Attachment 2

YMax Objection to AT&T Motion to Reopen Proceeding in Rhode Island

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July 12, 2012

VIA E-MAIL AND OVERNIGHT COURIER

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

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

Dear Ms. Massaro:

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

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

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

Sincerely yours,

Ronald W. Del Sesto, Jr.

Enclosure

cc: See attached Certificate of Service

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PUBLIC UTILITIES COMMISSION

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

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

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

I. Background

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

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

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

II. Legal Standard and Burden for Reopening a Proceeding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[8] *Clarification Order*, ¶ 4.

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

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

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

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

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

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

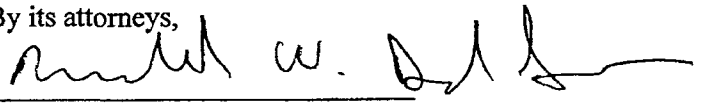
IV. Conclusion

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

Respectfully submitted,

YMAX COMMUNICATIONS CORP.

By its attorneys,



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