

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

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

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

I.

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

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

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

¹ *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc. for Temporary Waiver of Commission Rule 61.26(d) To Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, CC Docket No. 96-262, CCB/CPD File No. 01-19, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9118–19, para. 21 (2004) (“[O]ur long-standing policy with respect to incumbent LECs is that they should charge only for those services that they provide” and “[w]e believe that a similar policy should apply to competitive LECs.”).

² 47 C.F.R. § 51.913(b). Conversely, our rules do “not permit a local exchange carrier to charge for functions not performed by the local exchange carrier itself or the affiliated or unaffiliated provider of interconnected VoIP service or non-interconnected VoIP service.” *Id.*

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

⁴ 47 C.F.R. § 51.913(b).

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

First, the Commission stated in 1997 that “interconnection, i.e., the actual connection of lines [or loops] and trunks, is the characteristic that distinguishes switches from other central office equipment.”⁶ Although a switch may also perform other functions—a Bureau-level order had previously identified eight⁷—the FCC reasoned that these other functions are in the end peripheral to end office switching: “units that interconnect lines and trunks . . . are capable of providing all of the essential features and capabilities of a switch.”⁸ Or as the FCC put it in the 2011 *YMax Order*, “[e]nd office switching charges were and are authorized by law to allow local exchange carriers to recover the substantial investment required to construct the tangible connections between themselves and their customers throughout their service territory.”⁹

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

Third, the FCC’s 2011 *YMax Order* considered and rejected the contention that an over-the-top VoIP provider performs end office switching by interconnecting virtual loops over the Internet.¹¹ As the Commission reasoned, if “the entire worldwide Internet . . . comprises a ‘virtual’ loop,” then such loops “would be of indeterminate length and configuration” and “could extend thousands of miles via numerous intermediaries throughout the country (or even the world), or only a few miles via a couple of intermediaries in contiguous states. . . . If this exchange of packets over the Internet is a ‘virtual loop,’ then so too is the entire public switched telephone network—and the term ‘loop’ has lost all meaning.”¹²

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

None of this is to say that a LEC partnered with an over-the-top VoIP provider cannot collect *any* access charges. If such a partnership performs the functional equivalent of other intercarrier services, such as dedicated transport access service or tandem-switched access service,¹³ it may collect the

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

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

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

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

¹⁰ *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18025, para. 969 (2011) (*Universal Service Transformation Order*).

¹¹ *YMax Order*, 26 FCC Rcd 5742.

¹² *Id.* at 5758–59, para. 44.

¹³ 47 C.F.R. § 51.903(c), (i).

corresponding access charges. But the one thing our precedent makes clear is that transmitting calls to an unaffiliated ISP for routing over the Internet is not the functional equivalent of end office switching.

II.

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

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

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

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

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

¹⁶ 47 C.F.R. § 51.913(b).

¹⁷ *Order* at para. 35.

¹⁸ *Order* at para. 26.

¹⁹ *Order* at para. 31.

²⁰ *Order* at para. 21.

First, the order cannot credibly claim that the VoIP Symmetry Rule superseded the *YMax Order*. The rule came only six months after the *YMax Order* and did not at any point suggest it was superseding that order. Although both addressed intercarrier compensation, the VoIP Symmetry Rule addressed two analytically distinct issues left open in the *YMax Order*: (1) whether a LEC could collect access charges when it transmitted a call using a format other than time-division multiplexing (such as IP) and (2) whether a LEC could collect access charges for functions performed not only by itself but also by its VoIP partner.²¹

Far from undermining the *YMax Order*, the FCC specifically reaffirmed it in adopting the VoIP Symmetry Rule, citing the very portions quoted above in declaring that LECs cannot charge for services not performed.²² Indeed, shortly after the FCC adopted the VoIP Symmetry Rule, YMax of the *YMax Order* returned to the FCC worried that this citation “might appear to be suggesting that if the physical transmission facilities connecting the IXC and the VoIP service customer are provided in part by one or more unrelated ISPs (as is the case with YMax or ‘over-the-top’ VoIP providers such as Skype or Vonage), then the LEC and its VoIP service partner are not performing the ‘access’ function and cannot charge for it.”²³ In response, our staff rejected YMax’s request that it need only perform “some portion of the interconnection”—rather than interconnection all the way to the last-mile facility—in order to assess end office switching charges.²⁴ In other words, the staff made explicit what was already implicit: The *YMax Order* and associated precedent survived the VoIP Symmetry Rule, hence a LEC-VoIP partnership must itself interconnect with last-mile facilities—the IP equivalent of end office switching.

Second, the order incorrectly states that the VoIP Symmetry Rule adopted a “new functional equivalence approach.” One problem with this is that the VoIP Symmetry Rule did not adopt *any* test regarding functionality; it instead cleared up two separate issues as explained above. Perhaps more to the point, the functional equivalence approach codified in other rules²⁵ was nothing new; it was more than a decade old when the FCC adopted the VoIP Symmetry Rule.²⁶ And by adopting that time-tested approach, the FCC implicitly adopted its accompanying precedent—and explicitly endorsed the reasoning of the *YMax Order*.²⁷

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

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

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

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

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

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

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

Third, the order incorrectly suggests that the language of the VoIP Symmetry Rule means that a LEC and its over-the-top VoIP partner *must* be able to collect end office switching charges. But when it adopted the VoIP Symmetry Rule, the Commission cautioned that “although access services might functionally be accomplished in different ways depending upon the network technology, the right to charge does not extend to functions not performed by the LEC or its retail VoIP service provider partner.”²⁸ Indeed, the rule itself reiterates that “[t]his rule does not permit a local exchange carrier to charge for functions not performed.”²⁹ So it’s no surprise that VoIP providers performing differing functions would entitle LECs to differing intercarrier compensation, nor that a VoIP provider that interconnects a call with a customer’s last-mile facility performs the function of end office switching whereas a VoIP provider that transmits calls to an unaffiliated ISP for routing over the Internet does not.³⁰

III.

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

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

²⁹ 47 C.F.R. § 51.913(b).

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

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

³² 5 U.S.C. § 553.