



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

March 27, 2013

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 March 25, 2013, John Murdock, President, and Greg Rogers, Deputy General Counsel, Bandwidth.com, Inc.; Michael Shortley, III, Vice President, Legal, and Andrea Pierantozzi, Vice President, Voice Services, Level 3 Communications, LLC; and the undersigned ("CLEC Participants") met with Commissioner Mignon Clyburn and David Grimaldi, Legal Advisor to Commissioner Clyburn. In the meeting, the CLEC Participants reiterated their significant concerns regarding the series of voice over Internet protocol ("VoIP") provider ("Petitioners") petitions seeking limited waiver of Section 52.15(g)(2)(i) to obtain direct access to number resources.

The CLEC Participants emphasized the need for the Federal Communications Commission ("Commission") to issue a Notice of Proposed Rulemaking ("NPRM") to address the issue of whether it would be advisable to issue numbering resources directly to non-carrier providers such as Vonage. An NPRM provides an even-handed and nondiscriminatory forum to decide whether to change the longstanding practice of issuing numbers only to state-certificated carriers. The CLEC Participants have detailed in previous ex partes the many new issues that need to be addressed before non-carriers are permitted to have direct access to number resources. The Commission should not engage in a rush to judgment without giving fair consideration to these issues. The Commission has never provided clear direction to the industry as to the rules that would govern how non-carrier providers issued numbers will, for example, be obligated to pay intercarrier compensation or interconnect with other carriers.

The CLEC Participants have previously raised serious concerns relating to IP interconnection,¹ intercarrier compensation,² number exhaust,³ number portability,⁴ and call routing,⁵ and these issues must be addressed in a comprehensive manner before any significant volume of traffic is exchanged directly with non-carrier providers. Rushing forward to permit an avenue for multiple waivers also threatens to introduce a large number of non-carrier providers into the industry without ever conducting a rulemaking and establishing rules to govern their traffic. The Commission recently addressed the issue of phantom traffic,⁶ and should not permit the generation of high volumes of new traffic that are not governed by a clear set of rules. The only way to accomplish that is by conducting a rulemaking proceeding before any special waivers or trials are initiated.⁷

The Commission also needs to ensure that it considers this issue in the context of other IP Transition issues currently before the Commission. The issue of direct access to numbering resources cannot be addressed piecemeal, separate and apart from other IP interconnection and IP transition issues. As NTCA recently pointed out, “nearly no issue is positioned more squarely within the consideration of regulatory processes and constructs (or lack thereof) than the question of whether an IP enabled service provider should be eligible to obtain telephone numbering.”⁸ Vonage itself has repeatedly emphasized that one of the main purposes of its waiver request is to pursue IP interconnection.⁹ The Commission is currently addressing the issue of IP interconnection in the *Connect America Fund* FNPRM, as well as in the AT&T and

¹ See Ex Parte Letter from James C. Falvey, Counsel for CLEC Coalition, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 99-200, at 1-2 (June 6, 2012).

² See, e.g., Ex Parte Letter from James C. Falvey, Counsel for CLEC Coalition, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 99-200, at 8 (May 24, 2012) (“May 24 CLEC Coalition Ex Parte”).

³ See, e.g., *id.* at 2-5.

⁴ See, e.g., May 24 CLEC Coalition Ex Parte at 5-7.

⁵ See, e.g., Ex Parte Letter from James C. Falvey, Counsel for Joint Commenters, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 99-200, at 3-4 (Mar. 1, 2012).

⁶ See *Connect America Fund, et al., Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd. 17663, ¶¶ 702-735 (Nov. 18, 2011) (“CAF Order”).

⁷ Making the same decision through Vonage’s waiver request would be discriminatory in that it would give Vonage special treatment ahead of all other providers, and would pre-judge the issue of whether non-carriers should be permitted to obtain direct access to number resources without the necessary rulemaking. Moreover, Vonage has not met the legal standard to obtain a waiver. Under Commission precedent, Vonage has a “heavy burden” to show that “special circumstances” warrant deviation from the Commission’s rules, and that such deviation would be in the public interest. See *Administration of the North American Numbering Plan, Order*, 20 FCC Rcd. 2957, ¶ 3 (2005). Vonage has never distinguished itself from any of the other fourteen providers that have requested similar waivers, and granting a waiver for a single provider without first conducting a rulemaking to determine the rules that would apply to Vonage would clearly be contrary to the public interest.

⁸ Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2, CC Dkt. 99-200 (Mar. 21, 2013).

⁹ Letter from Brita D. Strandberg, Wiltshire Grannis, Counsel for Vonage, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Dkt. 99-200 (Mar. 4, 2013).

NTCA IP Transition Petitions.¹⁰ In order to develop a coordinated IP interconnection policy, the issues in this waiver proceeding should be fully developed through a coordinated IP Transition NPRM that addresses the heavily overlapping issues across all these proceedings. If there is to be an IP Interconnection trial or trials, they should be conducted in a coordinated manner in an unified proceeding. The CLEC Participants agree with NTCA that conducting *ad hoc* IP interconnection rulemakings or trials in multiple proceedings simultaneously will not lead to well-conceived policies and rules. Leading the way with a waiver proceeding instead of a rulemaking would be a particularly confusing way to proceed.

Both state regulators and key industry participants, including NARUC, NTCA, and NCTA, have also urged the Commission first to conduct a rulemaking rather than issue discriminatory waivers. NARUC, for example, has issued a resolution supporting a rulemaking and opposing waivers,¹¹ and has argued that “the relief requested by the carriers is broad and should be handled in the context of a rulemaking proceeding.”¹² NTCA has filed several *ex parte* letters on behalf of its rural carrier members opposing the waivers and supporting a rulemaking, most recently arguing that “consideration of the questions and issues raised by a numbering waiver petition – even if just in “trial” form – is best addressed within the full discussions” of the NTCA and AT&T IP Transition petitions.¹³ Cable providers have also asserted on multiple occasions their belief that the Commission must act through a broad NPRM as opposed to waivers or trials: “the question of whether, and under what conditions, non-carriers should be given direct access to number resources is best addressed in the context of a rulemaking, rather than a waiver petition.”¹⁴

The CLEC Participants also discussed the proposed order currently on circulation, based on our understanding of that order. The CLEC Participants raised concerns about the fundamental unfairness of conducting a Vonage trial with live traffic during the same time period that the Commission is conducting a rulemaking on the same topic. The responsible course would be to conduct the rulemaking first. But if there is to be a trial, it should at least be

¹⁰ *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353 (Nov. 7, 2012); *Petition of the National Telecommunications Cooperative Association to Promote and Sustain the Ongoing TDM-to-IP Evolution*, GN Docket No. 12-353 (Nov. 19, 2012).

¹¹ NARUC Resolution *TC-4 Resolution Concerning Access to Numbering Resources and Adherence to Numbering Rules by Voice over Internet Protocol and IP-Enabled Service Providers*, (adopted Feb. 8, 2012). State commissions, including the California and Pennsylvania Commissions, have also urged the Commission to conduct a rulemaking before granting any non-carrier waivers. *See* Comments of the California Public Utilities Commission and the People of the State of California, CC Docket No. 99-200 (Jan. 25, 2012); Comments of the Pennsylvania Public Utility Commission at 7, CC Docket No. 99-200 (Oct. 6, 2011).

¹² Letter from James B. Ramsey, NARUC, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2, CC Dkt. 99-200 (June 12, 2012).

¹³ Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2, CC Dkt. 99-200 (Mar. 21, 2013).

¹⁴ Letter from Steven F. Morris, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Dkt. 99-200 (Jan. 8, 2013).

completed *before* the rulemaking is initiated. If the purpose of the trial is to collect data that will inform the rulemaking, it follows that the trial must conclude before the rulemaking is initiated. In addition, conducting a trial involving just one party while the rulemaking is ongoing will undermine the integrity of the process. A rulemaking on an issue of this significance should not be burdened by the distraction of a parallel trial, where one party has access throughout the proceeding to information not available to all other parties.

If the Commission were to pursue a trial, the trial should be limited in scope and duration, and the Commission should determine the exact nature of the trial to maximize its utility. The Commission should ensure that a trial tests out number assignment in the rate centers of a variety of incumbent providers, and in both urban and rural rate centers. The trial should be strictly limited in duration. There should be a mechanism to terminate the trial if there are unforeseen consequences, including a mechanism to reclaim numbers, if necessary.¹⁵

If the Commission determines that a trial is absolutely necessary, it should be limited only to Vonage. By permitting multiple non-carrier providers to obtain direct access to number resources, it would be sending a message that it has prejudged the advisability of a policy that would permit non-carriers to be assigned number resources. In addition, because the necessary rulemaking has not yet been conducted, the Commission has not established a clear standard as to when a non-state-certificated provider is qualified to obtain access to numbers. While state commissions determine, pursuant to state rules and statutes, whether carriers are financially, managerially, and technically qualified to operate in their state, no similar test exists at the federal level. Until the Commission establishes such a standard, it would simply be picking favorites by deciding which additional providers should obtain number resources.¹⁶

CLEC Petitioners also expressed their opposition to the Commission delegating authority to the Wireline Competition Bureau to consider future waiver requests. Pursuant to the limitations on the Bureau's authority in the Commission's rules, the Bureau does "not have authority to act on any applications or requests which present novel questions of fact, law, or policy which cannot be resolved under outstanding precedents and guidelines."¹⁷ Given that there is no federal standard to measure the capabilities of providers requesting waivers, and the lack of rules governing non-carrier providers, there are certainly "novel questions of fact, law or

¹⁵ The idea of a limited trial is a flawed idea from the outset. If the Commission permits Vonage to have number resources and "ends" the trial after one year, but does not require Vonage to turn back the numbers, Vonage will continue to operate with directly assigned phone numbers throughout the term of the rulemaking. This could leave Vonage with numbers for several years during which the Commission still has not established clear rules to govern Vonage's number resources, causing industry and consumer confusion. This is sufficient reason alone that the Commission should conduct the rulemaking in advance of any such trial.

¹⁶ To say that any new provider requesting such a waiver would have to commit to the same conditions as Vonage is not to establish a standard for fitness to operate alongside certificated carriers. Any entity can commit to following waiver conditions and such a commitment is not a replacement for a thorough inquiry into the financial, managerial, and technical capabilities of a provider.

¹⁷ 47 C.F.R. § 0.291.

Ms. Marlene H. Dortch
March 27, 2013
Page 5 of 5

policy” at issue which cannot be resolved under the Commission’s precedents and guidelines. The use of delegated authority is particularly questionable here where Vonage itself has in this proceeding demonstrated that it lacks the numbering expertise required of a carrier.¹⁸

The requests of Vonage and other non-carriers for discriminatory waivers create more legal and regulatory problems than they solve at a time when the Commission needs to be focused on the issues critical to an IP transition. The Commission can greatly simplify this issue by issuing an NPRM and denying all waiver requests until such time as the Commission has fully considered the advisability of issuing number resources directly to non-carriers.

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 proceedings. 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
Counsel for CLEC Participants

cc: Commissioner Clyburn
David Grimaldi

¹⁸ See, e.g., May 24 CLEC Coalition Ex Parte at 2-4.