



1717 Pennsylvania Avenue,
N.W.
12th Floor
Washington, D.C. 20006

Tel 202 659 6600
Fax 202 659-6699
www.eckertseamans.com

James C. Falvey
jfalvey@eckertseamans.com
Phone: 202 659-6655

July 16, 2012

Notice of Ex Parte

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

Re: *In the Matter of Petitions for Waiver of Commission's Rules Regarding Access to Numbering Resources*, CC Docket 99-200; *Connect American Fund, et al.*, Further Notice of Proposed Rulemaking on IP-to-IP Interconnection Issues, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 07-135; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45; WC Docket No. 03-109; WT Docket No. 10-208

Dear Ms. Dortch:

On July 12, 2012, Erin Boone of Level 3 Communications, LLC, Greg Rogers of Bandwidth.com, Karen Reidy of COMPTTEL, and I ("CLEC Participants") met with Angela Giancarlo, Chief of Staff and Senior Legal Advisor to Commissioner McDowell. In the meeting, we discussed the CLEC Participants urgent concerns with the petitions of Vonage and other petitioners ("Petitioners") for limited waiver of Section 52.15(g)(2)(i) to obtain direct access to number resources.

CLEC Participants emphasized that Vonage and the other Petitioners have never presented any evidence of the requisite "special circumstances" that would justify giving individual companies special treatment. Commission rules currently require an entity to be a carrier to obtain numbering resources. If the Commission opts to allow non-carriers to obtain numbering resources, the only procedurally appropriate means to do so is through a rulemaking proceeding. Although CLEC Participants do not support a rule change, if the Commission intends to amend its rules, the only way to ensure that all carriers and providers obtain due

process is to deny the petitions and initiate a rulemaking proceeding.¹ A rulemaking ensures that all entities are treated the same and no one entity receives special treatment.

The CLEC Participants argued that the Commission faces a high legal bar and bears a “heavy burden” when it considers whether to grant a waiver of Commission rules: “Commission rules are presumed valid . . . and ***an applicant for waiver bears a heavy burden.*** Waiver of the Commission’s rules is therefore appropriate ***only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest***.”² Given the Commission’s “heavy burden,” there would have to be extremely compelling justification to grant the Petitions, which simply does not exist.

In fact, the CLEC Participants noted that Vonage has demonstrated that it is lacking the most important prerequisite for such a waiver, numbering expertise. As demonstrated in the CLEC Participants’s May 24 ex parte letter, Vonage does not understand what is required to obtain a Local Routing Number (LRN) or what is required to become a Code Holder.³ In addition, industry participants have presented evidence as to why it would not be in the public interest to deviate from current rules. A broad spectrum of state regulators, cable providers, rural phone companies, and competitive carriers have pointed to immediate complications relating to routing, number portability, intercarrier compensation, and interconnection.⁴

The CLEC Participants also raised their concerns with the possibility of the Wireline Competition Bureau (“Bureau”) issuing waivers on delegated authority. It would be particularly inapt for the Bureau to issue a waiver on delegated authority without consideration of this issue by the full Commission. The Bureau’s legal authority is strictly limited by the Commission’s rules: the Bureau does not have authority to act on any requests “which present novel questions of fact, law, or policy which cannot be resolved under outstanding precedents and guidelines.”⁵

¹ As Bandwidth.com has emphasized in its Petition, to provide preferential treatment on this critical issue to one or a handful of providers without a rulemaking would be arbitrary and capricious, beyond the bounds of the Commission’s statutory authority, without observance of lawful procedures, and would therefore violate both Commission practice and Administrative Procedure Act. 5 U.S.C. § 706(2)(A), (C), and (D).

² *In the Matter of Administration of the North American Numbering Plan*, CC Docket 99-200, Order, CC Docket 99-200, ¶ 3 (rel. Feb. 1, 2005) (“*SBCIS Waiver Order*”) (citations omitted, emphasis added).

³ See Ex Parte Letter from James C. Falvey, Counsel for CLEC Coalition, to Marlene H. Dortch, CC Docket No. 99-200, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45, WC Docket No. 03-109; WT Docket No. 10-208, at 2-5 (May 24, 2012) (“*May 24 CLEC Ex Parte*”).

⁴ See, e.g., *In the Matter Petitions for Waiver of Commission’s Rules Regarding Access to Numbering Resources*, Comments of the National Cable & Telecommunications Association, CC Docket No. 99-200, at 2 (Jan. 25, 2012); *In the Matter Petitions for Waiver of Commission’s Rules Regarding Access to Numbering Resources*, Comments of the National Telephone Cooperative Association, CC Docket No. 99-200, at 7 (Jan. 25, 2012); Ex Parte Letter from James Bradford Ramsay, General Counsel, NARUC General Counsel, to Chairman Genachowski, Commissioner McDowell, and Commissioner Clyburn, at 5 (March 30, 2012).

⁵ 47 C.F.R. § 0.291.

There is no question that granting Vonage or other Petitioners direct access to numbers would present novel questions of fact, law and policy. Subsequent to the grant of a waiver to SBC-IS (which unlike Vonage is an affiliate of a carrier), the full Commission considered and reaffirmed that only carriers should have access to numbering resources.⁶ In the same order (and again subsequent to the grant of that waiver), the Commission established VoIP provider number porting obligations that the Commission *only* addressed in the context where a VoIP provider is either a carrier itself or is paired with a numbering partner that is a carrier. If these waivers were granted, there would clearly be a novel factual and legal question as to whether carriers would be required to port numbers directly to a non-carrier in circumstances where the non-carrier is not paired with a carrier numbering partner. Moreover, the statutory definition of number portability only requires porting from one carrier to another carrier, and only for “telecommunications services,” which Vonage claims not to offer.⁷

Another novel issue is whether Petitioners and/or their carrier partners would accept their responsibility to pay intercarrier compensation if a phone number is directly assigned to them. Vonage has never committed to making such payments.⁸ These are just a few of the novel issues that would preclude the Bureau from acting on delegated authority.⁹

In the meeting, the CLEC Participants also discussed the fact that there are many other basic questions which remain unanswered and which Vonage and the other Petitioners appear to avoid deliberately. For example:

- As noted above, what are the “special circumstances” that support granting the Petitioners a waiver?
- What are the impacts on number exhaust? The Commission has said that expanding to a 12-digit or greater dialing pattern could cost the U.S. economy “between 50 and 150

⁶ *In the Matter of Telephone Number Requirements for IP-Enabled Service Providers*, WC Docket No. 07-243, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, ¶ 20 (rel. Nov. 8, 2007) (“*VoIP Number Portability Order*”).

⁷ 47 U.S.C. § 153(a)(46). It would be a novel legal issue and potentially beyond the Commission’s statutory authority if the Commission were to require porting of numbers for non-telecommunications services or to a non-carrier. 5 U.S.C. § 706(C).

⁸ The issue may not have arisen with SBCIS, now AT&T, because both the carrier partner and the VoIP entity are AT&T affiliates, making it difficult if not impossible to try to pass the buck to the other affiliated entity. Moreover, the issue is considered today in a different legal context, given the Commission’s recently issued *Connect America Fund Order*. *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, (Nov. 18, 2011).

⁹ It is not clear whether the foreign affiliate rules, which typically to carriers, would apply to Vonage. If not, there are significant policy issues as to whether carrier-type number-based services should be permitted in circumstances where many of the traditional carrier rules apply. This is not an issue with AT&T-IS because its carrier affiliates would have to report any foreign affiliations to the Commission pursuant to 47 C.F.R. § 63.11. Again, novel legal and policy issues are presented.

billion dollars.”¹⁰ For years, the Commission was making progress on number exhaust in coordination with the states.¹¹ Granting this waiver would represent a major step backwards.

- If the Commission grants one or more additional waivers, but later concludes that granting non-carrier direct access to number resources is not in the public interest, how will it unring the bell and return to a carrier-only system? An NPRM is the only correct procedural vehicle to provide for due process and to give due consideration to all the issues.
- Will the non-carrier Petitioners commit to making intercarrier compensation payments? To date, Vonage has not made such a commitment and has only stated that its carrier partners will *collect* intercarrier compensation.¹² Intercarrier compensation will continue into the year 2020, at least, and the Commission designed a gradual transition so as not to create an abrupt shift away from compensation.

It would be premature to proceed with a waiver without first addressing through a rulemaking proceeding the basic question as to what rules will apply when non-carriers are able to obtain direct access to number resources.

As required by Section 1.1206(b), this ex parte notification is being filed electronically for inclusion in the public record of the above-referenced proceeding. If you have any questions or require additional information, please do not hesitate to contact me at 202.659.6655.

Sincerely,

/s/ James C. Falvey

James C. Falvey
Counsel for CLEC Participants

cc: Angela Giancarlo
Michael Steffen
Julie Veach
Travis Litman
Angela Kronenberg
Matthew Berry
Priscilla Delgado Argeris

¹⁰ *In the Matter of Number Resource Optimization*, CC Docket No. 99-200, Report and Order, FCC 00-104, ¶ 6 & n. 10 (rel. Mar. 31, 2000) (citing NANC Meeting Minutes, Feb. 18-19, 1999, at 13).

¹¹ *In the Matter of Petitions of SmartEdgeNet, LLC and Millicorp, LLC for Limited Waiver of Section 52.15(g)(2)(i) of the Commission's Rules Regarding Numbering Resources*, CC Docket 99-200, Comments of the California Public Utilities Commission and the People of the State of California, at 5 (May 8, 2012).

¹² See *May 24 CLEC Ex Parte* at 8.