

April 6, 2012

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Ms. Marlene H. Dortch
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Federal Communications
Commission
445 12th St., S.W.
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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:

Cablevision Systems Corporation and Charter Communications, Inc. write to respond to an *ex parte* letter and accompanying white paper filed by Verizon in the above-referenced proceedings that addresses the treatment of originating access charges on VoIP calls.¹ In its letter, Verizon opposes both (1) a petition for reconsideration filed by Frontier and Windstream (the “*Frontier/Windstream Petition*”)² that seeks to allow the assessment of intrastate originating access charges on traffic that originates on the PSTN and terminates in IP (“TDM-IP Traffic”) and (2) the position taken by numerous commenters, including Cablevision and Charter, in response to the *Frontier/Windstream Petition*.³ Cablevision, Charter, and other commenters have emphasized to the Commission that any modification of the originating access

¹ See Letter from Maggie McCready, Vice President Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 (Mar. 23, 2012) (“*Verizon Letter*”).

² See Petition for Reconsideration and/or Clarification of Frontier Communications Corp. and Windstream Communications, Inc., WC Docket No. 10-90 (Dec. 29, 2011).

³ See, e.g., Letter from Kathleen Q. Abernathy, Frontier, *et al.*, to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 10-90, Attach. (Mar. 8, 2012) (“*Joint Commenter Letter*”); Letter from Samuel L. Feder, Jenner & Block, to Marlene H. Dortch, Secretary, Federal Communications Commission, Docket No. 10-90 (Mar. 12, 2012).

regime set by the *CAF Order*⁴ should treat VoIP traffic the same whether it is TDM-IP Traffic, or traffic that is originated in IP and terminated on the PSTN (“IP-TDM Traffic”).⁵ Frontier and Windstream themselves agree with that proposition, joining others in urging “the Commission [to] resolve this dispute by stating that all originating access charges are subject to the same treatment pending further reform.”⁶

Charter and Cablevision have consistently explained that any intercarrier compensation rules adopted should treat all traffic equally irrespective of the technology used.⁷ Any regime that rewards the use of older, TDM-based technologies over IP telephony will have the obvious effect of discouraging carriers from modernizing their equipment, while penalizing providers that have made such an investment already. The Commission’s resolution of the intercarrier compensation rules for VoIP traffic in the *CAF Order* represented a compromise position, which – although it did not preserve parity in the short term between VoIP and TDM calls as initially urged by Cablevision and Charter – adopted a path towards equalizing such rates in the future, and did not draw artificial regulatory distinctions among different forms of VoIP traffic.

Verizon asserts that the collection of intrastate originating access charges on VoIP traffic would cause other carriers “to incur new, unexpected expenses,” *see Verizon Letter* at 2, but that assertion is *not* accurate. Cablevision, Charter and other similarly-situated interconnected VoIP providers have historically assessed originating access charges on IP-TDM traffic, and – except for Verizon’s recent refusal to pay such properly tariffed charges, prompting nationwide litigation with multiple VoIP providers – Verizon has historically paid them. The Commission’s decision in the *CAF Order* to cause all intrastate VoIP traffic to be billed at interstate rates, therefore, represents substantial lost income to VoIP providers (including Cablevision and Charter) and a windfall for IXC’s such as Verizon. Far from representing an unexpected cost to IXC’s, permitting the continued assessment of intrastate originating access charges on VoIP traffic generally – if the Commission decides to grant the *Frontier/Windstream Petition* in the

⁴ *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663 (2011) (“*CAF Order*”).

⁵ *See* n. 2 *supra*.

⁶ *See Joint Commenter Letter* Attach. at 1; *see also* Reply to Oppositions to Petition for Reconsideration and/or Clarification of Frontier Communications Corp. and Windstream Communications, Inc., WC Docket No. 10-90, at 12 & n.40 (Feb. 21, 2012) (clarifying that while the immediate relief sought by their petition relates to the originating access charges assessed on TDM-IP traffic, they would not oppose the Commission’s taking broader action in response to their petition by permitting the continued assessment of intrastate originating access charges on VoIP traffic generally, irrespective of whether the traffic is IP-TDM or TDM-IP).

⁷ *See, e.g.,* Reply Comments of Cablevision Systems Corp. and Charter Communications, Inc., WC Docket No. 10-90, at 4-14 (Apr. 18, 2011); Comments of Charter Communications, Inc. to the Commission’s Further Inquiry, WC Docket No. 10-90, at 4-5 (Aug. 24, 2011).

manner urged by numerous commenters – would restore the *status quo* in the industry prior to Verizon’s efforts at self-help and adoption of the *CAF Order*.

Cablevision and Charter have previously explained the policy reasons why all traffic should be treated the same for intercarrier compensation purposes irrespective of the technology used, and will not repeat those policy arguments here.⁸ However, Verizon is mistaken insofar as it claims that the Commission is somehow procedurally barred from acting on the *Frontier/Windstream Petition* in a manner that ensures continued symmetry in the treatment of IP-TDM and TDM-IP traffic. *See Verizon Letter* at 2 (citing 47 U.S.C. § 405(a) and 47 C.F.R. § 1.429(d)). Verizon’s procedural argument – that the position taken by Cablevision, Charter and other commenters is an “untimely” request for reconsideration, *id.* – is baseless.

To begin with, the *CAF Order* is part of a rulemaking that is still ongoing – in fact, in the *CAF Order* itself, the Commission requested comment on whether the *CAF Order*’s new rules regarding intercarrier compensation had created any disparities or inconsistencies requiring further refinement.⁹ Where there is a “continuing rulemaking” in progress, the scope of the rulemaking itself – and not any particular request for reconsideration – defines the boundaries of the actions that can be taken by the Commission. *See, e.g., AT&T Corp. v. FCC*, 113 F.3d 225, 229 (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”). In particular, whenever a petition for reconsideration is pending, a “rulemaking is not final” and remains subject to further refinement by the Commission. *Globalstar, Inc. v. FCC*, 564 F.3d 476, 485 (D.C. Cir. 2009). The boundaries of the Commission’s authority, therefore, are defined not by the specific relief requested in any particular petition, but rather by the Administrative Procedure Act’s notice requirements and by the logical outgrowth of the underlying rulemaking itself. *Globalstar*, 564 F.3d at 485-86. As the D.C. Circuit has emphasized, the “logical outgrowth” test is not a high one; “the focus” of the test “is whether ... [the parties], *ex ante*, should have anticipated that such a requirement might be imposed.” *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991) (quoting *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506, 549 (D.C. Cir. 1983)). The “logical outgrowth” test is easily satisfied here – a rule ensuring continued symmetry in the treatment of IP-TDM and TDM-IP traffic would be comfortably within the scope of the *CAF* proceeding generally, as the Commission has built an extensive record regarding the appropriate treatment of VoIP traffic for intercarrier compensation purposes and has specifically requested comment on that exact topic.

Verizon’s argument also neglects that the Commission’s regulations, at 47 C.F.R. § 1.108, give the Commission the authority to “take any action it could take in acting on a petition for reconsideration” on its own motion. *Id.* Since “the filing of a petition for reconsideration tolls the thirty day period [the Commission’s] rules provide for sua sponte

⁸ *See* note 7 *supra*.

⁹ *See CAF Order*, 26 FCC Rcd at 18,109-12, 18,149, ¶¶ 1298-1305, 1403.

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reconsideration,” *In re Access Charge Reform*, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16,606, 16,626, ¶ 61 n.127 (1997), and the Commission remains free, in accordance with 47 C.F.R. § 1.108, to take any action in response to the *Frontier/Windstream Petition* that is a “logical outgrowth” of the underlying *CAF* proceeding on its own motion as well. The Commission’s authority, therefore, is not constrained by the specific relief requested in the *Frontier/Windstream Petition* as Verizon contends.

In the event the Commission is inclined to grant the *Frontier/Windstream Petition*, therefore, Cablevision and Charter urge it to do so in a manner that treats VoIP traffic consistently, rather than carving out a specific exception for the benefit of TDM-based LECs only.

Sincerely,

/s/ Samuel L. Feder

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