC Rcd at 5757, 5758–59, paras. 41, 44 & n.120).

partner."[28] Indeed, the rule itself reiterates that "[t]his rule does not permit a local exchange carrier to charge for functions not performed."[29] So it's no surprise that VoIP providers performing differing functions would entitle LECs to differing intercarrier compensation, nor that a VoIP provider that interconnects a call with a customer's last-mile facility performs the function of end office switching whereas a VoIP provider that transmits calls to an unaffiliated ISP for routing over the Internet does not.[30]

III.

In short, the order's decision to allow LECs to collect end office switching charges when its VoIP partner transmits calls to an unaffiliated ISP for routing over the Internet alters our rules to mean something they've never meant before. The FCC is of course free to amend its rules, but we cannot "under the guise of interpreting a regulation, . . . create de facto a new regulation."[31] Nor can we change our rules without abiding by the notice-and-comment requirements laid out in the Administrative Procedure Act.[32] Because the FCC has neither proposed nor sought comment on the novel test adopted "solely for purposes of this decision" and because this test undermines well-considered, long-established precedents, I respectfully dissent.

[28] *Universal Service Transformation Order*, 26 FCC Rcd at 18027, n.2028.

[29] 47 C.F.R. § 51.913(b).

[30] The order mistakenly suggests that the "key distinction between facilities-based VoIP and over-the-top VoIP lies . . . in the ownership or leasing of the means of transmission to the customer premises," which is "distinct from end office switching, and thus is not material to our determination." *Order* at para. 31 (footnote omitted). Since this dispute involves end office switching charges, the key distinction is instead between VoIP providers that interconnect directly with last-mile transmission facilities and those that do not, which is very much about end office switching and thus material to our determination.

[31] *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

[32] 5 U.S.C. § 553.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL O'RIELLY

Re: *Connect America Fund*, WC Docket No. 10-90, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92.

I cannot support today's order because it would unfairly penalize certain carriers for reasonably relying on what appeared to be well-settled: that carriers do not owe end office switching charges to other providers that do not actually perform the functional equivalent of end office switching (connecting trunks to loops).

Over several decades, the Commission has given meaning to the key terms at issue here; namely, "end office switching" and "functional equivalent". As a result, we know that the defining feature of end office switching is the actual connection of subscriber lines and trunks. And while the functional equivalent concept provides some flexibility in determining how that key criterion is met, we also know that intermediate routing, such as merely placing calls onto the public Internet, does not count. Against this backdrop, the Commission cannot suddenly reverse its interpretations in the guise of a clarification and apply such "clarification" retroactively.

The order argues that recent decisions that seem to be directly on point should be read narrowly. Even if that were true, it misses the point that the precedent had been established long before those decisions. Indeed, those recent decisions, however narrow, are further evidence that the rule *was* settled because they are consistent with the Commission's long-standing interpretations. That is, they apply a rule that had been reasonably clear to the specific facts at issue.

For example, in the YMax decision, the Commission rejected YMax's contention that it should be entitled to end office switching charges for placing calls onto a "virtual loop" that "could extend thousands of miles via numerous intermediaries throughout the country (or even the world), or only a few miles via a couple of intermediaries in contiguous states."[1] That's not surprising given that the Commission had previously determined, over a decade ago, that carriers that merely pass calls to other carriers rather than placing them directly onto the loops of particular end users do not provide the functional equivalent of end office switching.[2] Therefore, even if the YMax decision narrowly applies to the particular language in YMax's tariff and the specific configuration of YMax's network architecture, it is a further link in a chain of decisions that show that functional equivalent has specific meaning. It cannot be discarded without fair notice simply because it has become a hindrance to questionable new policies.

Moreover, the fact that the Commission adopted the intervening VoIP symmetry rule in the *USF/ICC Transformation Order* does not change anything because the Commission did not claim to modify the long-settled meanings of the key terms. Nor is a new interpretation necessary to effectuate the intent of that rule in an IP world. Entities that actually provide the functional equivalent of end office switching, such as many facilities-based VoIP providers, do benefit from the rule.

The order also attempts to explain why, as a policy matter, the decision is correct. In particular, the order claims that the decision is necessary to encourage the deployment of all-IP networks, protect and

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[1] *AT&T Corp., Complainant, v. YMax Communications Corp., Defendant*, File No. EB-10-MD-005, Memorandum Opinion and Order, 26 FCC Rcd 5742, 5758–59, para. 44 (2011).

[2] *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 (2004).

promote competition in the voice marketplace, reduce intercarrier compensation disputes, and avoid marketplace distortions and arbitrage. But here again, the policy justifications are also unavailing.

The charges for end office switching have been so high precisely because of the substantial costs of performing the function of connecting trunks and loops; costs that are not justified if providers simply place calls onto the Internet. Allowing such providers to pocket the difference does nothing to guarantee that they will use it to deploy IP networks. But it does promote artificial competition, marketplace distortions, and arbitrage. The order responds that this will be solved by the transition to bill-and-keep, but that does not address distortions and arbitrage during the transition or for originating end office switching. As a result, I expect disputes will continue.

Finally, the fact that some carriers chose to pay the charges does not mean that all carriers are legally required to pay the charges as long as the carriers that did not pay can reasonably claim that the applicable rule was settled. AT&T and Verizon have made that claim, and I agree with it. Therefore, I dissent.

In the bigger picture, I find it disturbing to be arguing over compensation and rates built for analog TDM networks when consumers and the industry are moving furiously to IP. It is similar to the fights over shipping costs prevalent in the railroad industry, which still exist to some degree, prior to the expansion and deployment of the airline industry. One of the beautiful features of the Internet is its pricing and traffic carriage structure, which thankfully have been outside the Commission's reach. Traditionally, those have been and continue to be worked out among the parties via market principles and cooperation, not government intervention. The last thing we should do is disrupt this by carrying forth the broken-down, inefficient call compensation regime.

Along those lines, I have raised objections to a disturbing trend where the Commission tries to bring new technologies, services or applications within the scope of existing statutory provisions and rules by ignoring or minimizing inconvenient history and precedent. We've seen this happen a number of times with over-the-top services. Sometimes the purpose is to impose new burdens to new market participants. At other times, there is a supposed benefit, but the "benefit" is often short-term or hypothetical, and I am forced to worry about the unintended consequences and possible long-term burdens that could flow from such flawed decisions. This item represents another example in a dangerous course that needs to be curtailed immediately.