

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Administration of the North American
Numbering Plan

Bandwidth.com Petition for Limited Waiver
Of Section 52.15(g)(2)(i) of the Commission's
Rules Regarding Access to Numbering
Resources

CC Docket 99-200

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC AND COMPTEL

James C. Falvey, Esq.
Justin L. Faulb, Esq.
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Ave., NW
12th Floor
Washington, D.C. 20006
jfalvey@eckertseamans.com
jfaulb@eckertseamans.com
Counsel for Joint Commenters

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Level 3 Communications, LLC (“Level 3”) and COMPTTEL (collectively, “Joint Commenters”) submit these comments in response to the Wireline Competition Bureau’s Public Notice (“*Public Notice*”)¹ seeking comment on the recent petition of Bandwidth.com (“Bandwidth”) filed June 13, 2012 (“Bandwidth Petition”). Bandwidth’s Petition seeks a limited waiver of section 52.15(g)(2)(i) of the Commission’s rules to allow the requesting Voice over Internet Protocol (“VoIP”) provider direct access to numbering resources from the North American Numbering Plan Administrator and the Pooling Administrator.

I. INTRODUCTION AND SUMMARY

The Bandwidth Petition is the most recent in a long list of similar petitions (with Bandwidth’s petition, “the Petitions”) filed by Vonage and other petitioners (“VoIP Provider

¹ *Wireline Competition Bureau Seeks Comment on Bandwidth.com, Inc. Petition for Limited Waiver of Commission’s Rules Regarding Access to Telephone Numbers, Pleading Cycle Established*, Public Notice, CC Docket No. 99-200, DA 12-1288 (Aug. 9, 2012) (“*Public Notice*”).

Petitioners”) in the seven years since the Commission granted a waiver to SBC Internet Services, Inc. (“SBC-IS”).² The Commission granted the SBC-IS interim waiver to an affiliate of a major carrier (now AT&T) in anticipation of conducting a comprehensive review all of the issues associated with direct assignment of numbers to non-carriers in a rulemaking proceeding. Since that waiver was granted, seven years have passed and fifteen other providers have attempted to obtain their own waivers, but without ever addressing the critical operational, legal, and regulatory issues that must be resolved in a comprehensive rulemaking. The Bandwidth Petition is unique in that it actively opposes the Commission proceeding through the waiver process. Nonetheless, Bandwidth’s Petition does not meet the standard for a waiver of the Commission’s rules. Neither Bandwidth nor previous VoIP Provider Petitioners have addressed the issues that plague all the Petitions, issues relating to number exhaust, routing, intercarrier compensation, and interconnection. The Commission should therefore deny the Petitions, including this latest from Bandwidth, and instead conduct a rulemaking to address these issues in a comprehensive manner.

II. BANDWIDTH HAS NOT MET THE LEGAL STANDARD TO OBTAIN A WAIVER

A. Bandwidth Has Not Met Its Heavy Burden to Show That Special Circumstances Warrant a Deviation from the Commission’s Rules

Bandwidth faces the same “heavy burden” to obtain a waiver of the Commission’s rules as the other Petitioners:

The Commission may waive its rules when good cause is demonstrated. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. In doing so, the Commission may take into account

² *Administration of the North American Numbering Plan*, CC Docket 99-200, Order, 20 FCC Rcd. 2957 (Feb. 1, 2005) (“*SBC- IS Waiver Order*”).

considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. Commission rules are presumed valid, however, 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.*"³

Bandwidth has not met the "heavy burden" that must be met to waive the Commission's rules. It has not demonstrated that "special circumstances" warrant a deviation from the general rule, nor that such a deviation would serve the public interest.

There are no "special circumstances" that warrant a deviation from the current rule that limits direct access to numbering resources to carriers. Bandwidth offers no unique facts or circumstances that set it apart from the literally hundreds of other VoIP providers that have decided not to become certificated carriers.⁴ Indeed, Bandwidth candidly admits that it "only files this petition to buffer against being placed in an unfair and competitively disadvantageous position."⁵ Bandwidth "firmly believes the Petitions for Waivers are an inappropriate means to address the relief requested by Vonage and others . . . [that] would implement dramatic and fundamental changes to long-standing industry norms without having afforded all affected parties the due process required in a normal rulemaking process."⁶ The Bandwidth Petition, like the other Petitions, fails to carry the required heavy burden to show that special circumstances exist and should therefore be denied.

³ *Id.*, at ¶ 3 (citations omitted, emphasis added).

⁴ According to the Bandwidth Petition, Bandwidth.com is not a certificated carrier. Bandwidth.com, Inc. Petition for Limited Waiver of Section 52.15(g)(2)(i) of the Commission's Rules Regarding Access to Numbering Resources, CC Docket No. 99-200 at 4 (filed June 13, 2012) ("Bandwidth Petition"). Only its affiliate, Bandwidth.com CLEC, LLC ("Bandwidth CLEC") is a carrier that has obtained state certification in 49 states.

⁵ Bandwidth Petition at 2.

⁶ *Id.*

B. Because the SBC-IS Waiver Was Never Intended to Be Permanent, the Commission and Standard Setting Bodies Require a Rulemaking to Implement What is Effectively a Far-Reaching Rule Revision

If the Commission determines that non-carriers should be permitted to obtain number resources directly, such a far-reaching rule change must be addressed in a rulemaking proceeding. If anything, there is less reason today to grant any waiver petition. The SBC-IS waiver was granted seven years ago and was to be valid only “until the Commission adopts final numbering rules regarding IP-enabled services.”⁷ It was clearly intended as a one-off interim Commission solution for a brief period until the Commission could conduct a comprehensive, generally applicable review of its numbering rules as they relate to IP-enabled providers.⁸ If anything, since that time, the Commission has emphasized the importance of issuing numbers only to carriers. For example, in 2007, the Commission, in establishing VoIP local number portability (“LNP”) requirements, reiterated that VoIP providers “may not obtain numbering resources directly from the NANPA because they will not have obtained a license or a certificate of public convenience and necessity from the relevant states.”⁹

The Commission cannot proceed in this ad hoc manner because significant rule revisions are required if additional non-carriers are to obtain direct access to number resources. In addition to the Commission clarifying the application of baseline regulatory and legal rules, as discussed further below and in the previous filings of Joint Commenters, industry standards-setting bodies also need sufficient lead-time to conduct critical transitional work. For example,

⁷ *SBC-IS Waiver Order*, ¶ 11.

⁸ The D.C. Circuit has endorsed a rule of reason as to how long an agency can operate under interim rules. *See, e.g., In re Core Comm’ns, Inc.*, 531 F.3d 849, 855-859 (D.C. Cir. 2008).

⁹ *Telephone Number Requirements for IP-Enabled Services Providers et al.*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, WC Docket Nos. 07-243, 07-244 and 04-36, CC Docket Nos. 95-116 and 99-200, at ¶ 20 (rel. Nov. 8, 2007) (“*VoIP LNP Order*”).

at the request of the North American Numbering Committee (“NANC”) in 2005, the ATIS Industry Numbering Committee (“INC”) reviewed the NANC’s July 2005 report¹⁰ and began crafting changes to relevant sections within four INC documents in anticipation of a Commission order addressing VoIP provider access to numbers. In June 2008, however, given that the impetus towards issuing numbers to VoIP providers had subsided, the INC tabled this issue until further action is taken by the Commission.¹¹ As such, the recommended changes were never made. The only sensible means to restart this process would be through a rulemaking proceeding that provides sufficient time frames for the INC and/or other industry bodies to complete these revisions. Without a comprehensive rulemaking and sufficient lead time for the necessary work of industry bodies, the Commission will end up creating uncertainty and potentially serious interoperability breakdowns.

In part due to these requirements, NARUC, recently issued a resolution urging the Commission “to issue a Notice of Proposed Rulemaking to address the waiver requests by VoIP and IP-enabled service providers,” and not to grant further waivers “unless it first proceeds with a Notice of Proposed Rulemaking”¹² Like the Joint Commenters, NARUC also cited concerns relating to number exhaust, call routing, consumer protection capabilities, and uncertainty relating to interconnection and compensation obligations.¹³ Accordingly, the

¹⁰ *VoIP Service Providers’ Access Requirements for NANP Resource Assignments – NANC Report and Recommendation by the Future of Numbering Working Group* (July 2005).

¹¹ ATIS INC Report to the NANC, at 3 (Mar. 29, 2012), attached hereto as Appendix A.

¹² See NARUC Request for a Rulemaking, CC Docket 99-200, 11 (filed March 30, 2012), and attached Appendix, *NARUC Resolution Concerning Access to Numbering Resources and Adherence to Numbering Rules by Voice over Internet Protocol and IP-Enabled Service Providers* (Feb. 8, 2012) (“*NARUC Resolution*”).

¹³ *Id.*

Commission should not create additional uncertainty in the industry by granting waivers without first conducting a rulemaking as recommended by NARUC, among others.

III. GRANTING ANY OF THE PETITIONS WOULD NOT SERVE THE PUBLIC INTEREST BECAUSE IT WOULD BE DISCRIMINATORY AND WOULD LEAD TO NUMBER EXHAUST AND OTHER REGULATORY FAILURES

Joint Commenters have already provided extensive input in this proceeding as to the many operational, legal, and regulatory complications associated with granting one or more waivers. Joint Commenters' arguments opposing other pending petitions apply with equal force to Bandwidth's waiver petition and are incorporated herein by reference.¹⁴ Critical questions relating to discrimination, number exhaust, number portability, routing, interconnection, and intercarrier compensation, remain unanswered. In the interest of brevity, Joint Commenters will not repeat here all of the arguments made in their previous comments, but will instead highlight some of the more significant complications raised.

A. Granting the Bandwidth Petition Will Result in Regulatory Discrimination

As Bandwidth itself notes, granting the Bandwidth's Petition or other pending petitions is fundamentally unfair and discriminatory as to existing carriers, which have duly complied with existing regulations.¹⁵ Considering further waiver petitions places the Commission on the horns of a dilemma. If the Commission were to opt to grant a single waiver or just a few waivers, it would be discriminating in favor of those few providers whose waivers were granted.

¹⁴ See, e.g., *Vonage Holdings Corp. Petition for Limited Waiver of Section 52.15(g)(2)(i) of the Commission's Rules Regarding Access to Numbering Resources*, CC Docket 99-200, Comments of Bandwidth.com, Hypercube, LLC, Level 3 Communications, LLC, Pac-West Telecomm, Inc., and COMPTTEL (Jan. 25, 2012) ("Joint Commenters' January 25 Comments"); *Petitions for Waiver of Commission's Rules Regarding Access to Numbering Resources*, Letter from James C. Falvey, Counsel to Joint Commenters, to Marlene H. Dortch, Secretary, FCC (May 3, 2012); Joint Commenters' April 13 Ex Parte; and Joint Commenters' May 3 Ex Parte.

¹⁵ Bandwidth Petition at 7-8. Bandwidth itself created a CLEC to comply with the rules.

Alternatively, if the Commission were to grant multiple waivers, each with its own unique terms and conditions, the Commission would sow confusion within the industry, and create a separate problem of tracking and enforcing multiple unique sets of conditions. If the Commission were to proceed by a rulemaking, however, it would escape this dilemma: the Commission would ensure that all providers are treated equally and that all operational and regulatory issues are addressed in a uniform and comprehensive manner.

To further demonstrate arguments concerning the discriminatory impact of Commission action via waiver, Joint Commenters emphasize that even Bandwidth's Petition argues that:

While Bandwidth did not choose to pursue a business model in which it is not subject to state regulation, Bandwidth cannot effectively compete if the Commission provides its competitors all the regulatory rights but none of the obligations of regulated carriers. Should the Commission begin granting Petitions for Waivers now, many others are likely to follow suit – quickly leading to a situation in which many non-carriers have regulatory rights without attendant obligations. As a practical matter, however, the Commission cannot have it both ways. If it wishes to upset the current balance by granting ad hoc relief to one party, the Commission must accept the certainty that the Commission will have to grant similar relief to all others.¹⁶

Again, the Commission can avoid this dilemma by proceeding through an NPRM. Moreover, the Commission is legally required to treat all parties equally by determining number access policy through a rulemaking.¹⁷

¹⁶ Bandwidth Petition at 8.

¹⁷ As Bandwidth itself has emphasized in its Petition (Bandwidth Petition at 2 & fn. 2), 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).

B. Granting the Bandwidth Petition Will Unnecessarily Accelerate Number Exhaust

Notably, Joint Commenters, NARUC, and others have also raised the issue of accelerated number exhaust, resulting from the impact of multiple VoIP providers obtaining new NXX codes in order to obtain a Local Routing Number (LRN).¹⁸ No VoIP Provider Petitioner has adequately explained why granting the pending petitions would not reverse years of progress toward controlling number exhaust and aggravate the exhaustion of finite number resources. Some petitioners have demonstrated that they do not even understand the manner in which LRNs and numbers are assigned, while others ignore the issue altogether. The Commission, however, must address this issue head on, and the only way to do so effectively is through a rulemaking that considers this critical industry issue in further detail.

C. Granting the Bandwidth Petition Without Clarifying the Number Portability Rules Could Lead to Failed Port Attempts and Customer Confusion

In the Commission's 2007 *VoIP Number Portability Order*,¹⁹ the Commission limited its guidance to circumstances where a VoIP provider works in tandem with a wholesale numbering partner: "interconnected VoIP providers generally obtain NANP telephone numbers through commercial arrangements with one or more traditional telecommunications carriers. As a result, the porting obligations to or from an interconnected VoIP service stem from the status of the interconnected VoIP provider's numbering partner and the status of the provider to or from which the NANP telephone number is ported."²⁰ Every example of porting obligations provided by the Commission in that Order relates to "an interconnected VoIP provider that partners with a

¹⁸ Joint Commenters' January 25 Comments, at 10-11.

¹⁹ *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* (rel. Nov. 8, 2007) ("*VoIP Number Portability Order*").

²⁰ *VoIP Number Portability Order*, ¶ 34.

wireline carrier for numbering resources”²¹ The only other circumstance addressed by the Order is the case where the interconnected VoIP provider is itself a carrier, and has a separate obligation to port numbers as a carrier.²²

The Commission’s focus on carrier obligations in the *VoIP Number Portability Order* is consistent with the statutory definition of number portability, which is limited to the porting of numbers used by carriers for telecommunications services: “The term ‘number portability’ means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of the quality, reliability, or convenience when switching from one telecommunications carrier to another.” 47 U.S.C. § 153(a)(46). The Act’s statutory number portability obligation therefore applies “when switching from one telecommunications *carrier* to another” and to users of “*telecommunications services*.”

Bandwidth and other Petitioners appear to plan on operating without a wholesale carrier partner. (If they do intend to utilize a carrier partner, why not retain the current system and avoid all the complications discussed in this docket?) But the Commission has never considered the scope of the number portability obligation where no carrier partner is involved. In fact, the Commission explicitly notes that “the porting obligations to or from an interconnected VoIP service stem from the status of the interconnected VoIP provider’s numbering partner”²³ The Commission has not defined how “number portability” as defined in the statute could apply to a requirement to port a number directly to a provider like Vonage, which considers itself neither a “carrier” nor a provider of “telecommunications services.” In any event, if the

²¹ *Id.*, ¶ 34. See generally, ¶¶ 34, 35.

²² *Id.*, ¶ 35 & n.117.

²³ *VoIP Number Portability Order*, ¶ 34.

Commission were to attempt to construct a rationale for such a new rule, it must be done in a rulemaking, and not in a waiver proceeding.

D. Legal Classification of Interconnection Agreements

Joint Commenters and others have raised a series of questions relating to the legal classification of interconnection arrangements entered into between carriers and VoIP Provider Petitioners.²⁴ If a carrier, such as one of the Joint Commenters, enters into an interconnection agreement with an incumbent local exchange carrier (“ILEC”), Section 251(c) requires, *inter alia*, that the agreement be filed with the state commissions.²⁵ This integral requirement of the Telecom Act ensures that ILECs will not discriminate between smaller carriers, picking and choosing who they will do business with and, potentially, who will succeed or fail. It is therefore not surprising that the largest ILECs have come out in support of the waivers, given the waivers’ corrosive effect on today’s competitive framework. Again, no VoIP Provider Petitioner has adequately addressed this question in this proceeding.

E. A Rulemaking is Necessary to Clarify Intercarrier Compensation Rules if Non-Carriers Obtain Direct Access to Number Resources

Joint Commenters have also raised serious concerns that VoIP Provider Petitioners will utilize carrier switching and transport facilities to terminate their traffic, but not commit to the payment of the same intercarrier compensation that carriers pay today.²⁶ Bandwidth itself notes that “acting on one waiver petition, which would disturb critical aspects of the [*CAF Order/FNPRM*²⁷] at this stage, would be unwise, would cause a number of problematic,

²⁴ *Id.* at 12-13; NTCA’s January 25 Comments, at 9-10.

²⁵ *See* 47 U.S.C. § 251(c), § 252(e).

²⁶ Joint Commenters’ January 25 Comments, at 13.

²⁷ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support;*

unintended consequences, and would upend much of the progress that the Commission has accomplished to date.”²⁸ There is a high likelihood, absent clarification in a rulemaking proceeding, that many carriers will claim that they have no such obligation to pay compensation for traffic originating from numbers assigned to Bandwidth or other VoIP Provider Petitioners. This presents Joint Commenters with the shell game they have previously identified as a serious problem: neither the VoIP provider nor the carrier steps up to its obligation to make payment, and traffic must be terminated free of charge. Intercarrier compensation will continue to be exchanged for years to come, yet no petitioner has addressed the fundamental question of which party is legally obligated to make payment. These and other questions are too important to the smooth functioning of the industry to continue to go unanswered. A rulemaking is the only way to provide unambiguous, equitable, and nondiscriminatory answers to these critical industry issues.

F. Bandwidth Does Not Explain How It Will Ensure Calls Are Routed Properly

Finally, Joint Commenters have raised concerns about whether calls will be routed properly. None of the VoIP Provider Petitioners, including Bandwidth, have sufficiently explained how it will route calls once they obtain direct access to number resources, as addressed by the Joint Commenters in recent ex partes.²⁹ Regardless of claims from certain of the VoIP Provider Petitioners that call routing is simple, the fact is that it is not. Even when carriers with

Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform - Mobility Fund, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (Nov. 18, 2011) (“CAF Order/FNPRM”).

²⁸ Bandwidth Petition at 5.

²⁹ See e.g., Ex Parte Letter from James C. Falvey, Counsel for CLEC Participants, to Marlene H Dortch, CC Docket No 99-200, at 2 (Aug., 9, 2012); Ex Parte Letter from James C. Falvey, Counsel for CLEC Participants, to Marlene H. Dortch, CC Docket No. 99-200, at 3 (April 13, 2012).

decades of operational experience interact, it can be extremely challenging to ensure successful interoperability. These challenges include proper call routing, ensuring call completion, and ensuring that customers can keep their local dialing patterns. It is therefore critical that an orderly foundation is first established through a rulemaking proceeding.

V. CONCLUSION

Joint Commenters urge the Commission to deny Bandwidth's Petition because it has not met its "heavy burden" to justify waiver of the Commission's rules. There are no "special circumstances" that warrant a waiver of the Commission's rules, and in fact, Bandwidth itself urges the Commission to deny the waivers filed, and to proceed via a generally applicable rulemaking proceeding. Seven years have passed since the Commission's interim waiver was issued to SBC-IS and the Commission must first complete a comprehensive rulemaking proceeding, as it committed to in 2005, if it is to consider granting any further waivers. Given the discriminatory impact, and the still unanswered questions relating to number exhaust, number portability, interconnection, intercarrier compensation, and call routing, among other issues, granting the Bandwidth Petition and other petitions would not be in the public interest.

Respectfully Submitted,

/s/ James C. Falvey
James C. Falvey, Esq.
Justin L. Faulb, Esq.
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Ave., NW
12th Floor
Washington, D.C. 20006
jfalvey@eckertseamans.com
jfaulb@eckertseamans.com
Counsel for Joint Commenters

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