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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington D.C. 20554

Re: Connect America Fund, WC Docket No. 10-90; A National Broadband Plan for Our Future, GN Docket No. 09-51; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135; High-Cost Universal Service Support, WC Docket No. 05-337; Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Federal State Joint Board on Universal Service, CC Docket No. 96-45; Lifeline and Link-Up, WC Docket No. 03-109; Universal Service Reform – Mobility Fund, WT Docket No. 10-208

Dear Ms. Dortch:

The National Cable & Telecommunications Association hereby responds to an *ex parte* letter submitted by Verizon reporting a meeting with members of the Office of the General Counsel and the Wireline Competition Bureau and attaching a white paper discussing originating access charges under the Commission’s transitional intercarrier compensation regime.¹ As demonstrated below, Verizon has misstated the facts and its legal analysis is flawed. Contrary to Verizon’s claim, access charges were assessed and paid on VoIP traffic, by Verizon as well as by other carriers, prior to the Commission’s adoption of the *CAF Order*.² Verizon’s argument that the Commission is barred from maintaining the parity adopted in the *CAF Order* for VoIP-PSTN traffic for originating access charge purposes does not withstand scrutiny.³

¹ Letter from Maggie McCreedy, Vice President Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (Mar. 23, 2012) (Verizon March 23rd *Ex Parte* Letter).

² *Connect America Fund, et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (*CAF Order*).

³ “VoIP-PSTN traffic” is defined by the Commission as traffic that originates and/or terminates in IP format and that is exchanged over public switched telephone network (PSTN) facilities between a LEC and another carrier in TDM format. *Id.* at ¶ 940.

Verizon Has Mischaracterized the Facts

Verizon begins its white paper by stating, “The Commission’s transitional intercarrier compensation regime extended access charges to VoIP traffic for the first time.”⁴ That statement is wrong, as Verizon is well aware. In Verizon’s own words from 2005:

[T]he fact is that *access charges do apply to VoIP traffic* under the Commission’s Part 69 rules. These rules broadly define access services to include “services and facilities provided for the origination or termination of any interstate or foreign telecommunication,” and require local exchange carriers to assess access charges on all “interexchange carriers” that use “local exchange switching facilities” to provide such services.⁵

In addition to advocating this position before the Commission, Verizon has both assessed and paid access charges for VoIP traffic. It was not until 2010 that Verizon made the unilateral decision to stop paying tariffed access charges to LECs for traffic that is exchanged in Time Division Multiplex (TDM) format that may (or may not) originate or terminate in Internet Protocol (IP) format.⁶ Given this history, the Commission should give no credence to Verizon’s assertion that the assessment of intrastate originating access charges will create new “burdens” and “windfalls” for carriers of VoIP-PSTN traffic.⁷

Verizon’s Legal Analysis Is Flawed

NCTA agrees with Verizon on one critical point – that the Commission in the *CAF Order* determined that all VoIP-PSTN traffic will be subject prospectively to rates equivalent to interstate rates and rate elements for both originating and terminating functions, regardless of whether the call originates or terminates in IP.⁸ Any decision to allow originating access charges at intrastate rates for VoIP-PSTN traffic, including traffic originated in TDM format, would not be a clarification but a substantive change to the rules promulgated in the *CAF Order*. As explained in prior NCTA filings, all VoIP-PSTN traffic should be treated equally regardless of

⁴ Verizon March 23rd *Ex Parte* Letter, Attach. at 1 (Verizon White Paper) (citing generally to the *CAF Order*).

⁵ Letter from Kathleen Grillo, Vice President Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-266, Attach. at 19 (Feb. 11, 2005) (emphasis added).

⁶ See Letter from Samuel L. Feder, Jenner & Block LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (Feb. 1, 2011); Comments of Cox Communications, Inc. and Midcontinent Communications, WC Docket No. 11-115, at 4 (Aug. 8, 2011).

⁷ Verizon White Paper at 1-2 (arguing that the assessment of intrastate originating access charges on VoIP-PSTN traffic will “increase [the] cost and discourage deployment,” and yet also “creat[e] a wholly unnecessary subsidy flow that merely provides a windfall” for VoIP traffic).

⁸ *CAF Order* at ¶¶ 933, 944, 961.

the originating technology.⁹ Indeed, any other approach would eliminate the incentive for carriers to invest in a transition to IP networks, since doing so would immediately reduce the carrier's revenue from originating access charges. Our member companies have taken the necessary steps to implement the Commission's new rules, including reducing the rates in intrastate access tariffs.

Notwithstanding NCTA's agreement with Verizon as to what the rules adopted in the *CAF Order* currently require, we strenuously disagree with Verizon's theory that the Commission is powerless to adopt a different transitional compensation regime for IP-originated VoIP-PSTN traffic. Verizon asserts that the Commission is limited solely to modifying the *CAF Order* with respect to originating access charges for TDM-originated VoIP-PSTN traffic because the Frontier/Windstream Petition did not specifically ask for its requested relief to be extended to IP-originated VoIP-PSTN traffic as well.¹⁰ Verizon is wrong for a number of reasons.

First, Frontier and Windstream clarified in their reply comments and subsequent filings that they were not advocating for disparate treatment of IP- versus TDM-originated VoIP-PSTN traffic, but were merely focused on the issue of the originating access rate and, in fact, would endorse a regime where all VoIP-PSTN traffic was subject to the intrastate originating access rate.¹¹ Consequently, a Commission order that allowed LECs to assess intrastate originating access charges on VoIP-PSTN traffic regardless of the originating technology would be entirely consistent with the scope of the requested relief.

⁹ Letter from Steven F. Morris and Jennifer K. McKee, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Attach. at 4-5 (July 29, 2011); Comments of the National Cable & Telecommunications Association, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, 18-19 (Aug. 24, 2011); Comments of the National Cable & Telecommunications Association, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, at 14-15 (Feb. 9, 2012) (NCTA Comments on Reconsideration Petitions).

¹⁰ Petition for Reconsideration and/or Clarification of Frontier Communications Corp. and Windstream Communications, Inc., WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, at 21-29 (Dec. 29, 2011) (Frontier/Windstream Petition).

¹¹ Reply to Oppositions to Petition for Reconsideration and/or Clarification of Frontier Communications Corp. and Windstream Communications, Inc., WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, at 12 n.40 (Feb. 21, 2012); Letter from Kathleen Q. Abernathy, Frontier, *et al.*, to Marlene H. Dortch, Federal Communications Commission, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Attach. (Mar. 8, 2012).

Verizon's suggestion that NCTA's position constitutes a late-filed petition for reconsideration is erroneous. NCTA's members *complied* with the originating access reforms adopted in the *CAF Order* and NCTA *opposed* Frontier and Windstream's petition for reconsideration to the extent it appeared to depart from the principle of equal treatment of VoIP-PSTN traffic.¹² NCTA's position has been that if the Commission grants the Frontier/Windstream Petition with respect to originating access rates for VoIP traffic, it must do so in a manner that preserves parity as between TDM-originated and IP-originated traffic.

Even if the Frontier/Windstream Petition did not address IP-originated traffic, Verizon is incorrect that the Commission could not revise the VoIP-PSTN originating access charge rules that apply to IP-originated traffic. As the U.S. Court of Appeals for the D.C. Circuit has held, the Commission may revise its rules as "an outgrowth of [an] ongoing proceeding," in response to a petition for reconsideration.¹³ Given the comprehensive nature of the intercarrier compensation reforms adopted in the *CAF Order*, the policy goal of bringing all traffic under the same set of compensation rules, and the Commission's adoption of a unitary, symmetrical transition for IP-originated and TDM-originated VoIP-PSTN traffic,¹⁴ consideration of potential changes to the rules for IP-originated VoIP-PSTN traffic unquestionably would be considered an "outgrowth" of a request to change the rules for TDM-originated VoIP-PSTN traffic. As in the *Globalstar* case, the Commission clearly has an extensive record compiled in response to the 2011 rulemaking proceeding on which to base a decision allowing carriers to assess intrastate originating access charges on all VoIP-PSTN traffic equally. The D.C. Circuit also rejected the claim that the Commission was bound narrowly to the specific relief identified by Globalstar in its petition for reconsideration, finding that "once Globalstar sought to overturn the *2004 Order*, the Commission surely was free to modify its decision based on the evidence amassed throughout the entire rulemaking."¹⁵ Similarly, the Commission is not bound to addressing only "PSTN-originated" calls in this case.

¹² NCTA Comments on Reconsideration Petitions at 14-15.

¹³ *Globalstar, Inc. v. FCC*, 564 F.3d 476, 485 (D.C. Cir. 2009); *see also AT&T Corp. v. FCC*, 113 F.3d 225, 230 (D.C. Cir. 1997) ("because there was a continuing rulemaking, the FCC was free to modify its rule on a petition for reconsideration as long as the modification was a 'logical outgrowth' of the earlier version of the rule");

¹⁴ *CAF Order* at ¶ 942.

¹⁵ *Globalstar v. FCC*, 564 F.3d. at 486. In the *Globalstar* decision the court refuted Globalstar's claim that its petition was so narrow in scope that it precluded the Commission from adopting a revised spectrum reassignment plan. *Id.* The Frontier/Windstream Petition similarly is not limited to the narrow interpretation put forth by Verizon. As in *Globalstar*, the request for relief in the Frontier/Windstream Petition was open-ended: "if the Commission intends in the *Order* to limit originating access rates for intrastate PSTN-originated VoIP-PSTN calls to interstate levels, it should reconsider that decision." Frontier/Windstream Petition at 28. The Frontier/Windstream petition does not request a specific outcome, other than reform of the access recovery mechanism if its reconsideration request is rejected (and in any case the Commission would not have been bound by such a request if it had), and does not seek to prevent the Commission from reexamining the treatment of all VoIP-PSTN calls, as opposed to "PSTN-originated" calls, for purposes of originating access rates.

Furthermore, and consistent with precedent, the Commission can reconsider on its own motion the implementation of an interstate originating access charge cap on VoIP-PSTN traffic. As the Commission has stated, “Under long-established Commission practice, the filing of a petition for reconsideration tolls the thirty day period our rules provide for sua sponte reconsideration.”¹⁶ The Commission also recently amended the rule governing reconsideration on the Commission’s own motion to make clear that the Commission may modify rules, in addition to revoking them.¹⁷ Therefore the Commission may revise its rules to allow all carriers of VoIP-PSTN traffic to assess originating access charges at intrastate rates pending the adoption of a transition schedule pursuant to the further notice of proposed rulemaking.

In addition, the Commission sought further comment on the originating access regime in the further notice of proposed rulemaking portion of the *CAF Order*.¹⁸ The Commission also sought specific comment on its newly adopted intercarrier compensation rules, asking if any of the new rules create conflicts or inconsistencies.¹⁹ The ongoing rulemaking proceeding provides the Commission with yet another avenue to revise its originating access rules for VoIP-PSTN traffic.

¹⁶ *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure*, CC Docket Nos. 96-262, 94-1, 91-213, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606, 16626, ¶ 61 n.127 (1997); *see also 1998 Biennial Regulatory Review – Part 61 of the Commission’s Rules and Related Tariffing Requirements; Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket Nos. 98-131, 96-187, Report and Order and First Order on Reconsideration, 14 FCC Rcd 12293, 12294, ¶ 3 n.4 (1999) (the filing of a petition for reconsideration tolled the 30-day sua sponte reconsideration period, allowing the Commission to reconsider a rule on its own motion after that deadline).

¹⁷ *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, GC Docket No. 10-44, Report and Order, 26 FCC Rcd 1594, 1608, ¶ 33 (2011); 47 C.F.R. § 1.108.

¹⁸ *CAF Order* at ¶¶ 1298-1305.

¹⁹ *Id.* at ¶ 1403.

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As discussed above, in the *CAF Order* the Commission limited originating access charges for all VoIP-PSTN traffic to interstate rate levels.²⁰ If the Commission reconsiders this decision it should do so in a manner that treats all VoIP-PSTN traffic in the same way and that does not disadvantage IP-originated traffic.²¹

Respectfully submitted,

/s/ Jennifer K. McKee

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²⁰ Although Frontier suggests that the Commission could “delay the effective date of the rate change,” the rules became effective on December 29, 2011. Instead, any change would have to be a change to the rule, rather than delaying an event that has already occurred. Letter from Michael D. Saperstein, Jr., Director of Federal Regulatory Affairs, Frontier Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 (Mar. 20, 2012).

²¹ To the extent the Commission revises the interstate rate cap for VoIP-PSTN originating access charges, the Commission must allow carriers that have already implemented reductions to revise their rates. It would be inequitable to penalize carriers that took steps to timely comply with the Commission’s rules by precluding them from refiling tariffs or making other changes to reflect the availability of intrastate originating access charges for some period of time.