



Christi Shewman
General Attorney

AT&T Services Inc
1120 20th Street NW Ste 1000
Washington, D.C. 20036

Phone 202 457-3090
Fax 202 457-3073
Email: cs856y@att.com

April 16, 2012

VIA ELECTRONIC SUBMISSION

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

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

Dear Ms. Dortch:

On April 12, 2012, Hank Hultquist and I met with Michael Steffen, Legal Advisor to Chairman Genachowki; Sharon Gillett, Chief of the Wireline Competition Bureau; Travis Litman, Victoria Goldberg, and Randy Clarke of the Wireline Competition Bureau, regarding the above-referenced proceeding. In a separate meeting on the same day, Hank Hultquist and I met with Christine Kurth, Legal Advisor to Commissioner McDowell, to discuss the same matter. In both meetings, we used the attached presentation as the basis of our discussion.

AT&T strongly supports the Commission's decision to bring all VoIP-PSTN traffic within the section 251(b)(5) framework and to set the default intercarrier compensation rates for toll VoIP-PSTN traffic at interstate access rates. During the meeting, however, AT&T urged the Commission to reconsider its determination that VoIP providers may assess originating access charges, including for 1-8YY calls, on a transitional basis.¹ Section 251 prohibits that outcome. As the Commission acknowledges, it already has concluded that "origination charges are inconsistent with section 251(b)(5)."² In light of the statutory language, the Commission, in the

¹ AT&T discussed only the issues discussed below. It did not address other issues related to the Commission's rules applicable to VoIP-PSTN traffic, including AT&T's disagreement with the Commission's determination that a LEC that accepts traffic bound to or from a non-LEC VoIP provider may collect access charges or reciprocal compensation for functions performed by the non-LEC VoIP provider rather than the LEC.

² *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 961 n.1976 (2011) (USF/ICC Transformation Order); Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, ¶ 1042 (1996) ("Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. This section does not address charges payable to a carrier that originates traffic. We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic.") (emphasis added).*

USF/ICC Transformation Order, stated that “we consequently do not believe that a permanent regime for section 251(b)(5) traffic could include origination charges” for VoIP-PSTN calls.³

Having properly made that determination, however, the Commission nonetheless authorized those same prohibited originating access charges on a transitional basis. But the Commission does not have authority to violate the statute even on a transitional basis. To be sure, section 251(g) permits the Commission to grandfather pre-existing charges and practices until they are superseded by regulations implementing the Act. But section 251(g) applies only to charges and practices that existed prior to the enactment of section 251.⁴ Here, the Commission expressly refused to “address preexisting law,” including whether VoIP was a telecommunications service or an information service and, if the latter, whether it was subject to the ESP exemption.⁵ Instead, it chose only to determine the framework that will apply prospectively.⁶ Accordingly, section 251(g)’s grandfathering provision cannot provide a source of authority to permit such charges, even on a transitional basis.

The Commission suggests that section 251(g) applies because LECs were entitled to compensation for providing exchange access in connection with VoIP calls prior to 1996 regardless of whether VoIP is a telecommunications service or an information service.⁷ But the D.C. Circuit already has rejected the Commission’s attempt to construe section 251(g) that broadly.⁸ The charges that would be due for VoIP calls under the alternative preexisting regimes would differ not only in amount (originating interstate access charges if VoIP were a telecommunications service versus SLC or special access if the ESP exemption applied) but also in the identity of the payor (carrier versus end user). Those are surely not equivalent obligations: for example, if the pre-existing law required that the SLC applied to VoIP calls, the Commission could not claim that by instead requiring a carrier to pay originating access charges, it was somehow merely preserving pre-existing obligations.

The only route by which the Commission could rely on section 251(g) would be to first find that originating access charges applied to VoIP-PSTN calls under the pre-existing regime. Because the Commission expressly refused to make that determination, section 251(g) does not provide a basis for the Commission’s decision to impose originating access charges on VoIP-PSTN calls on a transitional basis. And because the Commission has concluded that such charges are otherwise prohibited by section 251(b)(5), its decision to impose those charges—even on a transitional basis—is unlawful and should be reconsidered.

³ *USF/ICC Transformation Order*, ¶ 961 n.1976.

⁴ *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432-33 (D.C. Cir. 2002).

⁵ *USF/ICC Transformation Order*, ¶ 945.

⁶ *Id.*

⁷ *USF/ICC Transformation Order*, ¶ 957.

⁸ *Worldcom*, 288 F.3d at 433 (“The best the Commission can do on this score is to point to pre-existing LEC obligations to provide interstate access for ISPs.”).

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If you have any questions or need additional information, please do not hesitate to contact me. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

A handwritten signature in cursive script, appearing to read "Christi Shewman". The signature is written in black ink on a white background.

Christi Shewman

Attachment

cc: Michael Steffen
Christine Kurth
Sharon Gillett
Travis Litman
Victoria Goldberg
Randy Clarke

Originating Access Charges for VoIP-PSTN Traffic

Section 251(b)(5): Each local exchange carrier has “[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5).

The Local Competition Order: “Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. *This section does not address charges payable to a carrier that originates traffic. We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic.*” *Local Competition First Report and Order*, 11 FCC Rcd 15499, para. 1042 (emphasis added).

The USF/ICC Transformation Order: “The Commission also has held that origination charges are inconsistent with section 251(b)(5). [citing *Local Competition Order* at para. 1042.] Although we consequently do not believe that a permanent regime for section 251(b)(5) traffic could include origination charges, on a transitional basis we allow the imposition of originating access charges in this context, subject to the phase-down and elimination of those charges pursuant to a transition to be specified in response to the FNPRM.” *USF/ICC Transformation Order*, 26 FCC Rcd 17663, para. 961 n.1976.

Section 251(g): “On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with *the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996*, under any court order, consent decree, or regulation, order, or policy of the Commission, *until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996*. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.” 47 U.S.C. § 251(g) (emphasis added).

The USF/ICC Transformation Order: “*Our intercarrier compensation framework for VoIP-PSTN traffic will apply prospectively, during the transition between existing intercarrier compensation rules and the new regulatory regime adopted in this Order, and is subject to the reductions in intercarrier compensation rates required as part of that transition. We do not address preexisting law, including whether or how the ESP exemption might have applied previously . . .*” *USF/ICC Transformation Order*, 26 FCC Rcd 17663, para. 945 (emphasis added).