

Exhibit B

(Included as Attachment 3)

Attachment 3
YMax Letter to FCC

June 21, 2012

Via Email and Hand Delivery

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

Dear Jim:

Thank you for the opportunity to meet recently with you and other staff of the Office of General Counsel ("OGC") and Wireline Competition Bureau ("WCB" or "Bureau") to discuss MagicJack's and YMax Communications Corporation's¹ concerns regarding AT&T's appeal of the *USF/ICC Transformation Order*, as well as AT&T's and Verizon's positions in pending civil litigation in the Northern District of California.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴ FCC 12-47, released April 25, 2012.

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

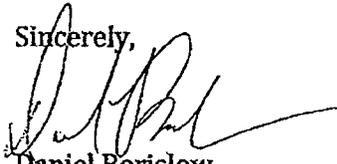
⁶ *Id.*, para. 42, quoting *USF/ICC Transformation Order*, para. 942.

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

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

Sincerely,



Daniel Borislow
President and Chief Executive Officer