BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of YMax Communications	)	
Corp.'s Tariff Filing to Revise its Intrastate	)	Case No. _____
Switched Access Services Tariff,	)	
P.S.C. MO. Tariff No. 2	)	

THE AT&T COMPANIES' MOTION TO SUSPEND AND INVESTIGATE TARIFF

The AT&T Companies[1] respectfully request that the Missouri Public Service Commission ("Commission") suspend and investigate[2] proposed tariff revisions filed by YMax Communications Corp. ("YMax") to revise its Intrastate Switched Access Services Tariff, P.S.C. MO. Tariff No. 2. In sum, the revisions are unlawful because they violate the rules and orders of the Federal Communications Commission ("FCC") and are otherwise unjust and unreasonable. The Commission should suspend the YMax access tariff revisions immediately, conduct investigative proceedings, and reject the tariff's unlawful provisions concerning switched access charges.

In support of this Motion, the AT&T Companies state as follows:

1. Background on Movants. AT&T Communications is a Delaware corporation, duly authorized to conduct business in Missouri with its principal Missouri office located at 2121 East 63rd Street, Kansas City, Missouri 64130. AT&T Communications is an "interexchange telecommunications company," an "alternative local exchange telecommunications company," and a "public utility," and is duly authorized to provide "telecommunications service" within the State of Missouri as each of those phrases is defined in Section 386.020 RSMo.

[1] AT&T Communications of the Southwest, Inc. will be referred to as "AT&T Communications" and Southwestern Bell Telephone Company, d/b/a AT&T Missouri will be referred to as "AT&T Missouri." Collectively, they will be referred to as "the AT&T Companies."

[2] The AT&T Companies make this filing pursuant to 4 CSR 240-2.065(3) and 4 CSR 240-2.075(2).

2. AT&T Missouri is a Missouri corporation duly authorized to conduct business in Missouri with its principal Missouri office located at 909 Chestnut Street, 35th Floor, St. Louis, Missouri 63101. AT&T Missouri is a "local exchange telecommunications company" and a "public utility," and is duly authorized to provide "telecommunications service" within the State of Missouri as each of those phrases is defined in Section 386.020 RSMo.

3. All correspondence, pleadings, orders, decisions and communications regarding this proceeding should be sent to:

Leo J. Bub
Robert J. Gryzmala
909 Chestnut Street, Room 3516
St. Louis, Missouri 63101

4. On July 10 and July 31, YMax filed proposed revisions to its Switched Access Tariff, P.S.C. MO. Tariff No. 2. For the reasons stated in detail below, the proposed tariff revisions are unlawful.

INTRODUCTION

5. Through its tariff filing, YMax asks this Commission for authority to charge other carriers for access functions that are not actually performed by either YMax or "Magic Jack," the Voice over Internet Protocol ("VoIP'") service provider with which it partners to provide VoIP service. The FCC has already promulgated rules and issued orders that expressly prohibit such charges in interstate and intrastate tariffs.[3] In fact, the FCC has already flatly rejected YMax's contrary interpretation of the FCC's rules.[4] Several other states have already taken steps to suspend similar YMax tariff filings (or indicated that they would take such steps unless YMax

[3] *See*, 47 C.F.R. § 51.913(b); *Connect America Fund et al.*, 26 FCC Rcd 17663, ¶¶ 943, 960-70 (2011) ("*Connect America Order*"); *AT&T v. YMax*, 26 FCC Rcd. 5742 (2011) ("*YMax Order*"); *see also*, Eighth Report and Order, *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 19 FCC Rcd 9108, ¶ 21 (2004) ("our long-standing policy" is that carriers "should charge only for those services that they provide").
[4] *YMax Clarification Order*, 27 FCC Rcd. 2142, ¶¶ 4-5 (2012), attached hereto as Exhibit A.

withdrew the tariff, which YMax has often done), and there is no basis for this Commission to take a different approach with YMax.

6. Although YMax has attempted to portray itself as an ordinary local exchange carrier ("LEC") that is entitled to charge standard rates for the full array of access services, in fact, "the functions YMax performs are very different from" – and much more limited than – "the access services typically provided by LECs." *YMax Order* ¶ 14. YMax, in conjunction with Magic Jack, provides VoIP services, but neither YMax nor Magic Jack provides facilities that extend to individual homes or businesses and that provide connections to the rest of the world. Rather, those connections are provided by separate entities, such as broadband service providers.[5] YMax operates only limited, intermediate facilities that are connected via a single, high capacity line to the Internet, and calls are routed between YMax's facilities and its customers over the Internet.[6]

7. The FCC recently issued rules for "VoIP-PSTN traffic" and initially determined that the "default" rate for this traffic would be the carrier's interstate access rate. *Connect America Order* ¶¶ 943-44; 47 C.F.R. § 913(b). However, the FCC also made it clear that its new rules "do not permit a LEC to charge for functions performed neither by itself or its retail [VoIP] service provider partner." *Id.* ¶ 970. YMax nevertheless filed a letter with the FCC, specifically asking for clarification that the FCC's new rules mean that "it is not necessary for either the LEC or its VoIP service partner to be using a TDM-based 'end office' switch or providing 'loop

[5] *YMax Order*, ¶¶ 3, 5, 19 ("YMax also admits that it provides no 'local loops' or any other facilities that physically connect to the premises of a Called/Calling Party. . . . Instead, the Called/Calling Parties must separately obtain service and facilities from a third-party ISP in order to place or receive calls.").

[6] *YMax Order* ¶ 7. For example, when an AT&T long distance call is being directed to a person with a Magic Jack, YMax obtains the call, converts it from standard TDM protocol into VoIP, and then sends the call over private lines onto the Internet. The call (in VoIP packets) may be handled by "numerous intermediaries" or Internet Service Providers (ISPs), and then it is ultimately handed off to the recipient's broadband service provider. *See YMax Order* ¶ 44 & n.127. The YMax facilities may be hundreds or even "thousands of miles" away from the recipient of the call. *Id.* (rejecting YMax's argument that it is connected to called parties over "'virtual' loops" consisting of "the entire worldwide Internet"). Neither YMax nor Magic Jack has any relationship, contractual or otherwise, with the end-user's internet services provider for the completion of the AT&T call.

facilities' or any other physical connection to the VoIP customer in order for the LEC to collect full access charges."[7] The FCC did not even request responses before it rejected YMax's request and reiterated that YMax and other CLECs (or their VoIP affiliates) cannot bill for functions that they do not provide. *YMax Clarification Order* ¶¶ 4-5.

8. In spite of this unambiguous guidance from the FCC, YMax's tariff contains numerous provisions that make clear that YMax will be seeking to collect the full array of access charges, including end office charges, even though neither YMax nor Magic Jack provide the services and functions that justify those access charges. Simply stated, YMax does not provide any end-office switching or any part of a local loop or physical connection that can constitute end office functions for which it can charge. YMax's revised tariff is thus plainly unlawful and it should be rejected.

9. The AT&T Companies' interests as telecommunications service providers differ from those of the general public. YMax's proposed tariff revisions, as well as the rates associated with them, if allowed to take effect, would apply to the AT&T Companies. The AT&T Companies have a significant financial interest in ensuring that YMax's intrastate switched access rates are lawful and appropriate. No other party to this proceeding will adequately protect the AT&T Companies' interests.

10. Granting of this intervention will be in the public interest because the AT&T Companies will bring to this proceeding their experience as telecommunications providers and their expertise in analyzing tariffs, which should assist the Commission in its review of YMax's filing.

[7] *See*, Exhibit B, attached hereto, Letter from John B. Messenger, VP – Legal & Regulatory, YMax, to Marlene H. Dortch, Secretary, at 3, FCC (Feb. 3, 2012) ("YMax Messenger Ltr.").

ARGUMENT

11. For several reasons, YMax's revised tariff setting forth switched access charges should be suspended and investigated, and ultimately rejected.

1. YMax's Intermediate Facilities And Its Limited Role In Call Routing.

12. Although YMax has been certificated as a competitive local exchange carrier ("CLEC"), it is not an ordinary local telephone company and it does not actually provide any local telephone services to its customers. As the FCC found, YMax "has no customers who purchase local exchange service from YMax's state tariffs." *YMax Order* ¶ 3. Indeed, YMax does not even "provide any physical transmission facilities connecting YMax to" retail customers and does not "own or lease *any facilities* capable of providing local exchange service as described in its state tariffs." *Id.* (emphasis added);[8] *see id.* ¶ 19 ("YMax . . . admits that it provides no 'local loops' or any other facilities that physically connect to the premises of a Called/Calling Party . . . ."); YMax Messenger Ltr. at 2 (YMax does not provide "the physical transmission facilities connecting the [long distance carrier] and the VoIP service customer"). As a result, the FCC found that YMax "lacks many typical local exchange carrier ('LEC') characteristics." *YMax Order* ¶ 3; *see id.* ¶¶ 14, 40-41.

13. Instead, YMax's customers "must separately obtain service and facilities from a third-party [Internet service provider] in order to place or receive calls." *Id.* ¶ 19. Along with third-party Internet services, YMax's customers must also obtain a device[9] or software provided by MagicJack, L.P., which is a company affiliated with YMax, in order "to use the Internet to make and receive calls throughout most of North America." *Id.* ¶¶ 4 & n.21, 5, 41 n.120, 44.

[8] Although the FCC redacted this last fact from the public version of the *YMax Order*, YMax quoted this sentence in its publicly filed petition for reconsideration of that order, and thus waived any claim to the continued confidential treatment of this factual finding of the FCC. To the extent the Commission would like to review the confidential version of the FCC's *YMax Order*, it could request that *Order* from YMax.

[9] The MagicJack device itself consists of a USB "dongle" on one end that plugs into a computer's USB port, and an RJ-11 telephone jack on the other end into which an ordinary landline telephone can be plugged. *YMax Order* ¶ 4.

MagicJack, L.P. relies on YMax to obtain telephone numbers and interconnection to the public switched telephone network ("PSTN") for MagicJack purchasers.

14. Ordinary long distance calls from a long-distance customer of AT&T or other interexchange carrier ("IXC") to a called party with a MagicJack device or software are routed as follows: the entity serving the AT&T long-distance customer (typically a LEC) delivers the long-distance call to AT&T, which then transports the call and hands it off to the access tandem provider (typically an incumbent local exchange carrier ("ILEC")) that serves the specific NPA-NXX code of the Called Party. *YMax Order* ¶ 7. The access tandem provider to which AT&T has terminated the call then delivers it to a point of interconnection that YMax has established, some of which have no facilities and exist presumably for the purpose of permitting YMax to obtain telephone numbers in those areas. *Id.* The call is then delivered over a private line to YMax's facilities, which generally consist of devices like access gateways, servers, and/or routers. *Id.* YMax converts the call from TDM to IP format and then sends the calls over a "single high-capacity line" to another carrier, which then sends the call over the Internet to one or more ISPs, the last of which delivers it to the called party's MagicJack. *Id.*

2. The FCC Has Ruled Three Times That YMax Cannot Charge For End Office Switching And Other Access Services That It Does Not Provide.

15. The FCC has issued at least three orders directly relevant to YMax's revised intrastate tariff. *First*, on April 8, 2011, the FCC granted in part a formal complaint filed by AT&T against YMax alleging that YMax's interstate access charges were improper. *YMax Order*, 26 FCC Rcd. 5742 (2011). The FCC found that YMax violated Section 203(c) and 201(b) of the Communications Act, 47 U.S.C. § 201(b); 203(c), "by assessing AT&T interstate switched access

charges that are not authorized by YMax's federal tariff." *Id.* ¶ 1.[10] YMax argued that its access charges were appropriate because it provided connections to callers over a "'virtual' loop" – which was not an actual, physical facility, but was a "type of non-physical, 'virtual connection'" that YMax claimed to provide over the public Internet. *Id.* ¶ 43-44 ("In essence, YMax contends that the entire worldwide Internet . . . comprises a 'virtual' loop" that terminates at [YMax's] equipment" and that justifies YMax's end office and other switched access charges). The FCC had little difficulty rejecting this argument, finding that, if accepted, a carrier's "local" end office connections to callers would "be of indeterminate length and configuration" and "could extend for thousands of miles via numerous intermediaries throughout the country (or even the world) . . . . 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." *Id.* ¶ 44. Although this FCC *Order* relates to YMax's interstate tariff in effect prior to April 29, 2011, YMax continues to route calls over the Internet using the same basic configuration, and the FCC's findings on these points, as well as its factual findings about YMax's limited facilities, which are described above, *see supra*, are relevant to this case.

16. *Second*, on November 18, 2011, the FCC issued an order promulgating new rules that apply to "VoIP-PSTN" traffic, which the FCC defined as "traffic exchanged over [Public Switched Telephone Network] facilities that originates and/or terminates in [Internet Protocol] format." *Connect America Order*, 26 FCC Rcd. 17663, ¶¶ 933-75 (2011) *petitions for review pending*, *In re FCC 11-161*, No. 11-9900, et al. (10th Cir.); *see id*. ¶ 944. The FCC's new rules included default compensation rates for VoIP-PSTN traffic, finding that default charges for "toll"

[10] In particular, YMax's tariff provided that switched access service could be billed only on long distance calls that were terminated by YMax to "end users," and in fact none of the entities to which calls were completed satisfied the definition of "end user" under YMax's tariff. *Id.* ¶¶ 15-34. An independent basis for the FCC's decision was that the specific charges assessed by YMax included two rate elements described in the tariff as "end office switching" and "transport," but YMax did not operate an "end office switch" as that term was defined in the tariff, and it therefore could not charge either the end office switching or transport rate elements. *Id.* ¶¶ 35-47.

VoIP-PSTN traffic will be equal to interstate access service rates, whether offered pursuant to interstate or intrastate tariffs. *Id.* ¶ 944.[11]

17. The FCC also addressed the situation where a retail VoIP provider uses an affiliated local exchange carrier to route its customers' calls to and from the PSTN. *See Connect America Order* ¶¶ 968-971. The FCC allowed the affiliated LEC to tariff charges for work actually performed by the affiliated VoIP provider. *Id.* The FCC, however, reaffirmed that, as it had held in the *YMax Order* (and in prior decisions), its "rules do *not* permit a LEC to charge for functions performed neither by itself or its retail service provider partner." *Id.* ¶ 970 (emphasis added). In fact, as support for this directive, the FCC specifically cited the *YMax Order*, and explained that it recognized 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 partner." *Id.* ¶ 970 n.2028 (citing *YMax Order* ¶¶ 41, 44 & n.120).

18. *Third*, shortly after the FCC's new rules became effective, YMax filed a letter with the FCC that sought clarification. *See*, Exh. B, YMax Messenger Ltr. YMax noted that the *Connect America Order* listed YMax as an example of a carrier who had sought to bill for access functions that it was not providing, and YMax asked the FCC to "clarify" that the new rules nonetheless were intended to authorize YMax and other carriers to impose "end office switching charges" on IXCs even though "the "physical transmission facilities connecting the IXC and the [end user] customer are provided in part by one or more unrelated ISPs." *Id.* at 2. YMax highlighted the "importan[ce] for there to be a clear rule as to when a [local exchange carrier] is

[11] On April 25, 2012, the FCC issued its *Second Order on Reconsideration*, FCC 12-47, released April 25, 2012 ("*Second Order*") modifying the *Connect America Order* regarding the intercarrier compensation for *originating* VoIP-PSTN traffic effective July 13, 2012 (*i.e.*, 45 days after the Order's May 29 publication in the *Federal Register*). Pursuant to the new rule, which does not modify 47 C.F.R. § 51.913(b), carriers will be allowed to set the default rate for intraLATA *originating* VoIP-PSTN traffic at their existing intrastate rate from July 13, 2012, until June 30, 2014, rather than the interstate rate required by the original FCC *Order*.

providing end office functionality and therefore can collect end office switching access charges" and sought a rule where "it is not necessary for either the LEC or its VoIP service partner to be using a TDM-based 'end office' switch or providing 'loop facilities' or any other physical connection to the VoIP customer in order for the LEC to collect full access charges." *Id.* at 3.

19. On February 27, 2012, the FCC issued an order that "disagree[d]" with and "reject[ed]" YMax's interpretation. *YMax Clarification Order* ¶¶ 4-5. The FCC explained that its 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 VoIP service. *Id.* ¶ 4 (internal quotation marks omitted). "The Commission made clear in [the *Connect America Order*] . . . that it intended to prevent double billing and charging for functions not actually provided." *Id.*

3. YMax's Intrastate Tariff Is Unlawful In Several Respects.

20. On July 10 and July 31, YMax filed proposed revisions to its P.S.C. MO. Tariff No. 2, which purport to comply with the FCC's new rules announced in its *Connect America Order*. In fact, however, YMax is determined to apply its own interpretation of the FCC's rules, in spite of the FCC's clear rejections of that interpretation. *See, e.g., YMax Order*, ¶¶ 40-44; *Connect America Order* ¶ 970 & n.2028; *YMax Clarification Order*, ¶¶ 4-5. In essence, despite having its novel views of the access charge regime rejected three times by the FCC, YMax seeks by its revised tariff to have this Commission provide YMax with a *fourth* bite at the apple. Inasmuch as the FCC already has decided the issue, and that the FCC's determinations are applicable to both interstate and intrastate access services (*see Connect America Orde*r, ¶¶ 760-781), there is nothing left for this Commission to decide, other than simply to reject the YMax tariff.

21. YMax's proposed revisions to its switched access tariff embody the very position that YMax asserted to the FCC and that the FCC directly rejected on three separate occasions: namely, that YMax, despite its limited facilities and very small role in carrying the VoIP-PSTN

traffic, may charge access rates regardless of whether YMax actually performs the end-office function of delivering the call to the called party. Specifically, YMax has included language in its revised tariff that violates the FCC's rules, which 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 VoIP service. *YMax Clarification Order* ¶ 4-5.

22. For example, in Section 1, Definitions and Abbreviations, at First Revised Page 6, YMax proposes a substantial change to the tariff's definition of "End Office Switch," in light of the FCC's prior finding that YMax did not operate an end office switch. *YMax Order* ¶¶ 36-45. Part of that definition in YMax's revised tariff provides as follows:

> The "first point of connection" means there is no other Switch performing these functions between it and the End User, *regardless of how the End User obtains its connection to that switch.* [emphasis added].

This definition is unlawful, because YMax does not provide any actual "end office" connections that connect calling or called parties to YMax's facilities. YMax cannot, in its own tariff, sidestep the FCC's orders merely by redefining, using its own, idiosyncratic beliefs, the standard, well-established meaning of end office switching. As the FCC explained and as is well known in the industry, end office (or local) switches are switches that are located close to individual customers, that are connected to hundreds or thousands of local loops running to the premises of the carrier's customers, and that are referred to as "'last mile facilities.'" *YMax Order* ¶¶ 39-40 & n.114 (citing authorities). This is the definition of end office switching contained in YMax's current tariff, and this tariff was "modeled on common language in LEC access tariffs." *Id.* ¶ 14. It is also the definition in the tariffs of the incumbent LECs with which YMax "competes," which uniformly

define end office switches as switches connected to these local loops.[12] YMax's tariff definition seeks unlawfully to expand the definition of "end office switch" in order to justify its assessment of local switching charges that it does not actually provide.

23. YMax's tariff revision violates binding FCC's access charge policies. As the FCC stated, it is the functional characteristics of end office switches described above that explain why end office switching charges are "among the highest recurring intercarrier charges," *YMax Order* ¶ 40, and are many times greater than rates for "tandem switching" which connect carriers' facilities to one another. The FCC specifically found that YMax's "End Office Switching rates greatly exceed all other non-recurring charges" in its initial FCC tariff. *Id.* ¶ 40. As the Commission is aware, it takes "substantial investment" (*see id.*) for a carrier to deploy end office switches and connect them to individual homes and businesses. By contrast, YMax's revised tariff seeks to impose charges that the FCC and the Commission have found to be appropriate for the intensive task of deploying local switches that connect directly to many individual homes and businesses. YMax has made none of these investments in Missouri. Indeed, YMax has no facilities in Missouri that would allow it to offer local exchange service connections to any Missouri residents or businesses.

24. Further, in section 2.9.3.A.2 of its proposed tariff revisions, YMax proposes the following language:

> Switched access charges under this tariff apply to VoIP-PSTN Access Traffic whether the connection to the called or calling party's premises is provided by the Company directly or in conjunction with a Provider of VoIP Service that does not itself seek to collect switched access charges for the same traffic. The Company will not charge for functions not performed by the Company or its affiliated or unaffiliated provider of VoIP service. For purposes of this provision, functions

[12] For example, AT&T Missouri's intrastate access tariff defines "End Office Switch" as follows: "Denotes a local Telephone Company switching system where Telephone Exchange Service customer station loops are terminated for purposes of interconnection to each other and to trunks …." *See*, AT&T Missouri Access Services Tariff, P.S.C. Mo.-No. 36, Section 2.6 at 3rd Revised Sheet 63.

> provided by the Company 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 carrier access service.

25. This language, especially when read in conjunction with YMax's unlawful proposed definition of "End Office Switch," is inconsistent with the FCC's orders and rules for at least three reasons. First, the FCC's rules (47 C.F.R § 51.913(b)) only allow a LEC to charge full access compensation when the LEC "itself delivers the call 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 VoIP service. Here, YMax does not have "contractual or other arrangements" with the broadband providers that actually deliver the calls to called (or calling) parties. Rather, its VoIP partner is its affiliate MagicJack, and MagicJack also lacks the facilities to deliver calls to the called parties. Accordingly, YMax's revised tariff is unlawful because it would permit YMax to charge the full array of switched access charges even though it has no arrangements with any entity that in fact delivers calls to a called party.

26. Second, YMax's addition to this provision (§ 2.9.3.A.2) of language stating that Ymax "will not charge for functions not performed by [YMax] or its affiliated or unaffiliated provider of VoIP service" does not cure the violations in YMax's revised tariff, but only compounds them. YMax's additional language renders § 2.9.3.A.2 fatally ambiguous, in violation of fundamental rules of tariffing.[13] On the one hand, the first sentence of this section of YMax's tariff provides that YMax will "apply" end office and other switched access charges, even when YMax or MagicJack do not provide the "connection to the called or calling party's

[13] *See, e.g., Arizona Groc. Co.*, v. *Atchison Ry. Co.*, 284 U.S. 370, 384 (1932) ("In order to render rates definite and certain . . . the statute required the filing and publishing of tariffs"). Tariffs that are not "definite" and "certain," and that fail to apprise the customer of the applicable terms, are vague and unlawful. *Norfolk & Western Ry. Co.* v. *B.I. Holser & Co.*, 466 F. Supp. 885, 890-91 (N.D. Ind. 1979) (the carrier "has a duty to express its intent in a tariff in clear and plain terms so that those referring to them may readily understand their meaning"); *Capital Network Sys., Inc.*, 7 FCC Rcd. 8092, ¶ 11 (1992) (tariffs "require clear and definite statements of a carrier's rates and regulations as well as the exceptions and conditions contained in the tariffs").

premises." In the very next sentence, however, YMax's tariff provides that YMax will *not* bill for functions that neither it nor MagicJack provide, which would mean that YMax cannot properly bill for end office services under its tariff. In short, in one sentence, YMax's tariff states that YMax will bill end office charges, yet in the very next sentence, YMax's tariff says that it cannot bill such services. The tariff fails to describe with certainty which services YMax may bill to its customers, and the conflict between these two sentences renders the tariff vague, ambiguous, and unlawful.[14]

27. Third, the final sentence of this tariff provision provides that, even though YMax performs only a small "part of transmitting" a call, YMax's limited services are necessarily "the functional equivalent" of access services assessed by incumbent LECs, which have typically deployed significant local facilities – among others, tandem switches, end office switches, and loops – to carry calls to and from a caller's premises. The provision thus directly conflicts with binding FCC rules which provide that a carrier can charge a rate equal to interstate access on VoIP-PSTN calls only to the extent the LEC, or its VoIP affiliate, are providing all of the functions associated with connecting callers. *Connect America Order* ¶ 970; *YMax Clarification Order* ¶¶ 4-5; 47 C.F.R. § 51.913(b). Here, the FCC found, and it is undisputed, that neither YMax nor MagicJack provides facilities that connect callers to YMax's facilities. *YMax Order* ¶¶ 3-8. Rather, callers "must separately obtain service and facilities from a third party ISP in order to place and receive calls," and it is those carriers that are providing the functions and services for

[14] *Halprin, Temple, Goodman & Sugrue* v. *MCI Telecomms. Corp*., 13 FCC Rcd. 22568, ¶ 8 (1998) (terms in a tariff that are not clear or explicit are "render[ed] . . . unreasonable"). As a practical matter, YMax's inclusion of language in its tariff that it "will not charge" for functions that neither it nor MagicJack provides access customers like AT&T an additional remedy against YMax if – as seems likely – it does ultimately seek to bill end office charges notwithstanding its limited role in call routing. If YMax were to bill such charges, those charges would be billed in violation of this tariff provision, and YMax therefore could not lawfully bill for or collect those charges. *YMax Order* ¶ 12 ("a carrier may lawfully assess tariffed charges only for those services specifically described in its applicable tariff"). But the fact that an access customer will ultimately have a remedy if (or when) YMax later unlawfully bills for services in violation of its tariff does not mean that YMax's unlawful tariff can be permitted to go into effect.

which YMax is attempting to tariff and then collect from AT&T and other access customers. *Id.* ¶¶ 5, 19. Accordingly, YMax's revised tariff is unlawful because it provides that YMax's limited services are in fact functionally equivalent to traditional access services offered by incumbents and other carriers.

CONCLUSION

28. For the foregoing reasons, the AT&T Companies respectfully request that the Commission (1) immediately suspend the YMax proposed switched access tariff revisions; (2) initiate an investigation of the proposed YMax tariff revisions; and (3) ultimately reject the proposed YMax tariff revisions.

WHEREFORE the AT&T Companies respectfully request that the Commission suspend YMax's proposed tariff revisions for investigation.

Respectfully submitted,

AT&T COMMUNICATIONS SOUTHWEST, INC. AND
SOUTHWESTERN BELL TELEPHONE COMPANY,
D/B/A AT&T MISSOURI

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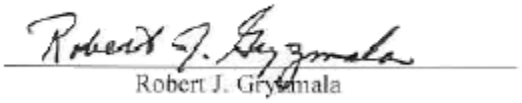
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties by e-mail on August 3, 2012.



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*27 FCC Rcd 2142, *; 2012 FCC LEXIS 914, **;*
55 Comm. Reg. (P & F) 684

In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform -- Mobility Fund

WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 07-135; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45; WC Docket No. 03-109; WT Docket No. 10-208

RELEASE-NUMBER: DA 12-298

FEDERAL COMMUNICATIONS COMMISSION

27 FCC Rcd 2142; 2012 FCC LEXIS 914; 55 Comm. Reg. (P & F) 684

February 27, 2012, Released

February 27, 2012, Adopted

CORE TERMS: carrier, competitive, merger, clarification, provider, traffic, phase, clarify, small business, symmetry, reconsideration, billing, tariff, double, high-cost, tariffing, partner, assess, retail, functions performed, rate-of-return, unaffiliated, affiliated, benchmark, modified, deliver, amend, Communications Act, service area, non-interconnected

ACTION:
[1]** ORDER

SUBSEQUENT HISTORY:
Later proceeding at In re Federal-State Joint Bd. on Universal Serv., 2012 FCC LEXIS 1506 (F.C.C., Apr. 5, 2012)

JUDGES: By the Chief, Wireline Competition Bureau

OPINION BY: GILLETT

OPINION:
[*2142] I. INTRODUCTION

1. In the *USF/ICC Transformation Order,* the Commission delegated to the Wireline Competition Bureau (Bureau) the authority to revise and clarify rules as necessary to ensure that the reforms adopted in the *Order* are properly reflected in the rules. n1 In this Order, the Bureau acts pursuant to this delegated authority to revise and clarify certain rules, and acts pursuant to authority delegated to the Bureau in sections 0.91, 0.201(d), and 0.291 of the Commission's rules to clarify certain rules. n2

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n1 *See* *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 at para. 1404, 2011 FCC LEXIS 4859 (rel. Nov. 18, 2011) (*USF/ICC Transformation Order*), *pets. for review pending, Direct Commc'ns Cedar Valley, LLC v. FCC,* No. 11-9581 (10th Cir. filed Dec. 18, 2011) (and consolidated cases).
n2 *See* 47 C.F.R. §§ 0.91, 0.201(d), 0.291. The Bureau may release additional clarification orders in the future, consistent with its authority under the *USF/ICC Transformation Order. See, e.g.*, *Connect America Fund et al.*, WC Docket No. 10-90 et al., Order, DA 12-147, 2012 FCC LEXIS 500 (rel. Feb. 3, 2012) (*USF/ICC Clarification Order*).

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[2]**

[*2143] II. DISCUSSION

A. Intercarrier Compensation

2. In the *USF/ICC Transformation Order,* the Commission adopted a prospective transitional intercarrier compensation framework for VoIP-PSTN traffic. n3 This transitional framework included default compensation rates and addressed a number of implementation issues, including explaining the scope of charges that local exchange carrier (LEC) partners of affiliated or unaffiliated retail VoIP providers are able to include in tariffs. In particular, the Commission determined that it was appropriate to adopt a "symmetric" framework for VoIP-PSTN traffic. This symmetric approach means that "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." n4

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n3 *See* *USF/ICC Transformation Order* at para. 970; *see also* 47 C.F.R. §§ 51.913, 61.26(f).
n4 *USF/ICC Transformation Order* at para. 942.

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3. As part of its symmetric regime, the Commission adopted rules that "permit a LEC to 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." n5 The Commission cautioned, however, 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 partner." n6 The Commission adopted this limitation to address concerns in the record regarding double billing. n7 This limitation was codified as part of the VoIP-PSTN framework

in section 51.913(b) of the Commission's rules. n8 The Commission also modified its tariffing rules in Part 61 for competitive LECs to implement the VoIP symmetry rule. n9

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n5 *Id.* at 970. This is often referred to as the "VoIP symmetry rule."
n6 *Id.* n.2028; *see* 47 C.F.R. § 51.913(b).
n7 *USF/ICC Transformation Order* at para. 970 ("However, our rules include measures to protect against double billing, and we also make clear that our rules do not permit a LEC to charge for functions performed neither by itself or its retail service provider partner."). **[**4]**

n8 Section 51.913(b) states, in pertinent part, that "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." 47 C.F.R. § 51.913(b).
n9 Parties argued that this additional rule language was necessary to implement the VoIP symmetry rule and avoid future disputes and controversy over the tariffing of these charges. *See* Letter from Mary McManus, Counsel, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GC Docket No. 09-51, WT Docket No. 10-208 (filed Sep. 22, 2011). In particular, the Commission modified 61.26(f) and added the language in italics to the existing rule: "[i]f a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, *except if the CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.*" 47 C.F.R. § 61.26(f) (emphasis added).

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[*2144] 4. On February 3, 2012, YMax Communications Corp. (YMax) filed an *ex parte* letter seeking confirmation of its interpretation that "under [the Commission's] 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 with the PSTN, and regardless of how or by whom the last-mile transmission is provided." n10 Stated differently, YMax seeks guidance from the Commission as to whether the revised rule language in Part 61, specifically, section 61.26(f) permits a competitive LEC to tariff and charge the full benchmark rate even if it includes functions that neither it nor its VoIP retail partner are

actually providing. YMax asserts that the purpose of the Commission's revisions to section 61.26(f) was to "defin[e] the minimum access functionality necessary in order for a CLEC to be allowed to collect access charges at the full benchmark level under the VoIP-PSTN symmetry rule." n11 We disagree. The Commission revised section 61.26(f) to reflect the change in the tariffing process to implement **[**6]** the VoIP symmetry rule, which included limitations to prevent double billing. Interpreting the rule in the manner proposed by YMax could enable double billing. The Commission made clear in adopting the VoIP-symmetry rule that it intended to prevent double billing and charging for functions not actually provided. n12 Indeed, section 51.913(b) expressly states that "[t]his rule does *not* permit a local exchange carrier to charge for functions not performed by the local exchange carrier itself or the affiliated or unaffiliated provider of interconnected VoIP service or non-interconnected VoIP service." n13

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n10 Letter from John B. Messenger, VP -- Legal & Regulatory, YMax Communications Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GC Docket No. 09-51, WT Docket No. 10-208 (filed Feb. 3, 2012) (YMax Letter).
n11 *Id.*
n12 *USF/ICC Transformation Order* at para. 970 ("However, our rules include measures to protect against double billing, and we also make clear that our rules do not permit a LEC to charge for functions performed neither by itself or its retail service provider partner."). **[**7]**

n13 47 C.F.R. § 51.913(b) (emphasis added).

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5. YMax's letter does, however, highlight a potential ambiguity because the amended rule 61.26(f), which is the tariffing provision intended to implement the VoIP symmetry rule, did not include an express cross reference to section 51.913(b). Although section 51.913(b) makes clear that its terms apply notwithstanding any other Commission rule, n14 to remove any ambiguity regarding the scope of what competitive LECs are permitted to assess in their tariffs, we amend section 61.26(f) to make clear that the ability to charge under the tariff is limited by section 51.913(b). In so doing, we address and reject YMax's interpretation of section 61.26(f). n15

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n14 47 C.F.R. § 51.913(b) (noting that this section applies "[n]otwithstanding any other provision of the Commission's rules").
n15 *USF/ICC Transformation Order* at para. 970; *see also* 47 C.F.R. §§ 51.913, 61.26(f). Thus, we make clear it is not sufficient merely for the competitive LEC to be listed in the Number Portability Administration Center (NPAC) database as providing the associated telephone numbers to enable a competitive LEC to assess the full benchmark rate.

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B. Universal Service

6. *Verizon Petition for Clarification or, in the Alternative, for Reconsideration.* In the *USF/ICC Transformation Order,* the Commission adopted rules to phase down existing high-cost support for competitive eligible telecommunications carriers (ETCs), and addressed the phase down of existing **[*2145]** high-cost support to Verizon Wireless and Sprint pursuant to those carriers' prior merger commitments, as clarified by the *Corr Wireless Order.* n16 On December 29, 2011, Verizon Wireless filed a petition for clarification or, in the alternative, for reconsideration of this aspect of the *Order* as it applies to Verizon Wireless. n17 Verizon Wireless argues that there are two permissible interpretations of the *USF/ICC Order* as it bears on the phase down of support for Verizon Wireless: that the general phase down of the competitive ETC support applies but Verizon Wireless's merger commitment no longer does, or that Verizon Wireless's merger commitment remains in effect but general phase down of competitive ETC support does not. n18 Verizon Wireless states that a Bureau-level clarification is the appropriate means of resolving this ambiguity. n19

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n16 *See* *USF/ICC Transformation Order* at paras. 519-20. **[**9]**

n17 *Connect America Fund et al.,* WC Docket No. 10-90 et al., Petition for Clarification or, in the Alternative, for Reconsideration of Verizon, at 3-8 (filed Dec. 29, 2011). The petition also addressed the Commission's rules governing phantom traffic, but the Bureau does not act on that aspect of the petition in this Order.
n18 *Connect America Fund et al.,* WC Docket No. 10-90 et al., Reply to Oppositions to Petition for Clarification or, in the Alternative, For Reconsideration of Verizon, at 2-3 (filed Feb. 21, 2012) (as corrected in Letter from Christopher Miller, Verizon, to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 10-90 et al., filed Feb. 22, 2012); *see also* Letter from Tamara Preiss, Verizon, to Austin Schlick, Federal Communications Commission, WC Docket No. 10-90 et al., filed Feb. 24, 2012 (clarifying previous filings and *ex parte* letters).
n19 *Id.*

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7. The Bureau clarifies that, pursuant to paragraph 520 of the *USF/ICC Transformation Order,* only Verizon Wireless's merger commitment applies. n20 Specifically, the Bureau clarifies **[**10]** that Verizon Wireless will receive support in 2012 based on its merger commitments, as clarified by the *Corr Wireless Order,* n21 not based on the general phase down of competitive ETC support described in the *USF/ICC Transformation Order.* n22 Verizon Wireless will not receive high-cost competitive ETC support after 2012. The Universal Service Administrative Company (USAC) shall disburse to Verizon Wireless in 2012 20 percent of the support it would have received for each ETC service area in the absence of its merger commitment and the *USF/ICC Transformation Order.* As a proxy for the amount Verizon Wireless would have received in 2012 in the absence of its merger commitment and the *USF/ICC Transformation Order,* USAC shall use the amount of support it calculated for Verizon Wireless in 2011 pursuant to the identical support rule and the interim cap, including any support not actually disbursed to Verizon Wireless as a result of

the merger commitment. n23

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n20 Nex-Tech and other small wireless carriers support this interpretation of the *USF/ICC Transformation Order. See Connect America Fund et al.,* WC Docket No. 10-90 et al, Nex-Tech et al. Opposition to Petition for Clarification or, in the Alternative, For Reconsideration of Verizon (filed Feb. 9, 2012). **[**11]**

n21 *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Request for Review of Decision of Universal Service Administrator by Corr Wireless Communications, LLC,* WC Docket No. 05-337, CC Docket No. 96-45, 25 FCC Rcd 12854, 12859-63, paras. 14-22 (2010) (*Corr Wireless Order*).
n22 The clarification in this Order applies only to Verizon Wireless service areas subject to the merger commitments. Other service areas, including those for which Verizon Wireless does not possess controlling ownership, are subject to the general applicable phase down of support for competitive ETCs described in the *USF/ICC Transformation Order* and continue to remain outside the scope of the merger commitment.
n23 Similarly, Sprint will receive support in 2012 based on its merger commitment, as clarified by the Corr Wireless Order, and will not be subject to the general phase down. Sprint's total 2012 support will be the lesser of 20 percent of its 2008 support or the amount it would have received in 2012 for each ETC service area in the absence of its merger commitment and the *USF/ICC Transformation Order.* As a proxy for the amount Sprint would have received, USAC shall use the amount of support Sprint received in each ETC service area in 2011.

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8. Accordingly, the Bureau grants Verizon's Petition to the extent it requests clarification of **[*2146]** the phase down of competitive ETC support and dismisses Verizon's Petition to the extent it alternatively requests reconsideration of the same issue.

9. *Other Matters.* First, the Bureau amends the definition of "rate-of-return carrier" in section 54.5 of our rules to correct an erroneous cross-reference to the definition of price cap regulation.

10. Second, the Bureau dismisses in part the petition for reconsideration filed by the United States Telecom Association (US Telecom), which, among other things, asked the Commission to clarify that reductions in legacy support resulting from a failure to meet the urban rate floor will, at most, extend only to high-cost loop support and high-cost model support. n24

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n24 *Connect America Fund et al.,* WC Docket No. 10-90 et al., Petition for Reconsideration of US Telecom, at 14 (filed Dec. 29, 2011).

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11. In the *USF/ICC Clarification Order,* the Bureaus addressed **[**13]** this issue by amending section 54.318(d) to clarify that support reductions associated with the rate floor will offset frozen CAF Phase I support only to the extent that the recipient's frozen CAF Phase I support replaced HCLS and HCMS. The Bureaus further stated that the offset does not apply to frozen CAF Phase I support to the extent that it replaced IAS and ICLS. n25 Because the *USF/ICC Clarification Order* addressed this issue, the Bureau dismisses as moot that portion of the US Telecom petition for reconsideration.

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n25 *USF/ICC Clarification Order* at para. 3.

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III. PROCEDURAL MATTERS

A. Paperwork Reduction Act

12. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public **[**14]** Law 107-198, see 44 U.S.C. 3506(c)(4).

B. Final Regulatory Flexibility Act Certification

13. Final Regulatory Flexibility Certification. The Regulatory Flexibility Act of 1980, as amended (RFA), n26 requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that "the rule will not have a significant economic impact on a substantial number of small entities." n27 The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." n28 In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. n29 A small business concern is one which: (1) is independently owned and operated; (2) is **[*2147]** not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). n30

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n26 The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). **[**15]**

n27 5 U.S.C. § 605(b).
n28 5 U.S.C. § 601(6).

n29 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."
n30 Small Business Act, 15 U.S.C. § 632.

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14. This Order clarifies, but does not otherwise modify, the *USF/ICC Transformation Order.* These clarifications do not create any burdens, benefits, or requirements that were not addressed by the Final Regulatory Flexibility Analysis attached to *USF/ICC Transformation Order.* Therefore, we certify that the requirements of this Order **[**16]** will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the Order including a copy of this final certification in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Order and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. *See* 5 U.S.C. § 605(b).

C. Congressional Review Act

15. The Commission will send a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act. n31

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n31 *See* 5 U.S.C. § 801(a)(1)(A).

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IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 2, 4(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, and 403 of the Communications Act of 1934, **[**17]** as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 152, 154(i), 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, 1302, and pursuant to sections 0.91, 0.201(d), 0.291, 1.3, and 1.427 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.201(d), 0.291, 1.3, 1.427 and pursuant to the delegation of authority in paragraph 1404 of FCC 11-161, 2011 FCC LEXIS 4859 (rel. Nov. 18, 2011), that this Order IS ADOPTED, effective thirty (30) days after publication of the text or summary thereof in the Federal Register, except for those rules and requirements involving Paperwork Reduction Act burdens, which shall become effective immediately upon announcement in the Federal Register of OMB approval.

17. IT IS FURTHER ORDERED, that Parts 54 and 61 of the Commission's rules, 47 C.F.R.

Parts 54, 61 are AMENDED as set forth in the Appendix A, and such rule amendments shall be effective 30 days after the date of publication of the rule amendments in the Federal Register.

18. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 254 of the Communications Act of 1934, as amended, 47 U.S.C. § 254, and the authority delegated **[**18]** in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the Petition for Clarification or, in the Alternative, for Reconsideration of Verizon IS GRANTED IN PART AND DISMISSED IN PART and the Petition for Reconsideration of United States Telecom Association IS DISMISSED IN PART.

19. IT IS FURTHER ORDERED, that the Commission SHALL SEND a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

20. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

[*2148] Sharon E. Gillett

Chief

Wireline Competition Bureau

APPENDIX:

[*2149] APPENDIX

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 54 and 61 to read as follows:

PART 54--UNIVERSAL SERVICE

1. The authority citation for part 54 continues to read as follows:

Authority: 47 U.S.C. 151, **[**19]** 154(i), 201, 205, 214, 219, 220, 254, 303(r), 403, and 1302 unless otherwise noted.

Subpart A--General Information

2. Amend § 54.5 by revising the definition of "rate-of-return carrier" to read as follows.

* * * *

Rate-of-return carrier. "Rate-of-return carrier" shall refer to any incumbent local exchange carrier not subject to price cap regulation as that term is defined in § 61.3(ee) of this chapter.

* * * *

PART 61--TARIFFS

1. The authority citation for part 61 continues to read as follows:

Authority: Secs. 1, 4(i), 4(j), 201-205 and 403 of the Communications Act of 1934, as amended; 47 U.S.C. 151, 154(i), 154(j), 201-205 and 403, unless otherwise noted.

2. Revise § 61.26(f) to read as follows:

§ 61.26 Tariffing of competitive interstate switched exchange access services.

* * * *

(f) If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, except if the CLEC is listed in the database of the Number **[**20]** Portability Administration Center as providing the calling party or dialed number, the CLEC may, to the extent permitted by § 51.913(b), assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.

February 3, 2012

Via EFCS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Ms. Dortch:

Re: *Written Ex Parte Presentation,* WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 07-135; WC Docket No. 05-337; CC Docket No. 01- 92; CC Docket No. 96-45; WC Docket No. 03-109; WT Docket 10-208

YMax Communications Corp. ("YMax") seeks confirmation that it is properly interpreting the Commission's *Report and Order and Further Notice of Proposed Rulemaking* ("ICC Reform Order" or "Order") in the above-captioned proceedings.[1] Specifically, 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 with the PSTN, and regardless of how or by whom the last-mile transmission is provided.

In the ICC Reform Order the Commission determined that LECs providing wholesale services to retail VoIP providers should be able to collect all the same intercarrier compensation charges as LECs relying entirely on TDM networks, regardless of how the relationship with their retail VoIP service partners is structured and regardless of whether the functions performed or the technology used correspond to those used under a traditional TDM architecture.[2]

YMax applauds the Commission's ruling, as well as its underlying policy finding that "a symmetric approach to VoIP-PSTN intercarrier compensation is warranted *for all LECs*."[3]

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[1] See *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (ICC Reform Order).

[2] ICC Reform Order at ¶¶ 968-970, and 47 CFR § 51.913.

[3] *Id.* at ¶ 968 (*emphasis added*).

The Commission went on to say, however, that its rules "do not permit a LEC to charge for functions performed neither by itself [n]or its retail service provider partner," and cited *AT&T Corp. v. YMax Communications Corp.*, 26 FCC Rcd 5742 (2011) (the "*YMax Order*") as illustrating that situation.[4] The Commission elaborated in a footnote 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 partner,"[5] and codified this exception in the text of its rules.[6]

Judging from the paragraphs of the *YMax Order* that it references, the Commission 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.[7]

YMax does not believe that is what the Commission actually ruled, for the reasons outlined below. However, YMax suspects that one or more IXCs may claim that the Commission's "functions not performed" exception permits them to refuse to compensate YMax for VoIP-PSTN traffic under the ICC Reform Order. Confirming now the proper interpretation of the Order and its implementing regulations in this respect would help prevent disputes, another key goal of the Order.[8]

The central question is this: under the Commission's new VoIP-PSTN symmetry rule, what is the baseline access function or functions that a CLEC must be performing in order to be allowed to charge the equivalent of full ILEC switched access rates, and without which the "functions not performed" exception applies? YMax believes the answer lies in the industry proposals on which the Commission's rule was based, and in the revisions to 47 CFR § 61.26 the Commission adopted in order to address this issue.

The VoIP-PSTN symmetry rule is based on proposals filed by several

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[4] *Id.* at ¶ 970 and nn. 2026, 2028. How the new VoIP-PSTN symmetry rule enunciated in the ICC Reform Order should be interpreted and applied prospectively – the subject of this letter -- is an entirely separate matter from the issues decided in the *YMax Order* and currently under reconsideration. YMax does not express any opinion here on the issues being litigated in the complaint proceeding (which concern the parties' rights and obligations under YMax's previous tariff language and the pre-Order regime), and is not asking here for any Commission attention or action on those issues outside of that proceeding.

[5] *Id.* at ¶ 970, n. 2028.

[6] *See* 47 CFR § 51.913(b)("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.").

[7] *See* paragraphs 41 and 44, n. 120, of the *YMax Order,* cited in the ICC Reform Order at ¶ 970, n. 2028.

[8] *See, e.g.,* ICC Reform Order at ¶ 930.

commenting parties and cited in the ICC Reform Order at ¶¶ 968–970.[9] Under those proposals it is not necessary for either the LEC or its VoIP service partner to be using a TDM-based "end office" switch[10] or providing "loop facilities" or any other physical connection to the VoIP customer[11] in order for the LEC to collect full access charges. Even AT&T, which vehemently opposed adoption of the VoIP-PSTN symmetry rule and now seeks to overturn it on appeal,[12] conceded that the proposal ultimately adopted would permit CLECs to collect full benchmark switched access charges "even when those CLECs perform few, if any, of the benchmark functions identified in the Commission's rules," and even for "functions actually being performed by ISPs who receive PSTN-to-IP calls from those CLECs and route them over Internet backbones, middle mile facilities, and broadband Internet access connections for termination to customers of "over the top" VoIP services."[13]

If "few, if any" of the traditional TDM-based ILEC access functions are required in order for a CLEC to collect full access charges on VoIP-PSTN traffic, what is the minimum functionality required? This, too, was addressed by the parties that proposed the symmetry rule, and accepted by the Commission.

In its *August 3 PN* Comments, Level 3 pointed out that "because the access charge rules differentiate between situations in which LECs provide end office functionality and ones in which they provide only transit, it is important for there to be a clear rule as to when a LEC is providing end office functionality and therefore can collect end office switching access charges, either originating or terminating."[14] Level 3 therefore urged the Commission to "establish a bright-line test that defines a LEC to be eligible to receive end office switched access charges when it is identified in the NPAC database as providing the calling party or dialed number."[15] In an *ex parte* filing dated September 22, Comcast put that concept into the form of a proposed text change to the existing CLEC benchmark regulation, 47 CFR § 61.26. Specifically, Comcast proposed adding language to paragraph (f) of that regulation stating that "if [a] CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number."[16]

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[9] *See, e.g.,* Comcast *August 3 PN* Comments at 5-8; NCTA *August 3 PN* Comments at 17-19; Time Warner Cable *August 3 PN* Comments at 9-10; Level 3 *August 3 PN* Comments at 21-14; Time Warner Cable-Cox Sept. 21, 2011 *Ex Parte* Letter; Comcast Sept. 22, 2011 *Ex Parte* Letter.
[10] *See, e.g.,* Comcast *August 3 PN* Comments at 7.
[11] *See, e.g.,* Level 3 *August 3 PN* Comments at 22.
[12] *See AT&T, Inc., v. FCC and USA,* 10th Cir. No. 11-9591.
[13] AT&T Oct. 21, 2011 *Ex Parte* Letter at 1-2.
[14] Level 3 *August 3 PN* Comments at 21.
[15] *Id.* at 21-24.
[16] Comcast Sept. 22, 2011 *Ex Parte* Letter.

Similar language was proposed in other filings.[17] The Commission adopted the proposed language in the final rules it promulgated with the Order, revising Section 61.26(f) as follows:

> If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, except if the CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.

Although the Commission did not discuss this rule revision in paragraph 970 or anywhere else in the text of its Order, its purpose was clearly to implement the "bright line" rule urged by Level 3, Comcast and others, and to avoid future disputes by expressly defining the minimum access functionality necessary in order for a CLEC to be allowed to collect access charges at the full benchmark level under the VoIP-PSTN symmetry rule.

The Commission also revised the definition of "switched exchange access services" in the CLEC benchmark rule to include

> [t]he termination of interexchange telecommunications traffic to any end user, either directly or 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 reciprocal compensation charges prescribed by this subpart for that traffic, regardless of the specific functions provided or facilities used.[18]

Putting all the pieces together, it seems beyond dispute that whenever a CLEC is providing "some portion" of the interconnection required to complete VoIP-PSTN calls and is listed in the NPAC database as providing the associated telephone numbers, then the CLEC is providing "switched exchange access services" and may collect the full benchmark rate level. So long as neither the VoIP service provider nor any other provider in the chain is also seeking to collect access charges on the call there is no double-billing problem, and because the CLEC's rate is benchmarked against the competing ILEC rate the IXC is paying no more to originate or terminate

[17] *See, e.g.*, Comcast/Time Warner Cable/Cox October 5, 2011, *Ex Parte* letter.
[18] 47 CFR § 61.26(a)(3)(ii).

the VoIP-PSTN call than it would have paid in an all-TDM scenario – the central policy behind the "symmetry" rule.

In order to avoid costly and disruptive disputes, YMax requests the Commission to confirm that its reading of the Order is correct.

Respectfully submitted,

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