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October 5, 2012

**RECEIVED**

OCT 05 2012

**PUBLIC SERVICE COMMISSION**

Darrell Nitschke  
ND Public Service Commission  
600 E Boulevard, Dept. 408  
Bismarck, ND 58505-0480

Re: AT&T Communications of the Midwest, Inc. vs. YMax Communication Corp.  
Case No. PU-12-433

Dear Mr. Nitschke:

Enclosed for filing please find the Notice of Withdrawal of Complaint of AT&T Communications of the Midwest, Inc. versus YMax Communication Corp. Pursuant to N.D. Admin Code § 69-02-02-02(3), one copy of the Notice of Withdrawal of Complaint for each respondent and seven additional copies of the Complaint are included.

I am also sending you a copy of the Notice of Withdrawal of Complaint electronically with an email.

If you have any questions, feel free to call me.

Respectfully yours,



Thomas D. Kelsch

TDK: trs  
Enclosures



19 PU-12-433 Filed: 10/5/2012 Pages: 6  
Notice of withdrawal of Complaint

AT&T Communications of the Midwest, Inc.  
Thomas Kelsch, KelschKelschRuff&Kranda

BEFORE  
THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

AT&T Communications of the Midwest, Inc.,	)	
	)	
	)	
Complainant,	)	Case No. PU-12-433
vs.	)	
	)	
	)	NOTICE OF WITHDRAWAL OF COMPLAINT
YMax Communication Corp.,	)	
	)	
Respondent.	)	

**STATEMENT OF CASE**

1. Respondent, YMax Communication Corp., (YMax) filed revisions to North Dakota Tariff No. 2 (Access Service) with the North Dakota Public Service Commission on June 8, 2012, Case No. PU-12-289.
  
2. On June 29, 2012, AT&T Communications of the Midwest, Inc., (AT&T) filed a Complaint with the North Dakota Public Service Commission (Commission) alleging that YMax's North Dakota Tariff No. 2 – Access Service filed with the Commission on June 8, 2012 (Case No. PU-12-289) includes charges for VoIP-PSTN traffic access functions that YMax does not provide. VoIP-PSTN traffic access is traffic exchanged over public switched telephone network (PSTN) facilities that originates or terminates in internet protocol format (VoIP).
  
3. In its Complaint, AT&T requested that the Commission suspend the YMax tariff filed on June 8, 2012 and determine that the tariff is not in compliance with the Federal Communications Commission's (FCC) recent orders in its access reform docket including *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking , FCC 11-161, 26 FCC Rcd 17663 (2011) and YMax Clarification Order, DA 12-298, released on February 27, 2012. AT&T requested the following relief:

- a. That the YMax Communication Corporation Tariff filed on June 8, 2012 be suspended, and
  - b. That YMax's Tariff be determined not to be in compliance with relevant FCC orders.
4. On July 11, 2012 the North Dakota Public Service Commission found that the June 29, 2012 complaint filed by AT&T Communications of the Midwest, Inc. states a *prima facie* case, and that the complaint was served on the Respondent, YMax Communications Corp., in Case No. PU-12-433.
  5. On August 13, 2012 the Commission issued a Notice of Hearing in the above case for October 18, 2012 beginning at 10:00 a.m.
  6. On August 28, 2012 YMax filed Revisions to North Dakota Tariff No. 2 with the Commission Case No PU-12-694 withdrawing the portions of North Dakota Tariff No. 2 (Access Service) Case No. PU-12-289 which were the subject of AT&T's Complaint.

#### **REASON FOR WITHDRAWAL OF COMPLAINT**

In light of YMax's Revisions to North Dakota Tariff No. 2 filed on August 28, 2012, Case No PU-12-694, withdrawing the tariff pages that are the subject of the above-captioned complaint, AT&T requests approval from the Commission pursuant to Administrative Rule Section 69-02-02-07 Amendments and Withdrawals to withdraw its complaint. Likewise AT&T does not object to YMax's Revisions to North Dakota Tariff No. 2 filed on August 28, 2012, with the Commission, Case No PU-12-694.

Although it is withdrawing its complaint, AT&T wants to make it clear to both YMax and the Commission that:

- (i) AT&T contends that the end office switching charges that YMax has consistently billed to AT&T for years (and apparently will continue to bill to AT&T) are flatly

inconsistent with both YMax's switched access tariff and with the orders and rules of the Federal Communications Commission ("FCC");<sup>1</sup>

- (ii) AT&T continues to have substantial and valid concerns regarding the legality of YMax's existing access tariffs regarding VoIP-PSTN traffic;<sup>2</sup> and
- (iii) AT&T intends to continue to dispute and withhold payment of any unlawful YMax switched access charges on those grounds, *i.e.*, that YMax is billing those charges in violation of its tariffs and of FCC rules and orders.

AT&T nevertheless wishes to conserve its resources and those of the Commission, and, as a consequence, AT&T is not requesting that the Commission take additional action at this time regarding YMax's revised access tariff via this complaint. However AT&T notes that the North Dakota rules do not allow for the automatic suspension of the tariff pending dispute resolution. Consequently, the language subject to this dispute was in effect from July 1, 2012 to September 17, 2012 when the tariff pages were withdrawn with that effective date. AT&T's concern is that the language was an attempt to provide support for YMax's legally insupportable position that it is entitled to charge for end office switching functions that it does not perform. As noted above, AT&T will not pay for any charges associated with an end office switching

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1 As AT&T has explained, YMax's tariff and billed charges violate the FCC's rules and orders. The FCC has made numerous, detailed factual findings – which remain binding on YMax – that YMax does not operate any facilities that are connected to lines that deliver VoIP-PSTN traffic to any individual caller's home or business. *YMax Order*, 26 FCC Rcd. 5742, ¶¶ 3-9, 14, 19, 38-45 (2011). These findings compel the conclusion that, under the FCC's clear rules, YMax does not provide end office switching and thus cannot bill AT&T for those services. *Id.* ¶¶ 40-41; *see Connect America Order*, 26 FCC Rcd. 17663, ¶ 970 (2011). After making these findings and rules, the FCC also flatly rejected YMax's proposal to "clarify" the FCC's rules to allow YMax to impose end office switching rates even though it is other internet service providers, and not YMax, that actually do the work of delivering the traffic to callers' homes and businesses. *YMax Clarification Order*, 27 FCC Rcd. 2142, ¶¶ 4-5 (2012).

2 Although YMax's letter regarding the tariff withdrawal claims that the withdrawal "reverts" the tariff back to the provisions that had been in effect prior to July 1, 2012, the withdrawal does not mean that YMax's tariff is (or was) lawful, or that all invoices that YMax sends to AT&T pursuant to the tariff are lawful or proper under the tariff. The tariff contains, for example, rates, terms and conditions for end office switching services, and for the reasons explained, YMax does not actually provide these services. While these provisions can be found in YMax's tariff prior to July 1, 2012, the fact is that the FCC has now made binding factual determinations regarding YMax's operations and its limited role in routing calls, and has also issued new rules that apply to YMax's services. Thus, even assuming, *arguendo*, that YMax's tariff was previously lawful, the effect of the FCC's factual findings regarding YMax and the FCC's new rules is that YMax is prohibited from maintaining a tariff that can be interpreted to allow it to charge for services (like end office switching) that YMax does not provide.

function that is not performed by YMax. This includes any billing for the time period in which the tariff was in effect.

Notwithstanding the closure of this docket, AT&T will continue to object to any effort on the part of YMax to bill AT&T with end-office switching charges and will avail itself of all remedies available. In short, the disputes between AT&T and YMax will continue so long as YMax insists that it can tariff and bill AT&T for end office switching services that YMax does not actually provide. If the parties cannot resolve this dispute, AT&T is concerned that the parties may need to appear before the Commission at some point in the future.

AT&T requests the Commission assess any costs incurred in this action by the Commission against YMax. YMax caused this action to be commenced by initially filing its revised tariff and then after AT&T filed this Complaint, YMax filed revisions to North Dakota Tariff No. 2 with the Commission Case No PU-12-694, deleting the tariff provisions which were the subject of AT&T's Complaint.

NOW WHEREFORE, AT&T prays for the following relief:

1. That the Commission grant permission to AT&T to withdraw its Complaint filed against YMax in the above entitled action.
2. That the Commission assess any costs incurred in this action against YMax.

Respectfully submitted,

AT&T Communications of the Midwest, Inc.

Dated this 5 day of October, 2012.



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State Bar ID No. 03918  
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Legal Counsel for AT&T Communications  
of the Midwest Inc.  
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BEFORE  
THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

AT&T Communications of the Midwest, )  
Inc. )  
 )  
Complainant, )  
vs. )  
 )  
YMax Communication Corporation, )  
 )  
Respondent. )

Case No. PU-12-433  
OAH File No. 20120251

**AFFIDAVIT OF SERVICE**

STATE OF NORTH DAKOTA )  
 ) ss.  
COUNTY OF MORTON )

I, Tania R. Schaaf, being first duly sworn, depose and state that she is a citizen of the United States, over the age of eighteen and not a party to the above-entitled action. That on this 5<sup>th</sup> day of October, 2012, I served the attached, which was e-mailed to the ND Public Service Commission on October 5, 2012 for filing:

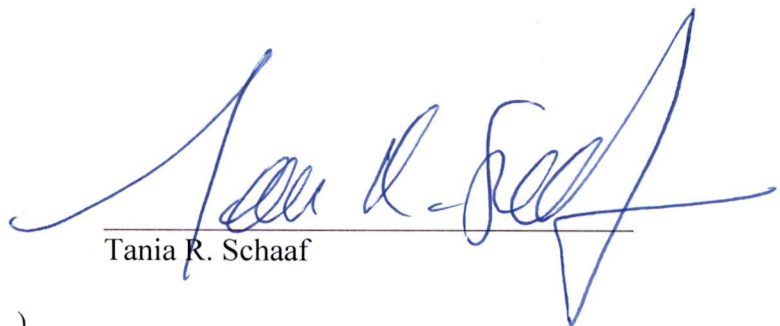
**1. Notice of Withdrawal of Complaint**

upon the following person by placing a copy of same in the United States mails at Mandan, ND, with sufficient postage affixed hereto, in an envelope(s) addressed as follows:

Zach Pelham  
Pearce & Durick  
P O Box 400  
Bismarck, ND 58502-0499

and

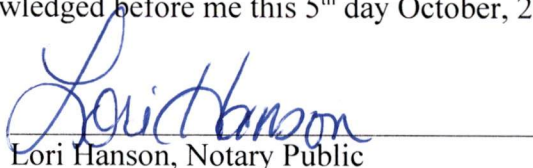
Russell Blau  
Bingham McCutchen, LLP  
2020 K Street NW  
Washington, DC 20006-1806

  
\_\_\_\_\_  
Tania R. Schaaf

STATE OF NORTH DAKOTA )  
 ) ss.  
COUNTY OF MORTON )

The foregoing instrument was acknowledged before me this 5<sup>th</sup> day October, 2012.



  
\_\_\_\_\_  
Lori Hanson, Notary Public