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October 14, 2011

**VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, S.W.  
Washington, DC 20554

Re: ***Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; High Cost Universal Service Support, WC Docket No. 05-337; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135; Connect America Fund, WC Docket No. 10-90; A National Broadband Plan for Our Future, GN Docket No. 09-51***

**Notice of Ex Parte Communication**

Dear Ms. Dortch:

On October 12, 2011 William A. Haas, Corporate Vice President of Public Policy and Regulatory of PAETEC Holding Corp. (“PAETEC”) and the undersigned met separately with Angela Kronenberg, Wireline Legal Advisor to Commissioner Mignon Clyburn, and Margaret McCarthy, Wireline Policy Advisor to Commissioner Michael Copps.

PAETEC urged the Commission to consider the impact of ICC reductions on CLECs and their customers and adopt a measured transition to ensure continued investment in competitive broadband services. Intercarrier compensation makes up approximately 7% of PAETEC’s revenue. The variance between PAETEC’s interstate and intrastate access rates varies widely depending on the state,<sup>1</sup> and the revenue impact of equalizing intrastate and interstate access is substantial. As PAETEC showed, AT&T is unlikely to suffer any access revenue losses in one-half of its states because its access rates are already equalized.<sup>2</sup> In those states, AT&T will have no lost access revenues to offset with increased SLCs or retail rates. In addition to the business/residential divide and long-term contract pricing commitments that will prevent CLECs from recouping lost revenues

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<sup>1</sup> See PAETEC Confidential Revenue and Cost Data (filed May 23, 2011), at Tab “Term. Rates Combined” (demonstrating the variance between interstate and intrastate rates across the PAETEC operating companies).

<sup>2</sup> PAETEC August 24 Comments, at 12-13.

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from their business end user customer base during the access flash cut,<sup>3</sup> PAETEC will face an effective price ceiling from AT&T's rates that will constrain its ability to recoup its significant terminating intrastate access revenue losses through retail rates and/or SLCs.

PAETEC also urged the FCC to find, in its first Order on this NPRM, that the exchange of IP voice traffic via IP-to-IP interconnection arrangements with ILECs is subject to Sections 251 and 252. Such a finding is necessary so that good faith carrier-to-carrier negotiations for IP interconnection can begin, giving state commissions and the FCC a better basis for determining how/what costs are incurred in a forward looking IP network architecture and how they should be recovered. Unless the Commission confirms the ILECs' obligations to negotiate IP-to-IP interconnection in good faith, ILECs will continue to deny that they have any obligation to interconnect directly on an IP-to-IP basis at all. The Commission's concerns expressed in 1996 remain true today: "Negotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires . . . The inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power in part because many new entrants seek to enter national or regional markets."<sup>4</sup> ILEC refusals to interconnect directly in IP put CLECs at a competitive disadvantage. Although ILEC customers retain all of the features and functions of IP services, where the CLEC's service must be converted for TDM interconnection, its IP-based customers may lose some of those features. The Commission must take action now to address the ILECs' incentives and ability to deny their competitors direct IP-to-IP interconnection that is necessary to transition the PSTN to support broadband services.

PAETEC argued that as a CLEC providing telephone exchange service, it is entitled to any technically feasible form of direct interconnection with an ILEC. The courts have upheld Commission rules that (1) impose obligations on ILECs to modify their networks to accommodate interconnection and (2) exclude economic considerations from the determination of what is technically feasible.<sup>5</sup> Like meet-point interconnection, "although the creation of [such] arrangements may require some build out of facilities by the

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<sup>3</sup> *Id.*, at 14.

<sup>4</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, at ¶ 55 (1996) (emphasis added) ("First Local Competition Order") (subsequent history omitted).

<sup>5</sup> See Reply Comments of PAETEC Holding Corp., and RCN Telecom Services, LLC, pp. 3-6, WC Docket No. 11-119 (Aug. 30, 2011). A copy of these comments is attached hereto.

incumbent LEC, [] such arrangements are within the scope of the obligations imposed by sections 251(c)(2) and 251(c)(3).”<sup>6</sup>

The fact that PAETEC’s telephone exchange service is an input in a VoIP service does not detract from PAETEC’s section 251(c)(2) interconnection rights. Information service providers “use” telecommunications services as inputs in their information services. The statutory classification of the retail VoIP service is not relevant to a determination of whether a LEC such as PAETEC offers the VoIP provider telephone exchange service that enables the VoIP provider and its subscriber to originate and terminate the telecommunications service that is an input in their VoIP service.<sup>7</sup>

Nor does the Act limit the term “telephone exchange service” to circuit-switched technology. Rather, “the concept of an exchange is based on geography and regulation, not equipment.”<sup>8</sup> Thus even where PAETEC uses packet-switched technology to offer telephone exchange service, it qualifies for section 251(c)(2) interconnection.<sup>9</sup>

Commission precedent permits an information service provider to classify the telecommunications *component* of an information service as a telecommunications service. For example, the FCC found a facilities-based provider of broadband Internet access is not offering a telecommunications service even where it self-provides transmission as a part of its broadband offering.<sup>10</sup> The FCC nevertheless permitted

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<sup>6</sup> First Local Competition Order, at ¶ 553.

<sup>7</sup> As the *Time Warner Order* emphasized, “the statutory classification of a third-party provider’s VoIP service as an information service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under Section 251(a) and (b).” *Time Warner Cable Request for Declaratory Ruling*, DA 07-709, Memorandum Opinion and Order, 22 FCC Rcd 3513, at ¶ 15 (March 1, 2007).

<sup>8</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd. 385, ¶ 22 (1999) (“*Advanced Services Order*”).

<sup>9</sup> As noted by Cablevision, Charter, Comptel and others, “section 252(c)(2) is technology neutral; it requires ‘interconnection with the local exchange carrier’s network’ without limiting that obligation to the use of any particular technology.” See Comments of Cablevision Systems Corporation and Charter Communications Inc., at p. 5 and Comments of COMPTEL:, at pp. iii, 3, 5, WC Docket No. 11-119 (Filed Aug. 15, 2011) (“As the Commission has previously stated, nothing in the statute or legislative history indicates that section 251(c) was only intended to apply to the technologies in existence in 1996. Rather the Statute is technology neutral.”).

<sup>10</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, at ¶¶ 104-105 (2005) (“*Wireline Broadband Order*”).

Ms. Marlene H. Dortch, Secretary  
October 14, 2011  
Page 4

facilities-based providers to self-classify the integrated transmission component of their information service as a telecommunications service.<sup>11</sup> Because the provision of a telephone number and the connection to the PSTN is essential to provide “customers with the capability of intercommunicating with other subscribers,” the PSTN connectivity component meets the “intercommunication” requirement of the Act’s definition of telephone exchange service.<sup>12</sup> The Commission should recognize that this basic building block, which is essential to enabling VoIP end users to communicate with others on the PSTN, is a telephone exchange service that entitles the LEC providing such PSTN connectivity to section 251(c)(2) interconnection rights.

Finally, PAETEC emphasized that the phantom traffic rule proposed in the NPRM will not close a loophole that permits entities to avoid payment for terminating charges. Although the proposed rule would help terminating carriers resolve the question of *what* jurisdiction the call should be billed as, it will not assist terminating carriers in identifying *who* should be billed. In order to identify the financially responsible provider, the terminating carrier needs the Carrier Identification Code (“CIC”) or Operating Company Number (“OCN”) of the provider delivering the call to the terminating tandem. Such CIC/OCN information is needed regardless of whether rates vary by jurisdiction or are unified. Without such information, phantom traffic will continue and the Commission will not have solved the problem of unbillable minutes of use. Indeed, masking the identity of the carrier delivering the call to the tandem could enable a significant ongoing arbitrage opportunity.

Sincerely yours,

*/s/ electronically signed*

Tamar E. Finn

Enclosure

cc (by e-mail):

Angela Kronenberg  
Margaret McCarthy

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<sup>11</sup> *Wireline Broadband Order*, at ¶ 94 & n.280 (2005) (citing “several prior instances, [in which] the Commission has permitted carriers to decide how to offer a service (*i.e.*, as non-common or common carriage).”).

<sup>12</sup> *Advanced Services Order*, at ¶ 23.