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April 12, 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.*, 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; *Technology Transitions Task Force*, GN Docket No. 13-5

Dear Ms. Dortch:

On April 10, 2013, Greg Rogers, Deputy General Counsel, Bandwidth.com, Inc.; Michael Shortly, III, Vice President, Legal, Andrea Pierantozzi, Vice President, Voice Services, and Joseph Cavender, Vice President, Federal Regulatory Affairs, Level 3 Communications, LLC; and the undersigned ("CLEC Participants") met with Diane Griffin Holland, Suzanne Tetreault, and Marcus Maher, Office of General Counsel. In the meeting, the CLEC Participants expressed their serious concerns with the proposed orders that are on circulation 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.

CLEC Participants articulated that Vonage and other Petitioners have failed to meet the legal standard for a waiver of Section 52.15(g)(2)(i) and that due process demands that the Commission act only after issuing a Notice of Proposed Rulemaking, including the question of whether changes to the Commission's numbering rules are warranted. Generally, the Commission may waive its rules upon a showing of "good cause."¹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance with the rule inconsistent with the public interest.² In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.³ "Commission rules are presumed valid, however, and an applicant for waiver

¹ 47 C.F.R. § 1.3.

² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

bears a heavy burden.”⁴ Waiver of the Commission’s rules is appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.⁵

The Commission here cannot cite any “particular facts” that support Vonage, or any other waiver applicant, in meeting its “heavy burden” to obtain a waiver. There are no “special circumstances” that would justify the grant of any waiver to Vonage or any other petitioner that would like to be exempt from Commission rules that apply to carriers. Clearly, Vonage and the fourteen other waiver applicants, and perhaps hundreds of other carrier and non-carrier providers, would prefer a special regulatory classification that would allow them to be exempt from regulations that apply to carriers. Beyond the obvious number management requirements, the Commission would create a regulatory vacuum with no clear rules applying to Vonage or other waiver recipients, including with respect to the rules relating to such core pillars of the Telecom Act as interconnection, intercarrier compensation, and number portability.

Vonage has suggested that the “special circumstances” are that Vonage’s waiver is necessary to study IP interconnection. This is the same reason that was given when the Commission granted the SBCIS waiver eight years ago.⁶ The Commission has had eight years to study the results of the SBCIS waiver, but there is no evidence that the Commission has made any effort to review AT&T’s experience.⁷ Further, the recent AT&T PSTN-IP Petition itself demonstrates that this supposed justification for granting the SBCIS waiver was misplaced.⁸ The idea that an additional waiver is now urgently needed for the same stated purposes rather than conducting a rulemaking is not credible. As the AT&T and NTCA petitions establish, the entire industry faces the challenges of how to transition from the PSTN to a regulatory structure for IP based services. Vonage has not met its heavy burden to show that there are “special circumstances” such that the Commission could garner new information from Vonage that is not already available from AT&T or that is otherwise attainable through open proceedings.⁹

⁴ *Administration of the North American Numbering Plan, Order*, 20 FCC Rcd. 2957, ¶ 3 (2005) (“*SBCIS Order*”).

⁵ *Id.* See also *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

⁶ See *SBCIS Order*, ¶ 6 (“Granting this waiver in order to facilitate new interconnection arrangements is consistent with Commission precedent.”).

⁷ The same argument can be made with respect to an urgent need to test, for example, routing, number portability, or intercarrier compensation arrangements.

⁸ AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353 (Nov. 7, 2012)

⁹ The SBCIS waiver grant is not in itself precedent for granting additional waivers eight years later. First, there are changed circumstances in that eight years have passed during which one would have expected the Commission to have initiated a rulemaking. Second, the fact that CLEC Participants and other parties did not challenge the grant of the SBCIS waiver does not preclude them from challenging a series of additional waivers if their interests are more directly affected at this time. See, e.g., *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958). Third, SBCIS was a carrier affiliate, and other carriers have the opportunity to hold AT&T accountable for the actions of its non-carrier affiliate.

The waiver the Commission is considering would be defective for an additional reason. As CLEC Participants understand the draft item on circulation, the Commission would *not* be concluding that there are “particular facts” about Vonage’s petition that would make strict compliance with the rule inconsistent with the public interest on the grounds that the public interest requires non-carriers like Vonage to have direct access to numbers. Rather, the Commission has indicated that it would be considering that very question in the context of an NPRM. However, the Commission may not grant a waiver unless and until it concludes that the public interest *would actually* be served by doing so.¹⁰

The “special circumstances” test may be a flexible one, but it is not a test without bounds. As the D.C. Circuit has explained, waivers may function as a “safety valve,” which may permit a “more rigorous adherence to an effective regulation.”¹¹ A waiver may be used, in other words, as a tool to advance the Commission’s substantive policy goals—as embodied in its rules. A waiver is not a tool that can be used to establish a trial when the Commission has not decided whether the trial would advance any such substantive policy. And neither is it a tool that may be used to design a new procedure when the requirements of the APA are inconvenient. Rather than proceeding down this legally untenable path, the Commission should, as the CLEC Participants have repeatedly urged, first consider these issues in the context of an NPRM.

CLEC Participants understand that the Commission also intends to delegate to the Bureau the authority to grant additional waivers. This does not cure but rather exacerbates the legal shortcomings of the Commission’s waiver decision. The Commission has never explained how Vonage has demonstrated that it has “special” circumstances when a series of additional applicants are also permitted to obtain similar waivers. CLEC Participants expressed their concern that the Commission is effectively changing its rules by issuing a series of waivers, and in such a way that the rulemaking proceeding that it is initiating along with the waiver will become an afterthought. At a minimum, the Commission is placing its finger on the APA rulemaking scale in favor of granting direct access to non-carriers by conducting a trial before it conducts a rulemaking.

The Commissioners who approved the SBCIS Waiver did so begrudgingly, advocating a rulemaking before granting any further waivers. These Commissioners shared CLEC Participants’ legal view that the Commission should conduct a rulemaking before granting any further waivers:

Commissioner Kathleen Q. Abernathy: “Particularly where, as here, the Commission already has sought public comment in a Notice of Proposed Rulemaking, I support adhering to the notice-and-comment rulemaking process established by the APA, rather than developing important policies through an ad hoc waiver process.”

¹⁰ See *Northeast Cellular*, 897 F.2d at 1166; *WAIT Radio*, 418 F.2d at 1159.

¹¹ *WAIT Radio*, 418 F.2d at 1159.

Commissioner Michael J. Copps: “Undoubtedly, SBC Internet Services is not the only provider of IP services interested in direct access to number resources. But our approach today neglects the need for broader reform that could accommodate other IP service providers.”

Commissioner Adelstein: “Addressing this petition through the IP-Enabled Services rulemaking would allow the Commission to consider more comprehensively the number conservation, intercarrier compensation, universal service and other issues raised by commenters in this waiver proceeding. It would also help address commenters’ concerns that we are setting IP policy on a business plan-by-business plan basis rather than in a more holistic fashion.”

In addition to these former Commissioners, a long list of industry trade associations, state commissions, and public interest groups agree with CLEC Participants that the Commission must conduct a rulemaking before proceeding with further waivers. The following parties have expressed support for a rulemaking and have voiced their opposition to proceeding through individual company waivers: COMPTTEL, NCTA, NTCA, AARP, Common Cause, Consumer Federation of America, Consumers Union, Free Press, Public Knowledge, National Consumers Law Center, NASUCA, and NARUC.

Calling the waivers “trials” suggests that they could inform an NPRM. Yet the proposed orders would have the “waiver/trials” held in parallel with the NPRM, which undermines the supposed benefit of a trial and raises more legal questions than it answers. To conduct the trial(s), the Commission will still have to grant the waivers, which do not meet the waiver standard. While the Commission claims to have time-limited the trials, it is the CLEC Participants’ understanding that Vonage and others will not be required to return the numbers after the “end” of the trial. So while the “trial” may be time-limited, the waivers are not. One might have thought that the AT&T waiver would be limited in time, but it remains in place today.

Trying to conduct trials with a limited subset of participants now, *during* a rulemaking is problematic in additional ways, as well. First, doing so threatens to prejudice the rulemaking. Notice and comment on all such information is required.¹² In addition, the Commission has not established, with public notice and comment, the rules to apply to Vonage and other trial participants. There are no rules in place for any trial participant in terms of, for example, intercarrier compensation, number portability, and interconnection. The Commission also has not taken public comment on how any trial should be structured, and the record reflects serious differences between the parties on a wide variety of issues, including, for example, whether rural exchanges should be part of the trial.

The legally sustainable way to proceed is to conduct a transparent and thorough rulemaking. Additionally, this will actually result in a speedier and more seamless IP Transition than the Commission’s current proposal.

¹² Ex Parte Letter from James C. Falvey, Counsel for CLEC Participants, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 99-200, at 3 (Apr. 4, 2012).

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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
Justin L. Faulb
Counsel for CLEC Participants

cc: Suzanne Tetreault
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