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May 21, 2013

Notice of Ex Parte

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

Re: Opposition of Bandwidth.com, Inc. to Request for Confidential Treatment of Filing of Vonage Holdings Corp. *In the Matter of Petitions for Waiver of Commission's Rules Regarding Access to Numbering Resources*, CC Docket 99-200

Dear Ms. Dortch:

On May 17, 2013, Vonage Holdings Corp. (“Vonage”) submitted, pursuant to the Protective Order in the above-referenced proceeding, its trial plan for direct access to numbers.¹ On May 20, 2013, IntelPeer, Inc. filed a similar trial plan.² Most of the critical factual portions of the Vonage Trial Plan were expurgated, implicitly requesting confidential treatment under the Protective Order, while IntelPeer provided cursory support for its request.

Although Vonage has not provided a specific basis in its Trial Plan filing for treating this information as confidential, when it initially requested confidential treatment in this proceeding, it was pursuant to 47 C.F.R. §§ 0.457 and 0.459 because filed information contained “sensitive trade secrets, commercial, and financial information that falls within Exemption 4 of the Freedom of Information Act (‘FOIA’) . . . of a kind that would not customarily be released to the public.”³ Vonage also claimed that it “would suffer substantial competitive harm if this information were disclosed.”⁴ The information for which confidential treatment is requested—which appears to be merely the LATAs and rate centers in which it will conduct its trial—does not meet this standard and should not be afforded confidential treatment.

¹ *Petitions for Waiver of Commission's Rules Regarding Access to Numbering Resources*, Vonage Numbering Trial Proposal, Docket No. 99-200 (May 17, 2013).

² *Petitions for Waiver of Commission's Rules Regarding Access to Numbering Resources*, IntelPeer VoIP Numbering Trial Proposal, Docket No. 99-200 (May 20, 2013) (“IntelPeer Proposal”).

³ *Petitions for Waiver of Commission's Rules Regarding Access to Numbering Resources*, Request for Confidential Treatment of Filing of Vonage Holdings Corp., CC Docket No. 99-200, at 1 (Aug. 9, 2012).

⁴ *Id.*

The context of the requests of Vonage and IntelePeer (“Participants”) for confidential treatment, **public** trials to test the operational feasibility and regulatory advisability of granting direct access to phone numbers to interconnected VoIP providers, is critical to the Commission’s review of their requests. The Participants voluntarily opted to participate in a Commission-sanctioned trial to provide input into a Notice of Proposed Rulemaking to determine: a) whether to provide interconnected VoIP providers direct access to number resources; and b) if so, on what terms and conditions, and subject to what Commission rules. There are two other voluntary trial applicants, both of whom have not claimed confidential treatment, and Participants are not being forced to participate in this trial.

Pursuant to the Commission’s order creating the trial (“*Trial Order*”), the trial is intended to be open to public review and comment: “to permit states, the public, and the Commission to monitor the impact of the trial, Vonage must file monthly reports beginning 60 days after Vonage requests direct access to numbers”⁵ The process is meant to be a public process throughout, with participant plans filed with the Wireline Competition Bureau and each relevant state commission.⁶ Participation is expressly conditioned on the understanding that these are to be public trials “so the Commission may gauge the risks and benefits of allowing interconnected VoIP providers to obtain direct access to numbers as part of a limited trial.”⁷ As Bandwidth has advocated in prior filings, because this information will inform the Commission’s rulemaking, the need for public participation is particularly important from a due process perspective.⁸

Shielding the information in question could fundamentally undermine the trial process, where only a few insiders would have access to baseline information about the contours of the trials. Importantly, those individuals would not be able to communicate with other interested members of the public, including state commission staff, about the progress of the trial. That is not the way an Administrative Procedure Act rulemaking should be conducted, and these trials are an extension of such a rulemaking. The information shielded by Participants appears to include some of the most basic information about where their trials will take place, including the LATAs and rate centers. Tellingly, two other providers, WilTel and SmartEdgeNet, LLC, that filed similar trial plans, recognized that providing the very same LATA and rate center information was a central part of the public filing, and one that should not be accorded confidential treatment.⁹ Without this information, the public has no information even as to the states in which these trials will be conducted or what regions within those states. The public, which is participating in these trials without customer notice, deserves to at least know where the trials will be conducted. The fact that two providers have provided this same information should

⁵ *Petitions for Waiver of Commission’s Rules Regarding Access to Numbering Resources*, Notice of Proposed Rulemaking, Order and Notice of Inquiry, *et al.*, CC Docket No. 99-200 *et seq.* (rel. Apr. 18, 2013) (“*Trial Order*”).

⁶ *Id.* ¶ 101.

⁷ *Id.* ¶ 94.

⁸ Ex Parte Letter from James C. Falvey to Marlene H. Dortch, CC Docket No. 99-200, at 2-4 (Apr. 4, 2013).

⁹ *Petitions for Waiver of Commission’s Rules Regarding Access to Numbering Resources*, Numbering Plan of SmartEdgeNet, LLC, Docket No. 99-200 (May 17, 2013); *Petitions for Waiver of Commission’s Rules Regarding Access to Numbering Resources*, WilTel Trial Proposal, Docket No. 99-200 (May 17, 2013).

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weigh heavily as the Commission balances whether this information should be shielded from public review.

The information expurgated by Participants cannot possibly be considered “sensitive trade secrets,” nor is it financial information. While it is “commercial” information, it provides no specific information as to any individual customers, customer phone numbers, or customer counts. It is also not “of a kind that would not customarily be released to the public,” as it has in fact been released by two other providers very recently. Providers routinely indicate where they are providing services through state certification filings, advertisements, and website listings. Participants also cannot claim they “would suffer substantial competitive harm if this information were disclosed.” Divulging a handful of rate centers where Participants do business will not result in “substantial competitive harm,” particularly where the Commission knows that other providers have willingly disclosed such information as the *quid pro quo* for participating in the trial.

Bandwidth and other parties interested in reviewing Participants trial plans have very little information about those plans, particularly from a geographic perspective. In requiring that Participants file their plans publicly, the Commission should also clarify that the 30 days to automatic Bureau approval does not begin to run until Participants make such filings.¹⁰ 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

James C. Falvey

Justin L. Faulb

Counsel for Bandwidth.com, Inc.

cc: Bill Dever
Brita D. Strandberg (counsel to Vonage)
Kristin Manwarren (counsel to IntelePeer, Inc.)

¹⁰ Intelepeer provides a brief description of its basis for confidential treatment, claiming that knowing where its trial would take place would “provide Intelepeer’s competitors with sensitive insights related to IntelePeer’s business plans, operations and systems, as well as business decisions used for vendor selection and management.” *See Intelepeer Proposal*. But in the end, the shielded information appears to be simply basic information as to where and how IntelePeer will conduct its trial. If Intelepeer is not even willing to let the public know in which part of its footprint it is volunteering its customers for trials, it should not participate in the trial. Moreover, given the readiness of other providers to make public such information, which impacts at most 5% of its numbers, IntelePeer cannot show “irreparable injury and substantial harm.”