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March 23, 2012

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: <u>In the Matter of Connect America Fund A National Broadband Plan for Our Future High-Cost Universal Service Support, WC Docket No. 10-90</u>

Dear Ms. Dortch:

On March 21, Chris Miller, Curtis Groves, and the undersigned of Verizon, and Scott Angstreich of Kellogg Huber representing Verizon, met with Austin Schlick, Peter Karanjia, Diane Griffin Holland, James Carr, and Marcus Maher of the Office General Counsel, and Rebekah Goodheart, John Hunter, and Travis Litman of the Wireline Competition Bureau. The purpose of the meeting was to address VoIP intercarrier compensation issues, and, specifically, recent disputes regarding the proper originating access rate for PSTN-VoIP calls under the *USF-ICC Transformation Order*. [1]

We discussed the pending petition for reconsideration or clarification filed by Windstream and Frontier regarding this matter. We acknowledged these carriers' concern over potential unexpected lost revenues that are not accounted for in the *USF-ICC Transformation Order's* access revenue recovery mechanisms. Nonetheless, we said that the *USF-ICC Transformation Order* provides that access charges (originating and terminating) for all PSTN-VoIP traffic are subject to interstate rates, not intrastate rates. We explained that this result strikes the right balance and is consistent with the Commission's objectives in the *Order*. We said that if the Commission were to reverse course now it would upset the balance of competing interests in the *USF-ICC Transformation Order*, and would have ramifications in pending and potential future appeals of the Commission's new VoIP rules.

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[1] *Connect America Fund, et al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011)("*USF-ICC Transformation Order*").

Moreover, expanding the scope of the reconsideration request, as some parties suggest, to include originating access charges on both PSTN- *and* IP-originated calls would raise additional concerns. As a threshold matter, we said that the request to expand the scope of the reconsideration request to IP-PSTN traffic is barred by statute and Commission rule as untimely. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(d). And, among other problems, this approach would cause other carriers to incur new, unexpected expenses ultimately borne by their customers.

The attached White Paper provides additional details regarding our discussion and Verizon's views on this issue.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's Rules. Should you have any questions, please contact the undersigned.

Sincerely,

Maggie McCready

Attachment

cc: (via e-mail)
Austin Schlick
Peter Karanjia
Diane Griffin Holland
James Carr
Marcus Maher
Michael Steffen
Christine Kurth
Angela Kronenberg
Sharon Gillett
Rebekah Goodheart
Randy Clarke
John Hunter
Victoria Goldberg
Travis Litman

VERIZON WHITE PAPER –March 23, 2012

Originating Access Charges Under the Transitional Intercarrier Compensation Regime

The Commission's transitional intercarrier compensation regime extended access charges to VoIP traffic for the first time.[1] In doing so, the Commission expressly started the transition to a single, low intercarrier compensation rate on a middle ground between those parties that urged the Commission to set a rate of $0.0007 (at most) per minute and those that urged the Commission to allow carriers to assess intrastate access charges on VoIP traffic. The Commission, therefore, expressly provided that VoIP traffic would be subject to (at most) only interstate access charges, and the Commission expressly applied that determination to traffic that either originates or terminates in IP. *See Order* ¶ 961 ("VoIP-PSTN traffic will be subject to charges not more than *originating and terminating interstate access rates*.") (emphasis added).

The Commission had good reason for reaching this result. That result was critical to (1) avoid a significant new "tax" on emerging VoIP services and technologies; and (2) avoid artificially subsidizing VoIP. On the one hand, imposing intrastate access charges on VoIP traffic would impose a significant new burden — *i.e.*, intrastate access charges, which are often several times higher than interstate rates for the same functions — on IP traffic and the broadband networks that support them, the effect of which would be to increase their cost and discourage deployment. On the other hand, allowing VoIP providers to charge intrastate access charges on VoIP services, whether terminating or originating, would effectively subsidize new IP services through highly regulated carrier-to-carrier payments and extend a flawed subsidy system to new technologies, creating a wholly unnecessary subsidy flow that merely provides a windfall

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

to many IP providers. And the cost of that new subsidy system (and the corresponding windfall to many IP providers) would necessarily be paid by the customers of traditional circuit-switched services that, ultimately, pay all of the costs associated with these services. The only way to prevent those irrational and counter-productive outcomes was to prohibit both originating and terminating intrastate access charges on VoIP traffic.

This result was also consistent with the industry reform plan that informed some aspects of the *Order*. That plan proposed that the Commission classify all VoIP services as jurisdictionally interstate,[2] and it defined VoIP traffic to include traffic that either originates or terminates in IP.[3] Parties may have had a different expectation (and the Commission did not "rubber stamp" this proposal in any event), but the conclusion in the *Order* to limit all VoIP access charges, both originating and terminating, to interstate rates is consistent with the text of the proposal. While the Commission ultimately did not reach the jurisdictional classification of VoIP traffic in the *Order*, its decision to apply interstate access charges to traffic that either originates or terminates in IP produces the same result for intercarrier compensation purposes, as the Commission recognized. *See Order* ¶ 959.

Some carriers claim that they had not accounted for the fact that traffic that originates in TDM but terminates in IP would be subject to only interstate — not intrastate — access rates for

[2] America's Broadband Connectivity Plan, Attachment 1 at 13 (Framework of the Proposal) (July 29, 2011) ("The Commission must conclude that VoIP services are interstate services, and reaffirm that broadband services are interstate services. The Commission must also preempt any state regulation of those services that is inconsistent with the federal policy of nonregulation.").

[3] *Id*. at 10 ("Under the plan, the Commission will adopt a new rule, effective January 1, 2012, to govern the intercarrier compensation rates applicable to VoIP traffic exchanged between LECs and other carriers. Such traffic will be rated at interstate access rates if the call detail indicates an 'access' call. . . . All 'toll' traffic that originates in IP or terminates in IP will be subject to current interstate access rates (regardless of whether it is interstate or intrastate). . . . Under the plan, intrastate access rates will not be applied to VoIP traffic.").

originating access charge purposes and have asked the Commission to change the *Order*.[4] These carriers request that the Commission either allow them to assess intrastate originating access charges on TDM-IP traffic or provide for additional opportunities for revenue recovery. If the Commission were to reverse course now, the result would be to impose artificially high intrastate originating access charges (which are approximately *four times higher* than interstate originating charges) on this traffic. The effect of such a reversal, of course, would be now to impose a tax on new technologies to subsidize legacy technologies. To be sure, the tax in some cases may be less direct than if a terminating carrier charges intrastate access directly to a VoIP provider in order to terminate its traffic, but this new tax would still be charged to an 8YY service provider (and also to a traditional long distance provider). In the 8YY context, which represents the bulk of all originating access charges, these new costs would ultimately be borne by the customers of the terminating IP service. This approach is at odds with the Commission's effort to avoid burdening IP providers and their customers with the cost of subsidizing legacy services, and instead to have the customers of those legacy services bear more of the cost themselves. *See Order* ¶ 935.

Regardless of how this narrow issue — *i.e.*, whether intrastate or interstate originating access charge rates apply to TDM-IP calls under the Commission's new intercarrier compensation regime — is resolved, the Commission should not, and cannot, permit intrastate originating access charges on the opposite call flow (IP-TDM traffic).[5] As an initial matter, those who now urge this result are legally barred from doing so. The Windstream/Frontier

[4] *See* Windstream/Frontier Recon. Pet. at 21-29, WC Docket No. 10-90 *et al.* (Dec. 29, 2011) ("Windstream/Frontier Petition").

[5] *See* Ex Parte Letter from Kathleen Q. Abernathy *et al.* to Marlene H. Dortch, Attach. at 1-2, WC Docket No. 10-90 *et al.* (Mar. 8, 2012); Ex Parte Letter from A. Richard Metzger, Jr. to Marlene H. Dortch, at 2, WC Docket No. 10-90 *et al.* (Mar. 8, 2012); Ex Parte Letter from Samuel L. Feder to Marlene H. Dortch, at 1-2, WC Docket No. 10-90 *et al.* (Mar. 12, 2012).

Petition is expressly limited in scope to originating access charges for traffic that is originated in TDM format, not traffic that providers (such as cable companies and their affiliated CLECs) originate in IP format — *i.e.*, IP-TDM traffic.[6] Indeed, Windstream and Frontier expressly stated just a few weeks ago that their petition was limited to originating access charges for "TDM-to-IP calls" and that they did "not adopt a position on appropriate originating access charges for IP-originated traffic."[7] Frontier also recently reaffirmed that its joint petition with Windstream was limited to TDM-originated traffic and that the petition "takes no position" with respect to originating access charges for "calls that originate in IP and terminate on the PSTN."[8]

The time to ask for reconsideration is statutory, and those providers that now seek to expand the scope of the Windstream/Frontier Petition to include IP-TDM traffic missed the deadline by nearly three months.[9] If these providers want to raise the issue, this can be done only through a petition for a new rulemaking, not through reconsideration. The Commission "has no discretion to extend or waive the [reconsideration] statutory filing deadline in the absence of 'extraordinary circumstances[,]' as narrowly defined by the courts" to be limited to situations "when the missed deadline is substantially attributable to Commission error in providing personal notice of the decision to be reconsidered."[10] That is plainly not the case here. Although the cable companies' concern about symmetrical treatment of all VoIP traffic is reason for the

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[6] *See, e.g.*, Windstream/Frontier Recon Pet. at 21 (urging the Commission to modify the *Order* to permit "intrastate originating access rates for *PSTN-originated* calls that are terminated over VoIP facilities") (emphasis added).

[7] Windstream/Frontier Reply at 12 & n.40, WC Docket No. 10-90 *et al.* (Feb. 21, 2012).

[8] Ex Parte Letter from Michael D. Saperstein, Jr. to Marlene H. Dortch, at 1 n.2, WC Docket No. 10-90 *et al.* (Mar. 12, 2012).

[9] *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(d).

[10] Order on Reconsideration, *TV Communications Network, Inc. Request for Waiver of the Installment Payment Rules and Reinstatement of Licenses,* 26 FCC Rcd 14891, ¶¶ 5-6 (2011).

Commission not to grant reconsideration in the first place, *expanding* the request for Commission authority to impose intrastate originating access charges to both TDM-IP, and IP-TDM traffic, would turn this issue into a much larger problem.

Overall, authorizing cable companies and their affiliated CLECs to collect intrastate originating access charges on IP-TDM calls would be utterly irrational and would conflict with the larger *Order* and the Commission's policy objectives. This approach would extend a wholly unnecessary new subsidy to IP services, the costs of which would be borne by customers of TDM services. That would directly contravene the core tenets of the *Order*. The entire purpose of the Commission's decision to adopt a special transition rule for VoIP-PSTN traffic was to ensure that this traffic, on a going-forward basis, would *not* be subject to the various absurdities inherent in — and providers' overreliance upon — the legacy access charge system.

As the Commission explained, in "declining to apply the entire preexisting intercarrier compensation regime to VoIP-PSTN traffic prospectively, [the Commission] recognize[d] the shortcomings of that regime." *Order* ¶ 935. The Commission explained further that it was "not persuaded" by arguments that VoIP-PSTN traffic should be subject "to the pre-existing intercarrier compensation regime that applies in the context of traditional telephone service, including full interstate and intrastate access charges." *Id.* ¶ 948. Not only would such a result fly "in the face of the known flaws of existing intercarrier compensation rules," but also it would "increase providers' reliance on intercarrier compensation at the same time the Commission's broader reform efforts seek to move providers away from reliance on intercarrier compensation revenues." *Id.* Reversing course now and creating a new subsidy for IP service providers through intrastate access charges is facially at odds with the Commission's well-reasoned conclusions, which are laced throughout the *Order*, to take just the opposite approach.

More generally, non-rate-regulated providers like cable companies have never had their voice service rates kept artificially low by regulators and supplemented by access charge subsidies. There was little reason to permit IP providers to assess "access" charges in the first place, and it would make no sense to "fix" the intercarrier compensation system by extending intrastate access charges and authorizing cable companies to charge intrastate originating access rates for their (or their affiliates') VoIP-originated traffic. That approach would *expand* the crumbling intercarrier compensation system with new Commission-approved subsidies for IP providers at the very same time the Commission determined to *eliminate* these regulated subsidies altogether.

Moreover, extending intrastate originating access charges to IP-TDM traffic threatens to unravel on appeal the new VoIP-PSTN intercarrier compensation regime in its entirety, including the new regime for VoIP terminating access charges. To do what the cable companies now suggest, the Commission would have to rationalize why different originating (*intra*state) and terminating (*inter*strate) rates *apply to the same call*. For example, a carrier terminating a call in TDM format would remain limited to billing interstate terminating access charges *because* the call originated in VoIP format, yet the cable company that originated the call in that format would be permitted to charge the far higher intrastate originating access charges. That makes little sense.

Although the Commission's decision to establish a transition for terminating rates that will start before any transition for originating rates means that different rules will apply for a time to originating and terminating rates for the same TDM-TDM call, the disparity described above in the VoIP-PSTN context is qualitatively different. For TDM-TDM traffic, the difference would result from the Commission's reasonable decision to address a complex issue one step at a time, with one portion of an overall transition to a bill-and-keep regime proceeding first. For VoIP traffic, in contrast, the Commission not only would need to justify authorizing — for the first time — intrastate access charges on the VoIP end of a call, but also doing so at the same time it relies on the VoIP origination of the call to prohibit intrastate access charges on the terminating end of the call. And, in any event, the Commission expressly determined that it is appropriate to have a different transition for VoIP-PSTN traffic than for TDM-TDM traffic. "We are not persuaded by the arguments of some commenters to subject VoIP traffic to the pre-existing intercarrier compensation regime that applies in the context of traditional telephone service. . . [T]he Commission's broader reform efforts seek to move providers away from reliance on intercarrier compensation revenues." *Order* ¶ 948 (citing comments from, among others, cable companies and CLECs).

To be sure, the Commission would face similar challenges justifying even the change that Windstream and Frontier originally requested (allowing intrastate originating access rates on TDM-IP calls), and the Commission should deny reconsideration for that reason. But the new VoIP-PSTN regime is transitional in nature, and the original Windstream/Frontier reconsideration request — which, again, is limited to TDM-IP calls, not the reverse — is at least traceable to pre-*Order* marketplace facts. Before the *Order*, intercarrier compensation disputes were rare — or even non-existent — with respect to intrastate originating access charges for TDM-IP calls. That was not because of agreement that intrastate originating access charges were proper on these calls — on the contrary, there was disagreement about that — but because of difficulties in identifying TDM-originated traffic that terminated in IP-format, without mechanisms such as the percent VoIP factors the Commission endorsed in the *Order*. *See Order* ¶ 963. But there is no such nexus to pre-*Order* facts with respect to IP-TDM calls because

Verizon and other carriers had been disputing attempts by many cable companies (certainly the largest cable companies) and their CLEC affiliates to collect intrastate originating access charges on IP-TDM traffic — normally 8YY traffic — for some time. And, again, allowing intrastate originating access charges on IP-TDM calls would require the Commission "to enunciate a policy rationale for expressly imposing [intrastate access charges] on VoIP-PSTN traffic," when the Commission has already announced that there is no such rationale. *Id.* ¶ 948.

Finally, expanding the scope of the Windstream/Frontier request to include IP-TDM originating access charges is simply unnecessary as both a legal and economic matter given the structure (and Commission discussion) of the access revenue recovery mechanisms established in the *Order*. The *Order* establishes two, cascading access revenue recovery mechanisms: (1) a new "access recovery charge" on ILEC bills; and (2) a spill-over "access recovery mechanism" in the Universal Service Fund. As Windstream and Frontier note, in designing these access recovery mechanisms, the Commission did not address the need, if any, to incorporate reductions in originating access revenues for TDM-IP traffic, but instead deferred that issue to a later date.[11]

But the *Order's* silence on the potential need to address additional revenue recovery associated with reductions in originating access charge revenues uniquely "burdens" only ILECs such as Frontier and Windstream, if it burdens any carriers at all. Cable companies and their affiliated CLECs are not similarly situated to ILECs in this regard because these companies are not entitled to participate in these recovery mechanisms at all, regardless of whether they are authorized to charge intrastate originating access rates or are limited to interstate rates. As the Commission found, there is good reason to limit these mechanisms to ILECs such as Windstream and Frontier. Only ILECs are still subject to proscriptive federal restrictions, such

[11] *See, e.g.*, Windstream/Frontier Reply at 2-4.

as caps on subscriber line charges, and in some cases continuing local rate restrictions set by state commissions. As the Commission explained:

> [I]ncumbent LECs generally are subject to more statutory and regulatory constraints than other providers in the retail pricing of their local telephone service. Thus, incumbent LECs are limited in their ability to increase rates to their local telephone service customers as a whole to offset reduced implicit subsidies.
>
> . . . .
>
> . . . [Other] carriers are free to recover reduced access revenue through regular end-user charges. . . .
>
> . . . [W]e disagree with parties that advocate making the recovery mechanisms we adopt today available to all carriers, both incumbent and competitive, or to all carriers that currently receive access charge revenues. Competitive LECs are free to choose where and how they provide service, and their ability to recover costs from their customers is generally not as limited by statute or regulation as it is for incumbent LECs.

Order ¶¶ 862, 864-865 (footnotes omitted). In other words, even if ILECs such as Windstream and Frontier have legitimate concerns about unexpected access charge revenue losses that the *Order's* revenue replacement mechanisms do not account for, there is no legal requirement or rational policy basis for the Commission to parlay those carriers' concerns into a windfall to cable companies and their affiliated CLECs at the expense of customers of other carriers. To the extent these companies may lose additional, incremental revenue as a result of charging only interstate originating access rates (which is debatable given industry practice prior to the *Order*), they can make rational business decisions and adjust their end-user prices.

* * *

The Commission should not disrupt the careful balance of competing interests in the *Order* and reverse course on originating access charges applicable to TDM-IP traffic. Regardless of how the Commission addresses this issue, it cannot — and must not — make matters worse by expanding intrastate access charges to include IP-TDM traffic.