

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

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

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

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

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

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

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

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

² *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc. for Temporary Waiver of Commission Rule 61.26(d) To Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, CC Docket No. 96-262, CCB/CPD File No. 01-19, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 (2004).

The order also attempts to explain why, as a policy matter, the decision is correct. In particular, the order claims that the decision is necessary to encourage the deployment of all-IP networks, protect and promote competition in the voice marketplace, reduce intercarrier compensation disputes, and avoid marketplace distortions and arbitrage. But here again, the policy justifications are also unavailing.

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

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

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

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