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07-23-12

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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Cox California Telcom, LLC (U5684C)

Complainant,

v.

VAYA Telecom, Inc. (U7122C),

Defendant.

C.11-09-007
(Filed September 9, 2011)

**OPENING BRIEF OF VAYA TELECOM, INC.
[PUBLIC VERSION]**

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GLOSSARY OF ACRONYMS

AMA	Automatic Message Accounting
CDR	Call Detail Record
CLEC	Competitive Local Exchange Carrier
CMRS	Commercial Mobile Radio Service
CPE	Customer Premises Equipment
DNS	Domain Name Server
EMI	Electronic Messaging Interchange
ICA	Interconnection Agreement
ILEC	Incumbent Local Exchange Carrier
IP	Internet Protocol
ISP	Information Service Provider
ISP	Internet Service Provider (as described in the “ISP Remand Order”)
IXC	Interexchange Carrier
JIP	Jurisdictional Indicator Parameter
LATA	Local Access Transport Area
LERG	Local Exchange Routing Guide
LRN	Local Routing Number
MTA	Major Trading Area
MOU	Minutes of Use
NANPA	North American Numbering Plan Administrator
NPA-NXX	Number Plan Area – (First 3 Digits of Local Telephone Number)
OCN	Operating Company Number
PIU	Percent Interstate Usage
PLU	Percent Local Usage
PSTN	Public Switched Telephone Network
PVU	Percent VoIP Usage
SIP	Session Initiation Protocol
SS7	Signaling System 7

TCP/IP	Transmission Control Protocol / Internet Protocol
TDM	Time Division Multiplexing
VoIP	Voice Over Internet Protocol

Vaya Telecom, Inc. (“Vaya”) respectfully submits its Opening Brief pursuant to the Assigned Commissioner’s Ruling and Scoping Memo (“Scoping Memo”) dated March 6, 2012, and the Administrative Law Judge’s Ruling Memorializing Law and Motion Ruling, Receiving Exhibits in Evidence and Revising Schedule, dated July 13, 2012.

I. INTRODUCTION AND SUMMARY OF ISSUES

On September 9, 2011, Cox California Telcom, LLC dba Cox Communications (“Cox”) filed this Complaint against Vaya at the California Public Utilities Commission (“CPUC” or “Commission”). In its Complaint, Cox alleges that Vaya owes over \$2.5 million, including late charges, under the Cox intrastate switched access tariff for Cox’s termination of intrastate toll traffic originated by Vaya’s customers, or its customers’ customers, for the time period from October 6, 2010 through September 2011 when the Complaint was filed. At the time of the filing of Opening Testimony in this proceeding, Cox alleged that the intrastate amount due was \$3,512,670.63 through Cox’s March 2012 billing.¹

Cox argues that Vaya is obligated to pay Cox’s invoices for intrastate access charges because its California intrastate switched access tariff applies to the traffic included in the invoices. Vaya denies that it owes Cox the amounts contained in the invoices. Simply stated, Vaya disputes the charges contained in the invoices because,

¹ Exhibit 3 at p. 3, line 21 and Attachment RLA-2. See also Transcript at pp.183, lines 13-28 and 184, lines 1-5.

as the record demonstrates, they are grossly inaccurate in several material respects, including:

- Categorizing interstate traffic based on calling and called telephone numbers as intrastate toll traffic subject to its intrastate switched access tariff;
- Categorizing intraMTA CMRS-originated traffic as intrastate toll traffic subject to its intrastate switched access tariff;
- Categorizing local traffic as intrastate toll traffic subject to its intrastate switched access tariff; and
- Categorizing Information Services traffic, including Voice Over Internet Protocol (“VoIP”) traffic, as intrastate toll traffic subject to its intrastate switched access tariff.

As the record further demonstrates, these inaccuracies result from Cox billing practices which include:

- Reliance on AT&T Electronic Messaging Interchange (“EMI”) records which did not include the calling and called telephone numbers during much of time period covered by the invoices;
- Failure to validate or verify the accuracy or completeness of the EMI records in accordance with industry guidelines;
- Failure to utilize SS7 call detail records provided by Vaya to AT&T and by AT&T to Cox containing additional information;
- Failure to utilize Cox call detail records produced by its own switches;
- Failure to notice and investigate obviously anomalous invoices categorizing almost all Vaya traffic as intrastate toll traffic for extended periods; and
- Lack of tariff provisions establishing Vaya as a customer under the tariff.

The Scoping Memo found the ultimate issues before the Commission to be: (1) whether the traffic Cox has terminated for Vaya, described as intrastate toll calls, has been properly characterized and if it has, (2) whether Vaya owes Cox compensation

under the Cox switched access tariff for terminating that traffic. Cox, as complainant, bears the burden of proof and must establish the facts to support its case in chief; Vaya must establish the facts to support its affirmative defenses.²

In its testimony, Vaya demonstrates that the traffic subject to Cox's invoices has not been properly characterized as intrastate toll traffic as described above, based upon detailed analysis of the Cox invoices, data from the AT&T EMI records, and the truly detailed Call Detail Records ("CDRs") created by the Vaya switch and supplementing data system. Cox did not introduce any evidence challenging the accuracy of this analysis, and did not conduct cross examination on any of its use of data sources, methodology, or conclusions. Vaya demonstrates that Cox's invoices vastly overstate the portion of total minutes of use ("MOUs") that are classified as intrastate intraLATA MOUs, which resulted in excessive bills for services rendered under Cox's intrastate switched access tariff.

Vaya also demonstrates that Cox did not produce its invoices based on the most accurate information available to it such as the SS7 data it received at the time of each call, or the Cox call records created by its own switch. Instead, Cox has admitted that it chose to simply use the Settlement Code field of the AT&T EMI records without question, which does not accurately categorize Vaya traffic as interstate, intrastate interLATA, intrastate intraLATA or local. Using the calling and called numbers of each and every disputed call, Vaya's switch-generated CDRs reach results that are far more accurate, varying dramatically from the Cox invoices.

² Scoping Memo at p. 3.

Vaya also shows that Cox did not produce its invoices to Vaya in accordance with industry guidelines or the terms of its intrastate switched access tariff. Finally, all of these invoicing errors, even if corrected, do not establish that the Cox intrastate switched access tariff applies to the Vaya traffic, because Cox's wireline intrastate switched access tariff does not apply to information services such as VoIP traffic, when it was an information service provided by Vaya or by Cox in terminating Vaya MOUs.

The Scoping Memo also instructs the parties to brief the following legal issue:

Whether switched access charges or other intercarrier compensation charges apply under applicable law to traffic subject to the Complaint, even if some or all of the traffic at issue was originated and/or terminated in Internet Protocol (IP) format, including whether this answer changes at any time as result of the *FCC ICC Reform Order*.³

This brief demonstrates that, for multiple reasons, intrastate switched access charges do not apply to the traffic subject to the Complaint. The evidence shows that 100% of the traffic at issue was originated in IP format by Vaya's customers or its customers' customers and/or much of it was terminated by Cox in IP format. As to the state of the law with regard to what intercarrier compensation applies to VoIP traffic, as demonstrated in detail below, the Federal Communications Commission ("FCC") set different prospective default rates for intercarrier compensation for "VoIP-PSTN Traffic," effective December 29, 2011. But the FCC expressly refused to apply these default rates to VoIP traffic exchanged prior to December 29, 2011, which is the bulk of the time

³ Scoping Memo at pp. 2-3.

period involved in this proceeding.⁴ Law existing prior to the *ICC Reform Order* did not apply access charges to VoIP traffic. Additionally, California law does not support, and the CPUC has not held, that intrastate switched access tariffs apply to VoIP traffic under facts remotely resembling those of this case.

II. BACKGROUND

The Scoping Memo summarizes the procedural background of this case.⁵ Testimony was exchanged by the parties in March and April 2012, and an evidentiary hearing was held on June 12, 2012 before the assigned ALJ. Cox presented two witnesses, Mr. Robert Allen, the Cox Manager of Carrier Access Billing Systems, and Mr. Joseph Gillan. Vaya presented testimony of two witnesses, Mr. James Mertz, who sponsored the detailed evaluation of the Cox invoices conducted by Vaya, and Dr. Lee Selwyn, whose testimony was focused on the proper regulatory treatment of VoIP and information services and how the Cox switched access tariff did not apply to VoIP services.⁶

⁴ *In the Matter of Developing an Unified Intercarrier Compensation Regime*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 11-161 (rel. Nov. 18, 2011) (“*ICC Reform Order*”) at paras. 933-935 and fn. 1874.

⁵ Scoping Memo at 2-3.

⁶ Dr. Selwyn’s testimony was admitted without any cross-examination by Cox.

III. STATEMENT OF FACTS

A. Services Provided by the Parties

Vaya is a CLEC and an IXC,⁷ as well as an information service provider (“ISP”). In conjunction with its affiliate, O1 Communications, Inc. (“O1”), and through operation of its IP network, Vaya offers customers IP transport and termination services and the capability of transforming IP-originated traffic into Time Division Multiplexing (“TDM”) in order to deliver a voice call to the Public Switched Telephone Network (“PSTN”).⁸ Vaya was formed to join the growing number of CLECs that support interconnection of non-facilities based VoIP service providers (such as Vonage and Google) to other VoIP service providers and to the PSTN.⁹

Vaya’s network for the delivery of traffic to Cox is depicted on the schematic diagram designated as Attachment 1 to Mr. Mertz’ testimony.¹⁰ Vaya receives IP originated traffic from its customers through an IP or Internet connection and transmits it to its destination point, depending upon whether the called party’s service provider is

⁷ See Joint Statement of Stipulated Facts, May 11, 2012, Attachment A, Stipulation 6 (“6. Vaya is certificated by the Commission pursuant to D.09-01-012.”)

⁸ At this point, Vaya has entered into a contract with one customer, its affiliate, O1 Communications, Inc. Vaya and O1 jointly provide IP termination and transit services to customers that have entered into contracts directly with O1. See Transcript at p. 224, lines 8-16 and p. 225, lines 1-11. In this brief, unless a distinction is specifically required in relation to a particular argument, Vaya will refer to the jointly-provided services as Vaya’s services and jointly-served customers generally as Vaya’s customers.

⁹ Declaration of Jim Beausoleil On Behalf of Vaya Telecom, Inc. attached to Vaya Motion for Leave to File Confidential Materials Under Seal (“Beausoleil Declaration”) at para. 2.

¹⁰ Exhibit 50, Attachment 1.

connected to Vaya through an IP connection or a TDM connection.¹¹ In order to ensure that the traffic originates in IP, Vaya requires its customers to sign a contract in which the customer “represents, warrants and certifies utilizes TCP/IP as a transmission protocol from a retail end user’s (the dialing party’s) originating customer premises equipment to a TCP/IP gateway, and is not a call originated on the PSTN.”¹²

If necessary to reach a called party through a TDM connection, Vaya converts the call to TDM and routes it to the connecting incumbent local exchange carrier (“ILEC”) tandem switch in the LATA designated in the Local Exchange Routing Guide (“LERG”) as the tandem serving the called party.¹³ Since Cox has refused to directly interconnect with Vaya via IP, Vaya must route its traffic destined for Cox through an intermediate AT&T tandem switch to which both Vaya and Cox are connected.¹⁴ The two LATAs in California where Vaya routes traffic through AT&T’s tandems to Cox are the San Diego and Los Angeles LATAs. Vaya customer traffic destined for Cox customers flows from Vaya to an AT&T tandem located in the same LATA as the Cox end offices and from the AT&T tandem to the Cox end offices in that LATA.¹⁵

Cox also is a CLEC and IXC. It provides retail voice service and switched access service using its own facilities and facilities leased from Cox Communications of California, LLC, its parent, which provides high speed internet access and cable

¹¹ Exhibit 51, p. 31, lines 12-16; Exhibit 5; Transcript at p. 200, lines 19-26.

¹² See Exhibit 60; Transcript p. 221, lines 27-28; p. 222, lines 13-16; p. 223, lines 16-23; Exhibit 51, p. 31, lines 17-23 and p. 32, lines 1-3.

¹³ Exhibit 51, p. 4, lines 1-10.

¹⁴ Exhibit 51, p. 5, lines 1-8.

¹⁵ Exhibit 51, p. 4, lines 8-11.

services.¹⁶ Cox's network diagrams are attached to Cox witness, Joseph Gillan's Opening Testimony as Exhibits JPG 2 and JPG 3. The diagrams reflect Cox's network and its use of both circuit-switched technology and VoIP technology to provide voice services.¹⁷ In December 2011 in California, Cox provided VoIP services to *****BEGIN CONFIDENTIAL***** **██████████** *****END CONFIDENTIAL***** of its retail voice customer base.¹⁸ This number has presumably increased since then, as it steadily has increased every month since July 2010.¹⁹ When Cox provides such VoIP service to its end users, Cox provides an information service, not switched access service.

B. History of Billing Dispute

Vaya began providing IP termination services in California in the autumn of 2010. Vaya received its first two invoices from Cox for switched access services on March 31, 2011. The two invoices have a bill date of March 5, 2011 and showed MOUs for February 6, 2011 through March 5, 2011. Vaya received its second set of invoices with a bill date of April 5, 2011 on April 11, 2011. Because Vaya's services were limited to VoIP services, it determined based on the existing law that they were not subject to intrastate switched access tariffs. Therefore, shortly after receiving its second set of invoices, on April 18, 2011, Vaya sent a letter to Cox, disputing the bills stating:

[c]onsistent with two [referenced] recent federal district court rulings, IP-originated or IP terminated traffic is not subject to tariffed intercarrier compensation charges. Accordingly, Vaya disputes

¹⁶ See Cox Complaint in this matter and CPUC Decision 12-05-021 in Application 11-09-009 (Issued May 30, 2012).

¹⁷ Exhibit 1C, Confidential Attachments JPG-2 and 3.

¹⁸ Exhibit 51-C, Attachment 1, p. 3 (Cox Confidential Response to Vaya Request 3-4).

¹⁹ *Id.*

your company's intercarrier compensation charges for this traffic. Furthermore, even if the tariffs are applicable to IP-originated or IP-terminated traffic, Vaya has not engaged your company for tariffed services. ...

Vaya hopes to resolve this dispute quickly and without litigation. To that end, Vaya looks forward to entering into a commercial agreement with your company that establishes terms and conditions for direct interconnection as well as reciprocal rates for the exchange of this traffic. Until such time as we enter into a commercial arrangement, we will continue in our default bill and keep agreement....²⁰

In addition to disputing the invoices based on the nature of Vaya's traffic, Vaya also noticed that the Cox invoices did not accurately reflect the amounts of traffic contained in Vaya's internal records or the jurisdiction of traffic based on calling and called party numbers. For example, the March and April invoices had *no* interstate MOUs, but large amounts of intrastate intraLATA usage billed at 1.8 cents per minute. Two April invoices showed total MOUs for December 6, 2010 through January 5, 2011 to be 99,736,041 MOUs,²¹ while Vaya's records showed only *****BEGIN CONFIDENTIAL *** [REDACTED] ***END CONFIDENTIAL ***** MOUs, or 22% of the MOUs for that time period.²² The April invoices showed 55,655,776 intrastate intraLATA MOUs for December 6, 2010 through January 5, 2011;²³ Vaya's records, based on the calling party and called party numbers, showed only *****BEGIN**

²⁰ Robert Allen Opening Testimony, Exhibit 3, Attachment RLA-1. Note that Vaya disputed these invoices on an ongoing basis.

²¹ See Exhibit 51C, Confidential Attachment 11, totals from the first line of each of the six pages.

²² Exhibit 51C, p. 25, lines 17-21.

²³ Exhibit 51C, p. 26, lines 3-5.

CONFIDENTIAL *** [REDACTED] *****END CONFIDENTIAL*****,²⁴ or approximately 2.3% of the invoiced intrastate intraLATA MOUs.

Vaya asked Cox for sample call detail records to compare their information to that of Vaya's records, because the numbers of MOUs for the time periods invoiced and the jurisdiction of the calls did not match. Over the next several months, Vaya attempted to work with Cox to reconcile the bills to data provided by Cox and Vaya internal records. Cox refused to try to validate the CDRs unless Vaya agreed in advance to pay for what Cox insisted were intraLATA calls. In response to an e-mail from Vaya asking to address the difficulties it was having in reconciling the Cox and Vaya call detail records with the invoices, a Cox representative stated: "I am not planning on having my billing experts on the call. My expectation is to discuss payment for the access charges issued. If we need to schedule a call to go over the CDRs in detail, we can do that once we have an agreement on payment for intraLATA calls."²⁵ The parties were then not successful in negotiating an agreement or a resolution to their differences. Cox filed its Complaint in September 2011.

IV. CPUC JURISDICTION

The Cox Complaint asserts that P.U. Code §§ 701, 1701 and 1702 grant the Commission jurisdiction over any utility's breach of the Code and/or Commission decisions, rules and policies,²⁶ and that its Complaint is properly brought for the

²⁴ Exhibit 51C, Confidential Attachment 10, p. 1.

²⁵ Exhibit 51, p. 23, lines 1-21; see also, Transcript p. 146, lines 18-28, p. 147, lines 1-28, p. 148, lines 1-12.

²⁶ Cox Complaint at p. 3, paragraph 8.

collection of lawful tariff charges pursuant to P.U. Code §§ 735 and 737.²⁷ However, P.U. Code § 1701 only establishes procedural requirements applicable to the Commission but does not confer jurisdiction, and P.U. Code § 737 only applies to proceedings brought to the Commission after a complaint for the collection of tariff charges has been filed in a court of competent jurisdiction. Neither of these statutes forms a basis for Commission jurisdiction to hear the Cox Complaint.

Vaya concurs that the Commission has jurisdiction to hear the Cox Complaint, subject to the constraint that the Commission's jurisdiction to adjudicate issues concerning interstate services is different in various circumstances, as discussed below.

A. The Commission has Jurisdiction Over Disputes Between Carriers Relating to Intrastate Traffic and for Enforcement of Intrastate Switched Access Tariffs

The Commission has jurisdiction pursuant to state law to resolve a dispute involving two California utilities subject to its regulation.²⁸ The Commission has jurisdiction to determine whether the Cox intrastate switched access tariff applies to any of the Vaya traffic at issue, and, if so, the portion of that traffic to which it applies. In making this determination, the Commission must interpret the Cox tariff, make factual determinations based on record evidence concerning the nature of this traffic as related to the tariff, including whether it is local or other intrastate traffic not subject to intrastate switched access charges, or if it is interstate traffic. In determining if any of the Vaya traffic is interstate traffic, the Commission has jurisdiction to apply applicable federal

²⁷ *Id.* at p. 4, paragraph 11.

²⁸ See, e.g., Decision 12-01-034, Order Granting Rehearing of Decision (D.) 08-12-002, *slip op.* at 3-6, C. 07-09-010, *Pac-West Telecomm, Inc. (U5266C), vs. Comcast Phone of Cal., LLC (U5698C)*, issued Jan. 12, 2012 (“*Rehearing Order*”).

law. However, the Commission does not have jurisdiction to enforce a Cox interstate tariff that may be applicable to some or all of the Vaya traffic, or otherwise determine Vaya liability for any switched access charges or other interstate traffic termination charges unless expressly authorized by federal statute or FCC order.

B. The Commission Does Not Have Jurisdiction over Disputes between Carriers Relating to Interstate Intercarrier Compensation absent Specific Statutory or FCC Authorization

There are several examples where the FCC or federal legislation provides specific authorization for the Commission to take regulatory action involving interstate services. To the extent any such grant of jurisdiction over interstate matters is relevant here, the Commission's jurisdiction is limited by the scope of that grant.

For example, when two California utilities have entered into an Interconnection Agreement ("ICA") pursuant to § 251 of the Communications Act,²⁹ the Commission has jurisdiction to arbitrate, approve, and enforce the provisions of the ICA pursuant to § 252 of the Act, including the authority to resolve disputes under an ICA concerning interstate telecommunications services subject to the ICA.³⁰ However, in circumstances like this case, where Cox and Vaya have not entered into an ICA, the Commission's jurisdiction to resolve the Complaint does not include determination of charges established by an interstate tariff filed with the FCC and applicable to interstate

²⁹ 47 U. S. C. § 151 et seq. (the "Act").

³⁰ See, e.g., *Pacific Bell Tel. Co. v. Cal. Pub. Util. Comm'n*, 597 F.3d 958, 961 (9th Cir. 2009).

services.³¹ Enforcement of a federal tariff would be undertaken before the FCC or federal courts.

Similarly, while the FCC has said that ISP-bound traffic, including physically “local” traffic, is “jurisdictionally interstate,”³² the Commission has determined that it has jurisdiction to adjudicate a dispute between two carriers subject to its regulation, including the authority to apply the federal rate for ISP-bound traffic, to the extent that it falls under the *ISP Remand Order*.³³

Finally, the FCC found in the *Vonage Order* that VoIP services are subject to its exclusive federal jurisdiction.³⁴ There, the FCC found that applying traditional state telephone company regulation to VoIP providers “outright conflicts with federal rules and policies governing” those communications. The *Vonage Order* confirms that all VoIP services are practically inseverable and therefore interstate for jurisdictional purposes.³⁵

³¹ In addition, any such adjudication of interstate rates applicable to Vaya traffic identified in this case would go beyond the relief sought by the Cox Complaint, which seeks only charges for “intrastate toll calls” subject to its California tariff. See, e.g., Cox Complaint at 12-13, paras. 65 and 66 (“65. Based on terms in the Cox Switched Access Tariff, the calls subject to this complaint are intrastate toll calls for which Cox is due compensation from Vaya. 66. Vaya’s refusal to pay Cox for the termination of intrastate toll calls violates Cox’s Switched Access Tariff. Vaya must comply with that tariff and pay Cox the amount owed.”).

³² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (“*ISPRO*”).

³³ *Rehearing Order* at pp. 3-6.

³⁴ See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22404, ¶¶ 15-37 (2004) (“*Vonage Order*”).

³⁵ See *Vonage Order*, ¶¶ 15-37.

In summary, except in specific circumstances identified in federal statutes or FCC decisions implementing them, the Commission does not have jurisdiction to adjudicate disputes arising between carriers concerning interstate services, but has jurisdiction to determine whether services that are alleged in a complaint to be intrastate services are instead, in whole or in part, interstate services not subject to an intrastate tariff as alleged in the complaint.

C. The Commission Does Not Have Jurisdiction over Disputes between Carriers Relating to Intercarrier Compensation for VoIP Traffic

VoIP is an Internet application utilizing packet-switching to transmit a voice communication over a broadband Internet connection. It is different from the circuit switching application used to route traditional landline telephone calls. In circuit switched communications, an electrical circuit must be kept clear of other signals for the duration of a telephone call. Packet switched communications travel in small digital packets along with many other packets, allowing for more efficient utilization of circuits. VoIP is more cost effective than traditional circuit switches.³⁶

VoIP also differs from traditional circuit switched telephone communications in that the end-to-end geographic locations of traditional landline-to-landline telephone communications are readily known, so it is easy to determine whether a particular phone call is intrastate or interstate in nature. VoIP-to-VoIP communications originate and terminate at IP addresses which exist in cyberspace, but are tied to no identifiable

³⁶ *Minnesota PUC v. Federal Communications Commission*, 483 F.3d 570, 574 (8th Cir. 2007) (“*Vonage Appeal Decision*”); See also generally Transcript at pp. 107-115.

geographic location.³⁷ Similarly, in a VoIP-to-landline or landline-to-VoIP communications, the geographic location of the landline part of the call can be determined, but the geographic location of the VoIP part of the call could be anywhere where the VoIP customer obtains access to the Internet – from the same building to the other side of the planet – and not associated with the geographic location of the customer’s billing address or assigned telephone number.³⁸

The FCC concluded, for these reasons among others, in the *Vonage Order* that VoIP service was practically inseverable for jurisdictional purposes because the characteristics of that service “preclude any practical identification of, and separation into, interstate and intrastate communications.”³⁹ The FCC focused on the inability to determine the geographic location of the calling party, since telephone numbers associated with VoIP services are able to be used from multiple locations. In addition, VoIP services provide the “inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously.” The FCC recognized that these “functionalities in all their combinations form an integrated communications service designed to overcome geography, not track it.”⁴⁰ The FCC then relied on this finding of “practical inseverability” to find that the states are preempted from imposing traditional telephone regulation on

³⁷ *Vonage Appeal Decision* at p. 574.

³⁸ *Id.*

³⁹ *Vonage Order* ¶ 14.

⁴⁰ *Id.* at para. 25.

Vonage's VoIP service. The FCC did not limit its inseverability analysis to Vonage's specific service. Instead, it explained that the "integrated capabilities and features" that render Vonage's service inseverable and, therefore, exclusively interstate for jurisdictional purposes— "are not unique to [Vonage's service], but are inherent features of most, if not all, IP-based services."⁴¹

Starting in November 2010, the FCC allowed states to extend their universal service contribution requirements to intrastate revenues of VoIP service providers as long as they did not conflict with the federal universal service fund rules for VoIP services.⁴² The FCC expressly declined in that Order, however, to otherwise modify its preemption ruling in the *Vonage Order*.⁴³

More recently, the *ICC Reform Order* permitted states to supervise modifications of CLEC intrastate tariffs to include language to implement the VoIP-PSTN intercarrier compensation transition and recognized that states may arbitrate disputes between carriers seeking to enter alternative arrangements. The FCC again rejected claims that it should distinguish among types of VoIP services for regulatory purposes and reiterated that "[n]othing" in this Order alters the status quo with respect to the jurisdictional treatment of VoIP traffic or services under existing precedent."⁴⁴ Affirmed

⁴¹ *Vonage Order*, para. 25, n. 93.

⁴² *In the Matter of the Universal Service Fund Methodology*, Declaratory Ruling, WC Docket 06-122, FCC 10-185 (rel. Nov. 5, 2010) at p. 1.

⁴³ *Id.*, at paras. 23-24.

⁴⁴ See *ICC Reform Order* ¶ 954 n.1942, ¶ 959 n.1967 and n. 1969.

by the Eighth Circuit, the *Vonage Order* confirms that all VoIP services are interstate for jurisdictional purposes.⁴⁵

V. LEGAL FRAMEWORK FOR TREATMENT OF VAYA TRAFFIC UNDER CALIFORNIA AND FEDERAL LAW

A. Cox Has The Burden of Proof to Establish the Factual and Legal Allegations of Its Complaint, and Has Failed to Do So.

The Cox Complaint seeks payment of invoices Cox delivered to Vaya that Cox asserts contain accurate charges for “intrastate toll traffic” subject to the Cox intrastate switched access tariff. As the Scoping Memo makes clear,

The ultimate issues before the Commission are: (1) whether the traffic Cox has terminated for Vaya, described as intrastate toll calls, has been properly characterized and if it has, (2) whether Vaya owes Cox compensation under the Cox Switched Access Tariff for terminating that traffic. *Cox, as complainant, bears the burden of proof and must establish the facts to support its case in chief;*⁴⁶

To meet its burden, Cox was required to introduce evidence demonstrating that its invoices were correct. As the Commission stated in D.98-08-033, consistent with the California Evidence Code⁴⁷

Complainants correctly observe that they bear the burden of establishing a *prima facie* case to support the relief they claim in the complaint. In the first instance, that burden is to produce evidence.

⁴⁵ *Vonage Appeal Decision, supra at 578.*

⁴⁶ Scoping Memo at p. 3 (Emphasis added.).

⁴⁷ *ARCO Products Co., et al., v. SFPP, L.P.*, D. 98-08-033, 81 Cal.P.U.C.2d 573, 1998 WL 748593 *9; *cf.* Cal. Ev. Code § 110 (the “burden of producing evidence’ means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.”) (“*Arco*”).

But Cox failed to present any evidence supporting the accuracy of any specific charge set forth in its invoices, and also fell well short of meeting its burden of proof in most other aspects of its *prima facie* case, as demonstrated below.

The Commission decision in *Coachella Valley Comm's v. U.S. Sprint*⁴⁸ gives the most apposite explanation of the requirement that a carrier seeking to collect call termination charges it has invoiced must be able to substantiate the invoices, not merely assert they are correct. There, two carriers disagreed over whether one's invoices to the other were correct, partly because each company's switches recorded traffic differently. The complainant, as in this case, did not support for its invoices in discovery or at hearing, relying only on their stated monthly totals.⁴⁹ As a result of this deficiency, the Commission dismissed the complaint:

Specificity is required if complainant is to carry its burden of proof. In this case [defendant's] billing to [complainant] shows full details of each and every call.... [Complainant] submits summary figures which are not compatible with those provided by [defendant].... We conclude that, in not furnishing call detail as requested by defendant, complainant has not carried its burden of proof....⁵⁰

The Commission had also noted the importance of validating intercarrier invoices long ago: "We will however caution the NDIECs [Non Dominant Interexchange Carriers]

⁴⁸ D. 92-09-010, 45 Cal.P.U.C.2d 258, 1992 WL 672662.

⁴⁹ *Id.* ("CVC's billing periods and corporate usage summaries for the Ultra WATS service supplied by Sprint are not directly comparable to those produced by Sprint's switch, and monthly or longer period totals generated by the switches of wholesaler and retailer vary greatly.").

⁵⁰ *Id.*

that in the event of complaints between them and the LECs, regarding billing ... the party(s) who have the detailed billing history may well prevail.”⁵¹

In this case, Cox did not introduce its invoices into the record,⁵² although Vaya presented record evidence containing its own detailed Call Detail Records in order to demonstrate the material inaccuracies of the Cox invoices.⁵³ Furthermore, Cox did not introduce into evidence *any* of the AT&T EMI records upon which it asserts that it entirely based its invoices.⁵⁴ Thus the fundamental underlying call detail records upon which Cox admits it based the specific charges in its invoices were not produced for the record by Cox. Vaya surely did not need to do so in order to defeat Cox’s Complaint;

⁵¹ *Re Tariff Filing Rules for Telecommunications Utilities, Other than Local Exchange Carriers and AT&T-C*, D. 90-08-032, 37 Cal.P.U.C.2d 130.

⁵² Vaya introduced the Cox invoices into the record for the limited purpose of showing that data was accurately extracted from the invoices when Vaya performed its analysis of the invoices using its own call detail records. The AT&T EMI records themselves were not made part of the record by Cox or Vaya.

⁵³ Exhibit 53C, consisting of 14 DVDs.

⁵⁴ See Cox Complaint at 6, paragraph 29 (“29. Based on the CDRs obtained from AT&T, Cox renders industry standard carrier access bills (‘CABS billing’) to Vaya pursuant to the Cox Switched Access Tariff.”) This crucial omission was apparently a surprise to Mr. Allen, the Cox witness sponsoring the invoices:

Q. Do you know whether the EMI records that you claim are the basis for your invoices are a part of the record in this case?

A. The -- yes. I'm assume they are.

Q. And by the EMI records, I mean the records that Cox received -- the call detail records that Cox received from AT&T as EMI formatted records.

A. Yes. That's the only EMI records we even have reference to, correct?

Q. Yes.

A. Yes.

Transcript at p. 177, line 22 to p. 178, line 26.

Vaya merely had to demonstrate that Cox's invoices were incorrect: "It [is] sufficient for defendant to produce evidence that cast doubt upon complainants' evidence."⁵⁵

Therefore, the Cox Complaint can and should be dismissed in its entirety solely on the basis that Cox did not provide any underlying data whatsoever to support the accuracy of its invoices. Cox presented no specific, quantitative call detail records that validated either (1) whether the invoices accurately reflect the allegedly underlying AT&T EMI records when categorizing Vaya traffic as intrastate toll traffic; or (2) whether AT&T recorded, processed, modified or otherwise produced EMI records accurately reflecting Vaya's traffic.⁵⁶ In dismissing the case on this basis, the Commission need not reach any decision on any of the other issues which present further, independent reasons why the Cox Complaint should be denied.

B. VoIP is an Information Service.

The text of the Act and FCC precedent make clear that VoIP is an information service and not a telecommunications service. At least three federal district courts have agreed that VoIP services are information services.⁵⁷ VoIP meets the Act's statutory definition of "information service":

⁵⁵ *Arco* at *9 (holding that "Defendant did not need to present its own ... study to carry its burden of production" of evidence).

⁵⁶ Significant record evidence exists concerning reasons why the EMI records themselves may not accurately categorize Vaya traffic. Cox, however, introduced no evidence demonstrating that Cox transformed the data in these records into Cox invoices without distortion, omissions, or other errors. As the record stands, it is not possible to precisely determine whether or to what extent AT&T or Cox is the source of the material discrepancies between the Cox invoices and the Vaya CDRs.

⁵⁷ See *PAETEC Commc'ns Inc. v. CommPartners, LLC*, No. 08-cv-0397, 2010 U.S. Dist.Lexis 51926, *7 (D.D.C. Feb. 18, 2010) ("*PAETEC*"); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1081-83 (E.D. Mo. 2006)

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.⁵⁸

VoIP is an information service because it “offers customers a suite of integrated capabilities and features that allow[] the user to manage personal communications dynamically” and to “generate, acquire, store, transform, process, retrieve, utilize, or make available information via telecommunications.” VoIP providers offer these information-processing capabilities and features as part of a single, integrated service; there is no separate “telecommunications” offering to consumers within those VoIP services.⁵⁹ As the Commission recognized in the *Vonage Order*, “integrated features and capabilities” like these—which are “inherent features of most, if not all, IP-based services,” including “those offered or planned by facilities-based providers”—allow customers to “control their communications needs by determining for themselves how, when, and where communications will be sent, received, saved, stored, forwarded, and organized.”⁶⁰ Because those capabilities are offered as part of a single, integrated, any-distance service—and cannot practicably be broken apart into component pieces—

(“*Southwestern Bell*”), *aff’d*, 530 F.3d 676 (8th Cir. 2008), *cert. den’d*, 555 U.S. 1099 (2009); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F.Supp. 2d 993, 998-1001 (D. Minn. 2003), *aff’d*, 394 F.3d 568 (8th Cir. 2004).

⁵⁸ 47 U.S.C. § 153(24).

⁵⁹ See e.g., *Southwestern Bell*, 461 F. Supp. 2d at 1079

⁶⁰ *Vonage Order*, paras. 7, 25 and n. 93.

these services, at a minimum, “combine both telecommunications and information components” and are accordingly “treated as information services.”⁶¹

In the *Brand X* decision, the United States Supreme Court addressed what it means to offer consumers a suite of integrated capabilities and features that allow customers to “generate[], acquire[], store[], transform[], process[], retrieve[], utilize[], or ma[k]e available...information...via telecommunications.”⁶² The Court considered the status of cable modem service, the broadband Internet access service that cable companies sell and which includes both a data transport element (telecommunications) and Internet access (information). The Court explained that the test for determining whether that service is a single information service and not two distinct services is to look at what the end use customer perceives as the finished product. If the various features are offered as a single, integrated service, without a “transparent transmission path” to provide a telecommunications service separate from any information processing — as was the case in *Brand X* — the service is properly classified as an information service. As the Court noted, “a consumer cannot purchase Internet service without also purchasing a connection to the Internet and the transmission always occurs in connection with information processing.”⁶³

Naturally, all VoIP services must utilize databases that associate IP addresses with 10-digit telephone numbers, just as Internet access providers use Domain Name

⁶¹ See e.g., *PAETEC*, at p. 6.

⁶² *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1010 (2005) (“*Brand X*”).

⁶³ *Brand X* at 992; Exhibit 50 at pp. 13-16.

Server (DNS) databases. In *Brand X*, the Supreme Court agreed that this integrated feature, alone, was sufficient to render cable modem service an information service.⁶⁴

VoIP also offers the capability to perform a “net protocol conversion” from IP to TDM, and vice versa. As the FCC has explained, a service that enables “an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly ‘transforms’ user information” and therefore “constitute[s]...information services under the Act.”⁶⁵ The Supreme Court also recognized in *Brand X* that a protocol conversion is the “ability to communicate between networks that employ different data transmission formats.” VoIP services “offer[] [the] capability” to perform that conversion, even if that capability is not used in every communication.⁶⁶ The FCC has long classified services that require or have an integrated capability of a net protocol conversions as “enhanced services,” which are defined as services that “employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber’s transmitted information.”⁶⁷

As the federal district court in *PAETEC*, for example, held, all VoIP and IP-based services are properly classified as information services because they allow subscribers to originate or terminate real-time, two-way voice communications over an IP-generated dial-tone and a broadband connection that, when delivered to or received from the

⁶⁴ *Brand X* at 987, 990-991, 998-1000.

⁶⁵ *Implementation of the Non Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (“*Non Accounting Safeguards Order*”) at para. 104 .

⁶⁶ *Brand X*, *supra*. at 977.

⁶⁷ *Non Accounting Safeguards Order*, paras. 102-107; 47 C.F.R. Section 64.702(a).

PSTN, undergo a net protocol conversion to enable them to exit or enter the network in a different protocol.⁶⁸

VoIP-originated traffic is fundamentally different than “IP in the middle traffic” which the FCC previously found to be subject to the access charge regime.⁶⁹ That case addressed traffic that began and ended in TDM protocol on the PSTN. When the calls entered AT&T’s network – in the middle – they were converted into IP and transported over AT&T’s Internet backbone before being converted back to the original format when entering the PSTN for termination at the called party’s location. The FCC concluded that the service did not involve a net change in form, and so it qualified as a telecommunications service. The FCC noted that AT&T did not offer the customers a ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information’⁷⁰ The FCC described its holding in the *IP in the Middle Order* in a way that highlights the difference between that traffic and the VoIP originated traffic at issue in this case:

We emphasize that our decision is limited to the type of service described by AT&T in this proceeding, i.e., an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider’s use of IP technology.⁷¹

⁶⁸ *PAETEC*, at pp.5-7; Exhibit 50 at p. 26, lines 14-23, p. 27, lines 1-4.

⁶⁹ *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-To-Phone IP Telephony Servs. are Exempt from Access Charges*, WC Docket No. 02-361, 19 FCC Rcd. 7457 (2004) (“*IP in the Middle Order*”).

⁷⁰ *Id.* at paras. 12-15.

⁷¹ *Id.* at para. 1.

The FCC went on to conclude that “generally, services that result in a protocol conversion are enhanced services, while services that result in no net protocol conversion to the end user are basic services.”⁷²

Here, Vaya has demonstrated that its VoIP services are IP originated services, transmitted over its IP network and converted by Vaya from IP to TDM prior to delivery to AT&T’s tandem and ultimately to Cox’s customers.⁷³ In addition, in conjunction with its customers, VoIP service providers like Vonage, Vaya provides the VoIP end users with an integrated service that offers the end users a suite of integrated capabilities and features that allow the user to manage personal communications dynamically and to generate, acquire, store, transform, process, retrieve, utilize or make available information via telecommunications.⁷⁴ No evidence exists in the record that shows that the VoIP end users are separately offered the transmission from the other features of their VoIP services.

In order to enable communications between end users served by its IP network to end users served by a TDM network – or even simply to deliver an IP originated call to a TDM network, Vaya also must utilize databases that associate IP addresses with 10-digit telephone numbers.⁷⁵

⁷² *Id.* at para. 4.

⁷³ Beausoleil Declaration at para. 2; Exhibit 51, p. 31, lines 12-16 and Attachment 1; Transcript at p. 200, lines 19-26.

⁷⁴ Beausoleil Declaration at para. 2; *Vonage Order* at paras. 6-7.

⁷⁵ *Vonage Order* at para. 9.

C. Pre-ICC Reform Order, Access Charges Do Not Apply to VoIP.

The FCC decided in the *ICC Reform Order* to amend the existing rules to institute a transitional intercarrier compensation regime for VoIP-PSTN traffic. Prior to that Order, access charges did not apply to VoIP. First, the federal rules regarding access charges limited the application of access charges to telecommunications traffic. 47 C.F.R. Section 69.2 defined “access service” as “services and facilities provided for the origination or termination of any interstate or foreign *telecommunication*.” In addition, 47 C.F.R. Section 69.5(b) provided that a filing carrier’s charges shall be assessed “upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign *telecommunications* services.” “Telecommunications” is defined as “the transmission between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁷⁶ Because IP originated or IP terminated traffic clearly involves a “change in form,” it simply cannot be telecommunications.⁷⁷ Even as late as November of 2011, the FCC acknowledged that it has never classified VoIP traffic as “telecommunications.”⁷⁸

Second, as an information service or an enhanced service, VoIP service is subject to the FCC-established exemption to access charges, the Enhanced Service Provider (“ESP”) exemption. The ESP exemption allows enhanced service providers to avoid the application of traditional switched access charges imposed by LECs on

⁷⁶ 47 U.S.C. § 153(50).

⁷⁷ *PAETEC* at p. 6; 47 C.F.R. Section 64.702(a).

⁷⁸ *ICC Reform Order*, para. 954.

interexchange carriers (“IXCs”) for the origination and termination of interstate telecommunications. The Commission exempted this traffic from access charges because it recognized that certain “users who employ exchange service for jurisdictionally interstate communications...would experience severe rate impacts were we immediately to assess carrier access charges upon them.”⁷⁹ Moreover, exempting information services from access charges enabled the rapid development of the Internet and other services and advanced the goals of the Act, “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal and State Regulation.”⁸⁰

Third, because no pre-1996 intercarrier compensation obligation applied to VoIP originated traffic, such charges were not preserved by Section 251(g)’s carve-out for the legacy access charge regime. In 1996, Congress adopted Section 251(g), which mandated that federal and state access charges could apply only to traffic subject to the then-existing access charge regime. 47 U.S.C. Section 251(g) provides: On and after February 8, 2006, each local exchange carrier shall provide access services as it did on that date, unless superseded by Commission rule or order. Except as specifically

⁷⁹ *MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Memorandum Opinion and Order, 97 FCC Rcd.682, 715, para. 83 (1983). (First Reconsideration of 1983 Access Charge Reform Order); Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers, CC Docket 87-215, Order, 3 FCC Rcd 2631, para. 2, n. 8 (1988) (“ESP Exemption Order”).*

⁸⁰ *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges, First Report and Order, 12 FCC Rcd. 15982 at paras. 341-348 (1997); see also, In the Matter of Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor Telecommunications Service, 199 FCC Rcd 3307 (2004).*

provided in Section 251(g), Section 251(b)(5) reciprocal compensation applies to all telecommunications. As the D.C. Circuit stated in *WorldCom v. FCC*:

On its face, Section 251(g) appears to provide simply for the “continued enforcement” of certain pre-Act regulatory “interconnection restrictions and obligations,” including the ones contained in the consent decree that broke up the Bell System, until they are explicitly superseded by Commission action implementing the Act.⁸¹

At no time did the FCC identify a pre-1996 per minute access charge compensation obligation imposed on net protocol exchange traffic exchanged between a LEC and an IXC.⁸² In the absence of a per-minute access charge compensation obligation, there is no compensation obligation to be “preserved” by Section 251(g), and access charges cannot apply. Compensation, if any, would be governed by Section 251(b)(5).⁸³

Courts that have examined this issue have determined as a matter of law that interstate and intrastate access charges do not and cannot apply to VoIP traffic. In *Southwestern Bell Telephone*, the federal district court in Missouri rejected the argument that VoIP originated traffic is subject to access charges because – based on existing law, “federal access charges are inapplicable to IP-PSTN traffic because such traffic is an ‘information service’ or an ‘enhanced service’ to which access charges do not apply.” The court found:

⁸¹ *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002).

⁸² See *ICC Reform Order*, para. 956, n. 1952.

⁸³ In at least some cases, parties have reached negotiated resolutions regarding intercarrier compensation for VoIP traffic. For example, Verizon reached agreements to exchange VoIP traffic at \$0.0007 per mou. *ICC Reform Order*, para. 938, n. 1886.

Because IP-PSTN is a new service developed after the Act, there is no pre-Act compensation regime which could have governed it, and therefore Section 251(g) is inapplicable.⁸⁴

D. Post *ICC Reform Order*, in the Absence of an Agreement, a New Regime of Interstate Call Termination Charges Apply to toll VoIP-PSTN Traffic.

The FCC's *ICC Reform Order* fundamentally reformed the intercarrier compensation regime. Establishing a "prospective intercarrier compensation framework for VoIP-PSTN traffic" is one of the more significant reforms contained in the Order.⁸⁵ The FCC defined VoIP-PSTN traffic as "traffic exchanged over PSTN facilities that originates and/or terminates in IP format."⁸⁶ The FCC determined that ultimately all VoIP-PSTN traffic "will be subject to a bill and keep framework" and established a transition to that end point: (1) all VoIP-PSTN traffic is brought within the section 251(b) framework; (2) default intercarrier compensation rates for toll VoIP-PSTN traffic are equal to interstate access rates, (3) default intercarrier compensation rates for non-toll VoIP-PSTN traffic are the otherwise applicable reciprocal compensation rates; and (4) carriers may tariff these default charges for toll VoIP-PSTN traffic in the absence of an agreement for different intercarrier compensation.⁸⁷ The VoIP intercarrier compensation provisions of the Order only apply to VoIP-PSTN traffic exchanged between the parties after December 29, 2011.

The exchange of VoIP to VoIP traffic is not impacted by the *ICC Reform Order's* imposition of intercarrier compensation on toll VoIP-PSTN traffic. The FCC limited the

⁸⁴ *Southwestern Bell* at p. 1079; See also, *PAETEC* at p. 9.

⁸⁵ *ICC Reform Order*, para. 933.

⁸⁶ *ICC Reform Order*, para. 940.

⁸⁷ *Id.*, paras. 933 and 958.

scope of its Order to VoIP-PSTN traffic exchanged by the parties in TDM and not in IP format and did not otherwise modify application of the ESP Exemption to information services traffic.⁸⁸

To implement this change in law, the FCC expressed its preference for parties to negotiate agreements but also has allowed LECs to modify their intrastate and interstate tariffs to include language to establish the default rates.⁸⁹ Cox modified its intrastate tariff on December 22, 2011 (with an effective date of December 29, 2011) to implement the change in law.⁹⁰ Cox added language to the tariff that for the first time subjected “VoIP-PSTN traffic” to the tariff.

E. California Law Does Not Require Access Charges to Apply to VoIP.

Cox argued during its opening statement at the hearing in this matter that California law requires this Commission to hold that Vaya is obligated to pay switched access charges on VoIP traffic. Cox is wrong.

The two cases cited by Cox are *Pacific Bell v. Global Naps* and *Cox v. Global Naps*. As the 9th Circuit made clear in the *Pacific Bell v. Pac West* case, “interconnection agreements are binding on the parties.”⁹¹ Thus, notwithstanding the authority discussed above that VoIP traffic is exempt from access charges, the parties to an interconnection agreement are free to agree to apply access charges to such traffic. In other words, if the parties have agreed to specific intercarrier compensation

⁸⁸ *ICC Reform Order* at paras. 940, 945, n. 1905.

⁸⁹ *ICC Reform Order* at para. 961.

⁹⁰ Exhibit 61; Cox Advice Letter No. 993.

⁹¹ *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1125 (9th Cir. 2003).

applicable to VoIP traffic or to apply an NPA NXX-based jurisdictional classification to all traffic generally regardless of its status as VoIP traffic, that agreement controls.⁹²

This rationale was the basis for both of the cited *Global Naps* cases at the Commission. In *Global Naps v. Pacific Bell*, D.09-01-038, for example, the Commission stated, "...the core issue driving our determination in D.08-09-027 is the ICA between GNAPs and AT&T, and our attendant authority to interpret and enforce such contracts. We believe that ultimately, the entire matter begins and ends with that."⁹³ Likewise, in the Cox GNAPs litigation, the Commission concluded that: "The rights and obligations of the parties are governed by the terms of the Interconnection Agreement."⁹⁴ Cox's claims here, in contrast, are based exclusively on the terms of its intrastate switched access tariff. The Commission cannot find for Cox based on the cases cited by Cox since there is no interconnection agreement in place between Cox and Vaya. In the *Global Naps v. Pacific Bell* case, the Commission also found that GNAPs failed to demonstrate that its traffic was VoIP. Here, in contrast, Vaya has demonstrated that the traffic at issue either originated or terminated in IP or both originated and terminated in IP.⁹⁵

Cox has not cited any Commission decision that found under the facts of this case that tariffed intrastate access charges apply to VoIP. Since the issue has not been

⁹² *Global NAPs Cal., Inc. v. Pub. Util. Comm'n of Cal.*, 624 F. 3d 1225, 1233 (9th Cir. 2010).

⁹³ Order Denying Rehearing of Decision, D.08-09-027, *slip op.* at 3 (2009).

⁹⁴ *Cox California Telcom, LLC v. Global NAPs Cal., Inc.*, Opinion Granting Complainant's Motion for Summary Judgment, D. 07-01-004, *slip op.* at 7 (2007).

⁹⁵ See Section III.A and Section VI.

decided by the Commission, it should address the issue in accordance with the authorities cited by Vaya in previous sections of this brief.

F. Intrastate Access Charges Do Not Apply to CMRS Originated Traffic.

During the course of this litigation, while performing Vaya's CDR study, Mr. Mertz ran an analysis of the OCNs associated with the telephone numbers of the originating traffic and discovered that some traffic subject to Cox's invoices originated on telephone numbers assigned by the North American Numbering Plan Administrator ("NANPA") to CMRS carriers.⁹⁶ Alone this does not mean that the traffic should be considered to be strictly CMRS originated rather than both CMRS and IP originated traffic for purposes of intercarrier compensation. Vaya does not have contracts with CMRS carriers to terminate VoIP traffic. CMRS customers are able to access enhanced services from their wireless phones, which may result in IP originated traffic.⁹⁷

Even if this Commission were to find that the CMRS-originated traffic identified here is not also IP originated, the intraMTA CMRS traffic is not subject to Cox's intrastate switched access tariff. CMRS calls that originate and terminate in the same Major Trading Area ("MTA") are local calls subject to reciprocal compensation, not long distance calls subject to switched access charges.⁹⁸ In the *ICC Reform Order*, the FCC adopted bill and keep as the default compensation mechanism for intraMTA CMRS

⁹⁶ Exhibit 51, Attachment 9 and Exhibit 51-C, Confidential Attachment 10.

⁹⁷ Exhibit 8 and Transcript at p. 234, lines 15-28; p. 235, lines 1-17; and p. 238, lines 7-18.

⁹⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16017-18, paras. 1036-1044 (1996); See also, Exhibit 50 at pp. 9-12; 47 C.F.R. §§ 20.11 and 51.701(b)(1); see also, Exhibit 50, p.9 lines 9-20, p.10, lines 1-7, p.11, lines 1-4 and p.12, lines 1-8.

traffic as of the effective date of the Order, December 29, 2011.⁹⁹ This rule applies even if the CMRS originated call transits through a third party carrier before terminating to the calling party's carrier.¹⁰⁰

Prior to that date, intrastate access tariffs did not apply to intraMTA CMRS traffic but the CMRS providers and other LECs could enter into agreements to exchange traffic at a reasonable rate.¹⁰¹ The majority of ILECs adopted \$0.0007 per MOU or less as their reciprocal compensation rate for CMRS traffic.¹⁰² Cox and Vaya had no agreement as to the treatment of CMRS traffic for intercarrier compensation purposes.

Mr. Mertz totaled the intraMTA CMRS traffic that he identified from the Vaya CDRs for the usage period December 6, 2010 through December 6, 2011 on Confidential Attachment 13, column 3.¹⁰³

VI. TRAFFIC AND SERVICES OF THE PARTIES

The services provided by the parties are described generally in Section III A above. In short, Vaya, in conjunction with its affiliate, O1, provides VoIP termination services to other VoIP service providers, including non-facilities based retail VoIP providers like Vonage and Google. Cox, in conjunction with its parent, provides a bundle of services including retail voice communications, cable and Internet access services. Cox's voice services are provided over TDM or VoIP technologies. The traffic

⁹⁹ *ICC Reform Order*, paras. 978, 988, 994.

¹⁰⁰ *Id.* at 1007.

¹⁰¹ *T-Mobile et. al. Petition for Declaratory Ruling Regarding ILEC Wireless Termination Tariffs*, Declaratory Ruling and Order, 20 FCC Rcd. 4855, 4860, para. 9 (2005).

¹⁰² *Id.*, at para. 997 and n. 2105.

¹⁰³ Exhibit 51C, Confidential Attachment 13, Column 3.

exchanged between the parties at issue in this case consists of VoIP-PSTN traffic and VoIP-VoIP traffic, depending upon whether the traffic terminated to a customer served by Cox using its IP platform.

As described above and in the testimony of Vaya witness Mr. Mertz, Vaya restricts its VoIP termination service to traffic originated by its customers or its customers' customers at the calling party's customer premises equipment in IP format. As part of its enforcement mechanism, it requires its customers to indemnify it against any claims that the traffic originates on the PSTN.¹⁰⁴ Based on the IP certifications, 100% of the non-local traffic Vaya receives from its customers is originated in IP from the retail end user's premise.¹⁰⁵ Vaya also requires customers to set up a special IP realm to interconnect to transmit IP originated traffic only. Vaya has worked with any LEC that complained about receiving non-IP originated traffic, and in one instance removed customer traffic delivered to Vaya when VoIP certifications appeared to have been violated.¹⁰⁶

While a provider's self-certification may not be 100% reliable, self-reporting for originating and terminating traffic type is a reasonable and acceptable mechanism that the industry has used to properly classify the traffic. In the *ICC Reform Order*, the FCC acknowledged the lack of a uniform method to identify VoIP traffic and it suggested that carriers use self-certification as a reasonable method.¹⁰⁷ This is consistent with the

¹⁰⁴ Exhibit 60 and Exhibit 51 at pp. 31-32; See also generally Transcript at pp. 221-227.

¹⁰⁵ Exhibit 8.

¹⁰⁶ *Id.*; Exhibit 51 at p. 31, lines 17-23 and p. 32, lines 1-3.

¹⁰⁷ See for example, *ICC Reform Order* at para. 963, fn. 1990-1991.

methodologies used in other contexts to identify traffic jurisdiction when the billing carrier's own systems cannot identify jurisdiction on its own. For instance, private line services require the purchasing carrier to certify to the billing carrier the percentage of interstate usage to properly classify the private line services as interstate or intrastate.¹⁰⁸ In fact, Cox itself chose to use the self-certification method to implement the VoIP-PSTN intercarrier compensation transition in its intrastate switched access tariff.¹⁰⁹

On the terminating side of the traffic involved here, information produced by Cox in discovery demonstrates that as of the end of December 2011, Cox considered nearly *****BEGIN CONFIDENTIAL*** [REDACTED] ***END CONFIDENTIAL***** of its end user voice customers to be VoIP customers.¹¹⁰ Consequently, even if the Commission were to find that Vaya did not demonstrate that 100% of the traffic involved here was IP-originated, at a minimum, traffic to many of the Cox customers is terminated in IP and thus would be considered PSTN to VoIP traffic.

VII. BILLING ISSUES

A. Cox Invoices.

The Cox invoices at issue are contained in Confidential Attachment 3 to Mr. Mertz' testimony, and separately identified as Exhibit 52C. Vaya began receiving two Cox invoices in March 2011 and has received two invoices from Cox every month since.

¹⁰⁸ Exhibit 51 at p. 32.

¹⁰⁹ Exhibit 61; Advice Letter 993 section 4.6 (5)(e).

¹¹⁰ Exhibit 51C Confidential Attachment 15, p. 5 (Cox Confidential Response to Vaya Request 3-4); See also Confidential Attachment 15, pp. 7 and 11-18 (Confidential Response to Vaya Request 3-7).

One invoice is for 3 Cox end offices in the Los Angeles LATA. The second invoice is for the 3 Cox end offices in the San Diego LATA. Both of the monthly invoices are dated the fifth of the month and Vaya receives the invoices on average 9 days after the bill date or the 14th of the month. All of the two monthly invoices show MOUs by end office for the two preceding months (i.e. the May 5, 2011 invoice shows usage for March 6 – April 5 and April 6 – 16 May 5 by end office) with the exception of the two April 5, 2011 invoices. The two April 5, 2011 invoices showed MOUs by end office for four months (i.e. 12/6/10 – 1/5/11, 1/6/11 – 2/5/11, 2/6/11 – 3/5/11, 3/6/11 – 4/5/11). The two monthly invoices show aggregated Interstate InterLATA, Intrastate InterLATA, Intrastate IntraLATA and Local MOUs by end office by monthly usage period. The invoices do not identify specific call details (such as calling or called telephone number, date, time, or duration of call) for any of the MOUs totaled on the invoice; only the total MOUs in each included category are stated on the invoice.¹¹¹ Attached as Confidential Attachment 4 to Mr. Mertz' testimony are summaries of MOUs of the Cox monthly invoices by end office prepared to facilitate discussion of the invoice contents. There are six summaries– one for each Cox end office that receives traffic from Vaya through the AT&T tandem located in the same LATA as the Cox end office. Each of the six summaries show the Cox end office, the Cox billing account, the LATA (Los Angeles or San Diego) and the AT&T tandem. The summaries show “Inter MOUs,” “Intra MOUs,” “Local MOUs” and “Intrastate dollar amounts” billed from the Cox invoices by bill date and bill period. The “Inter MOUs” are the Interstate InterLATA MOUs from the Cox monthly invoices. The “Intra MOUs” are the Intrastate IntraLATA and Intrastate

¹¹¹ Exhibit 51, p. 8, lines 1-23.

InterLATA MOUs combined from the Cox monthly invoices. The “Local MOUs” are the Local MOUs from the Cox monthly invoices. The “Intrastate dollar amounts” are the Intrastate IntraLATA and Intrastate InterLATA amounts from the Cox monthly invoices combined.¹¹²

The two monthly Cox invoices together average over 60 pages each month. Twelve months of invoices exceeds 750 pages. The summary by each of the six end offices for twelve months into six pages facilitates an in depth analysis of the results of Cox’s billing practices.¹¹³

These summaries demonstrate that Cox’s billing of intrastate switched access charges (and interstate switched access charges) is inconsistent between the Los Angeles LATA and the San Diego LATA. Additionally, Cox’s billing of intrastate switched access charges (and interstate switched access charges) is inconsistent among the three end offices in the Los Angeles LATA. Furthermore, Cox’s billing of intrastate switched access charges (and interstate switched access charges) is inconsistent among the three end offices in the San Diego LATA.¹¹⁴

¹¹² Exhibit 51C, Confidential Attachment 4, Exhibit 51C, p. 9, lines 1-14.

¹¹³ Exhibit 51C, p. 10, lines 5-9.

¹¹⁴ Exhibit 51C, p. 10, lines 10-17.

LATA and End Office Intrastate Percentage

Los Angeles
ALVJCABBDS0 89.80%
RSMGCAHADS0 99.90%
RSMGCAHADS2 99.90%
San Diego
ELCJCABBDS0 2.70%
ELCJCABBDS1 30.02%
SND1CAFYDS0 10.04%

The above table shows that that the Cox billing of intrastate MOUs from March 5, 2011 through February 5, 2012 would indicate an extremely unusual traffic pattern between Vaya and each of the six Cox end offices. For some unknown and unexplained reason, the traffic transmitted in the Los Angeles LATA is almost exclusively intrastate intraLATA traffic and the traffic in the San Diego LATA is predominantly non intrastate traffic, in other words, interstate or local.¹¹⁵

The percent interstate usage (“PIU”) and percent local usage (“PLU”) columns on Attachment 4 to Mr. Mertz’ testimony are calculated based on MOUs shown in other columns. The PIU is calculated by dividing the Interstate MOUs by the Total MOUs. The PLU is calculated by dividing the Local MOUs by the sum of Intrastate MOUs and Local MOUs. The calculated PIU and PLU factors do not appear on the Cox invoices. The calculated PIU and PLU factors vary between the Cox end offices and between LATAs. The calculated PIU and PLU factors show a pattern by end office. The calculated

¹¹⁵ Exhibit 51, p. 13, lines 1-8.

factors change during the twelve months of analysis and the changes continue in subsequent months.¹¹⁶

Because Cox claims to have used the Settlement Code on the AT&T EMI records to jurisdictionalize the traffic between interstate, intrastate and local to create its invoices, the pattern of calculated PIUs and PLUs could be the result of AT&T applying factors to calculate the Settlement Code on the EMI records provided to Cox instead of using calling and called numbers. However, neither Mr. Mertz nor Cox's billing witness, Mr. Allen, testified that they were able to discern any verifiable method to AT&T's use of a particular Settlement Code to jurisdictionalize the traffic identified in the EMI records.¹¹⁷ As described below and demonstrated by the Vaya CDRs, the Settlement Codes certainly are not derived from the called and calling party numbers or from any information that Vaya provided to Cox or to AT&T to jurisdictionalize the traffic.

B. Vaya's Claims Concerning Cox Invoices.

1. The Cox Invoices Improperly Characterize Interstate, intraMTA CMRS and Local Vaya Traffic as Intrastate Vaya Traffic.

As demonstrated in previous sections of this brief, the traffic contained in the invoices subject to the dispute in this case is either IP originated or IP terminated or both IP originated and IP terminated. Consequently the calling and called party telephone numbers do not determine the jurisdictional classification of the calls involved here and the intrastate tariff does not apply. Even if this Commission were to determine, however, that some of the traffic is not VoIP traffic, Vaya is not obligated to

¹¹⁶ Exhibit 51, p. 13, lines 9-17 and p. 14, lines 1-3.

¹¹⁷ Exhibit 51, p. 15, lines 4-11; Transcript at p. 135, lines 25-28 and p. 136, lines 1-19.

pay Cox the amounts contained in its invoices because the invoices improperly characterize interstate, intraMTA wireless and local traffic as intrastate switched access traffic.

Vaya's switch creates a record for every call that Vaya sends to AT&T's tandem in the Los Angeles and San Diego LATA. The Vaya switch records show the calling party number, called party number, the beginning time of the call, the ending time of the call and other information associated with each call. The switch records are pulled every two hours and a call detail record ("CDR") is created with information from the switch record and information pulled from other databases. For instance, the calling number and called number on the switch record are compared against a Local Routing Number ("LRN") database to determine the LRNs and the LRN is used to determine the Operating Company Number ("OCN") in the LERG which is recorded on the CDR. Additionally, the rate center associated with the calling number and called number is recorded on the CDR.¹¹⁸

Vaya's CDRs contain more information about the calls processed by Vaya than the AT&T EMI records. For example, the EMIs provided by AT&T to Cox do not include the calling number for *any* of the Vaya MOUs terminated by Cox in the Los Angeles LATA. The AT&T EMI records provided by AT&T to Cox first began including the calling number for the San Diego LATA in June 2011 and then did not include a valid 10 digit number for all EMI records.¹¹⁹

¹¹⁸ Exhibit 51, p. 20, lines 1-15.

¹¹⁹ Exhibit 51, p. 20, lines 16-22.

Vaya's witness, Mr. Mertz, conducted a traffic study comparing Vaya's CDRs to the Cox invoices subject to this case.¹²⁰ The Vaya CDRs for each usage month (the 6th of the month through the 5th of the following month) and end office were analyzed to determine the number of MOUs by the type of call based on calling and called party telephone numbers and whether the calling party's number was assigned to a CMRS provider. The results show the number of MOUs separated for each of the six Cox end offices monthly by the following ten categories:

1. Wireless Interstate MOUs – This category includes both interstate intraMTA MOUs and interstate interMTA MOUs
2. Wireless intrastate intraMTA MOUs
3. Wireless intrastate interMTA MOUs
4. Interstate MOUs
5. Local MOUs per the Local Calling Area Database
6. Local MOUs when the calling and called rate centers are less than 17 miles apart
7. Intrastate intraLATA MOUs that are not classified as Local
8. Intrastate interLATA MOUs
9. The calling number is an 8YY number
10. All remaining MOUs – which includes: UNAVAILABLE, ANONYMOUS, RESTRICTED and where the calling number is populated with more or less than 10 digits (standard length of a calling number) and the calling number is all zeros¹²¹

The results of the Vaya CDR study are attached to Mr. Mertz' testimony as Confidential Attachment 10.

¹²⁰ A detailed description of the traffic study is included as Attachment 9 to Exhibit 51.

¹²¹ Exhibit 51C, p. 23, lines 22-23, p. 34, lines 1-21 and Confidential Attachment 10

The information on Confidential Attachment 4 is from the Cox invoices by bill date and shows MOUs by usage period.¹²² Mr. Mertz sorted the information on Confidential Attachment 4 by usage period in order to compile the MOUs by usage period (i.e. the 6th of the month through the 5th of the following month). The results are Confidential Attachment 11.¹²³

Mr. Mertz compared the MOUs from the Vaya CDRs for traffic invoiced by Cox with the MOUs on the Cox invoices by usage period by end office. The results are in Confidential Attachment 12.¹²⁴ As the final column of the spreadsheet shows, the total MOUs on Vaya's CDRs were within 0.08% of the Total MOUs on Cox invoices by usage month and end office with the exception of December 6, 2010 through January 5, 2011 usage month.¹²⁵ This indicates that other than the December-January billing month, the total pool of minutes shown in the Cox invoices and the total pool of minutes in the Vaya CDRs is relatively equal. As Mr. Mertz' Testimony and its Attachments demonstrate, however, those same minutes are jurisdictionally characterized very differently in Cox's invoices than they are in Vaya's CDRs.

The first problem with the Cox invoices is demonstrated in the December 2010-January 2011 usage period. As discussed above in the section addressing the History of Billing, the two April 5, 2011 Cox invoices showed 99,736,041 total MOUs for the period of December 6, 2010 through January 5, 2011 whereas the Vaya CDRs showed

¹²² Exhibit 51C, p. 24, lines 23-23, p. 25, lines 1-5.

¹²³ Exhibit 51C, p. 25, lines 4-5.

¹²⁴ Exhibit 51C, p. 25, lines 6-11.

¹²⁵ A non-confidential version of Attachment 12 is attached to the public version of Exhibit 51, which includes the percentages set forth in the last column.

BEGIN CONFIDENTIAL [REDACTED] ***END CONFIDENTIAL*** total MOUs or 22% of the MOUs for the same time period. The next highest usage period on the Cox invoices showed ***BEGIN CONFIDENTIAL*** [REDACTED] ***END CONFIDENTIAL*** MOUs (December 6, 2011 through January 5, 2012). The December 6, 2010 through January 5, 2011 MOUs on the Cox invoice were 358% greater than the next highest month. In fact, Cox billed Vaya ***BEGIN CONFIDENTIAL*** [REDACTED] ***END CONFIDENTIAL*** intrastate MOUs for the December 6, 2010 through January 5, 2011 usage period, twice the *total* usage for all calls of any other month and 2.5 times the MOUs shown from Vaya's CDRs.¹²⁶ Thus, with regard to that month, on their face and simply compared to the other Cox invoices, both the total number of MOUs and the intrastate MOUs are extremely overstated.

The second problem with the Cox invoices is that they mischaracterize the jurisdiction of the calls. The invoices from Cox from March 5, 2011 through February 5, 2012 billed Vaya 92 MOUs as intrastate interLATA and 180,575,072 MOUs as intrastate intraLATA (The total Intrastate MOUs from Attachment 12 minus 92). In other words, the bills characterize over 99.9% of the intrastate MOUs as if the calls originated and terminated within the Los Angeles LATA. The same is true for the San Diego LATA. Intrastate intraLATA means that a call originates and terminates in the same LATA. Intrastate interLATA means that a call originates and terminates in different LATAs but within the state of California.¹²⁷ Based on Cox's invoices, nearly all of the intrastate calls from Vaya's customers to Cox's customers for over a year's time would have to

¹²⁶ Exhibit 51C, p. 25, lines 12-23 and p. 26, lines 1-7.

¹²⁷ The California LATA Map is in Exhibit 51 at p. 5.

have both originated and terminated within the Los Angeles LATA or within the San Diego LATA.¹²⁸

In contrast, using calling and called party telephone numbers, the Vaya CDR study shows there were *****BEGIN CONFIDENTIAL***** **CONFIDENTIAL***** intrastate interLATA MOUs and *****BEGIN CONFIDENTIAL***** **CONFIDENTIAL***** intrastate intraLATA MOUs.¹²⁹ This means that Cox mischaracterized 160,359,033 (180,575,072-20,216,039) of intrastate intraLATA MOUs.¹³⁰ A mischaracterization of that magnitude alone demonstrates the inaccuracy of Cox's billing methodology. The Cox email discussed in Q & A 31 in Mr. Mertz' testimony shows that Cox was aware of the distinction between interLATA and intraLATA billing as early as July 7, 2011, when Vaya was trying to understand the inconsistency between its records and Cox's invoices. The Cox email stated "payment for intraLATA calls." not payment for interLATA calls.¹³¹

Cox also billed interstate MOUs, intraMTA CMRS-originated MOUs and local MOUs as intrastate intraLATA MOUs. The comparison of MOUs from the Vaya traffic study to the MOUs from the Cox invoices shows that Cox billed interstate (Wireless & Other) MOUs, CMRS-originated IntraMTA MOUs and Local MOUs as subject to intrastate switched access charges every month from its first invoices in March 2011

¹²⁸ Exhibit 51C, p. 26, lines 18-23 and p. 27, lines 1-7.

¹²⁹ Exhibit 51C, Confidential Attachment 12, page 2, Grand Total row, Intrastate interLATA and intrastate intraLATA columns.

¹³⁰ Exhibit 51C, p. 27, lines 3-19.

¹³¹ Exhibit 51 at p.23.

through the February 2012 invoice.¹³² Confidential Attachment 13 to Mr. Mertz' testimony is an excerpt from Confidential Attachment 12 showing the minimum number of MOUs wrongly billed as intrastate intraLATA MOUs for the Cox end offices in the Los Angeles LATA. In the Public Version of Mr. Mertz' Testimony, Attachment 13 shows that Cox billed interstate, intraMTA and local MOUs as intrastate intraLATA MOUs at all three end offices in the Los Angeles LATA by a minimum of a *million* MOUs for every usage period for 12 months except one.¹³³

Cox vainly argues that the analysis prepared by Mr. Mertz should be relied upon to establish that approximately*****BEGIN CONFIDENTIAL*****  *****END** **CONFIDENTIAL***** of the quantities of intraLATA toll traffic Cox invoiced falls into that category.¹³⁴ However, this position ignores the explicit disclaimers by Mr. Mertz that his analysis has not located all errors in Cox's invoices,¹³⁵ ignores other arguments concerning the nature of this traffic, such as whether it consists of information service traffic, and ignores whether Cox provides an information service when it terminates some of this traffic to its customers, such as those served by VoIP technology, including

¹³² Exhibit 51C, p. 28, lines 1-8 and Confidential Attachment 12.

¹³³ Exhibit 51 at p. 28 and Attachment 13, column "interstate & local MOUs billed as intrastate". The minimum MOUs shown in Attachment 13 does not include all MOUs that were erroneously billed as intrastate intraLATA MOUs. For purposes of the study, Mr. Mertz did not jurisdictionalize MOUs where the calling party number on the Vaya CDRs was an 8YY number or unknown and did not count those as erroneously billed. Therefore, the minimum number listed as incorrectly billed is understated. Exhibit 51, p. 28, lines 16-22.

¹³⁴ Exhibit 4C, p. 2, lines 20-24, p. 3, lines 1-5.

¹³⁵ Exhibit 51, p. 31, lines 1-8 and p. 37, lines 5-9.

those utilizing SIP trunks.¹³⁶ In any event, even if these explicit disclaimers and additional legal flaws are ignored, which they should not be, Cox cannot rely on a Vaya study demonstrating several, but not by any means all, of the material flaws in the Cox invoices to satisfy Cox's own burden of proof.¹³⁷

2. The Reason the Cox Invoices Mischaracterize Vaya Traffic is That Cox Developed its Invoices from AT&T's EMI Records without Any Additional Verification or Validation.

Cox asserts that it relied on Category 50 or EMI records provided by AT&T to create its invoices.¹³⁸ The AT&T EMI records are records that are produced by AT&T and provided by AT&T to service providers like Cox that are terminating calls to their customers that flow through an AT&T intermediate tandem switch. The EMI records are not produced by AT&T simultaneously with calls included in the records. Instead, the call records recorded by the AT&T tandem switch, referred to as Automatic Message Accounting ("AMA") records, are collected by AT&T at some point in time not quantified by Cox, and subjected to numerous adjustments by AT&T, including being processed by differing software programs, and application of AT&T "business rules" before the resulting EMI records are created and eventually sent to the terminating service provider such as Cox. They are sent to the terminating carrier at various times after the call occurred.¹³⁹

¹³⁶ Exhibit 1C, Attachments JPG 2 and 3; Exhibit 57 and Transcript p. 62, lines 17-23.

¹³⁷ As demonstrated above, neither Cox nor Vaya included the AT&T EMI records Cox asserts validate its invoices in the record.

¹³⁸ Exhibit 3, p. 6, lines 12-17.

¹³⁹ Exhibit 51 at pp. 14-15.

Changes are made to the AT&T switch AMA records to create EMIs. These include algorithms that are used by AT&T to populate an EMI record “Settlement Code” field for each call with a 6 (Local), 8 (Intrastate), J (Interstate) or Z (Unknown). Neither Mr. Allen nor Mr. Mertz testified that they were aware of how AT&T makes that categorization, or whether, for example, AT&T applies considerations unique to its own record requirements for settlements with various types of carriers utilizing the tandem switch. Nor did either witness testify that he was aware of whether AT&T even provides a record of various changes it makes to its AMA records to create EMIs.¹⁴⁰

In states other than California AT&T EMI records generally contain the calling and called telephone numbers, the time and duration of the call, a jurisdictional indicator parameter (“JIP”) field, and a Settlement Code field.¹⁴¹ However, the AT&T California EMI records provided to Vaya by Cox did not contain calling party number information until June of 2011, and then only for some AT&T tandem switches.¹⁴²

Consequently, the AT&T EMI records relied on by Cox did not contain the calling number for calls in the Los Angeles LATA from December 5, 2010 through February 5, 2012. A calling number began to be populated on some calls in the San Diego LATA beginning with calls made in June 2011. Populating the EMI records with the calling party number in the San Diego LATA significantly reduced the number of intrastate MOUs that Cox billed Vaya.¹⁴³

¹⁴⁰ See, e.g., Exhibit 51 at p. 15, lines 7-19; Transcript p. 135, lines 25-28; p. 136, lines 1-19.

¹⁴¹ Exhibit 51, Attachment 5, and p. 15, lines 20-23.

¹⁴² Exhibit 51 at p. 16, lines 1-9.

¹⁴³ Exhibit 51 at p. 16, lines 4-15 and Exhibit 51C at p.17.

This is shown on the following chart, which Vaya witness Mertz based on Cox witness Allen's Confidential Attachment RLA-2 to his Opening Testimony. Mr. Mertz created Confidential Attachment 6 to Exhibit 51C, color-coding Mr. Allen's Confidential Attachment RLA-2 to indicate the significant reduction of the Cox invoices for intrastate switched access charges after the EMI records were populated with a calling number in the San Diego LATA. A summary of this Attachment 6 is at page 17 of Exhibit 51C and below:

BEGIN CONFIDENTIAL

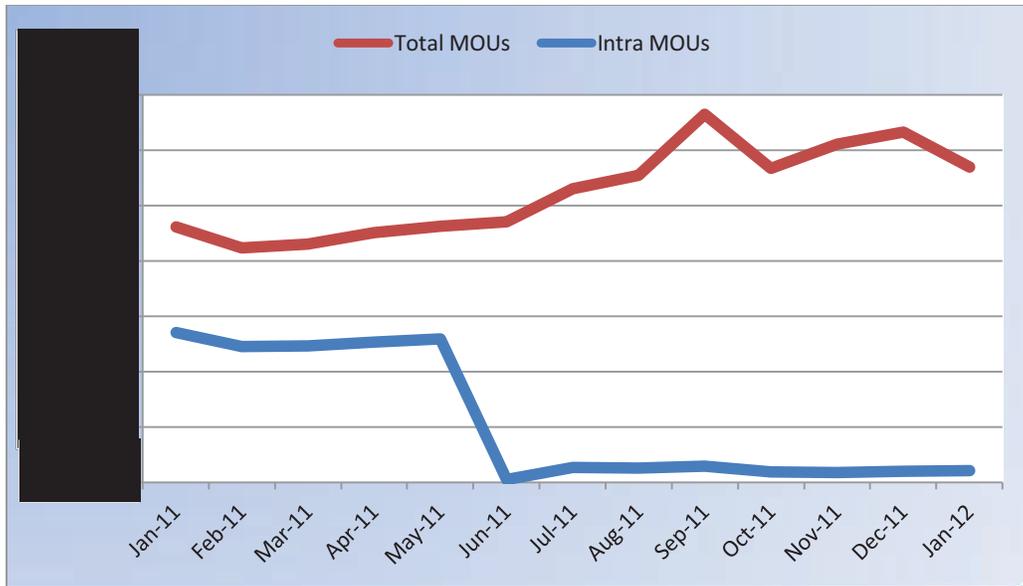
Bill Date	Intrastate	Interstate
LOS ANGELES LATA		
March-11		
April-11		
May-11		
June-11		
July-11		
August-11		
September-11		
October-11		
November-11		
December-11		
January-12		
February-12		
March-12		
LATA Total		
SAN DIEGO LATA		
March-11		
April-11		
May-11		
June-11		
July-11		
August-11		
September-11		
October-11		
November-11		
December-11		
January-12		
February-12		
March-12		
LATA Total		
Grand Total		

END CONFIDENTIAL

Cox should have known about overstatement of intrastate MOUs at least in July or August 2011 because, as the above table demonstrates, the number of intrastate intraLATA MOUs and the corresponding billed charges decreased dramatically after AT&T's EMI records included the calling party number. Page 19 of Mr. Mertz' Reply Testimony contains another chart which proves this point. It shows the Total MOUs and intrastate MOUs at the El Cajon Cox end office in the San Diego LATA. The chart

clearly shows a large decrease in intrastate MOUs beginning in June 2011 – the same time the AT&T EMI records began containing calling number. The chart also shows that the total MOUs at the El Cajon 1 Cox end office were increasing as the intrastate MOUs were decreasing.

BEGIN CONFIDENTIAL



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Cox's reliance on the AT&T EMI records that did not contain calling number information led to Cox invoices containing vastly overstated quantities of intrastate intraLATA MOUs in its invoices. Because intrastate access rates are the highest of Cox's intercarrier compensation rates, this resulted in significant overbilling of Vaya. This is true based on the simple inaccuracy of the data used to invoice, and is not dependent on any other legal arguments about whether any Vaya traffic would be subject to the Cox tariff at all, such as because some of it is VoIP or CMRS traffic.¹⁴⁴

¹⁴⁴ Exhibit 51C at p.17, lines 1-6; p. 18, lines 1-15.

Cox admits in pleadings in another case filed at the Commission that EMI records should not be used to determine whether a call should be rated as local or intrastate for purposes of intercarrier billing and that, instead calling party and called party numbers (“NPA-NXXs”) should be used to rate traffic:

...Cox admits that Category 11 records and Category 50 records may be utilized for identifying the carrier originating transit traffic but denies that such records are currently the industry standard for *rating* such traffic as a local call or an intrastate toll call. Cox denies that traffic O1 terminates should be *rated* as a local call or an intrastate toll call based on the Operating Company Number (OCN) included in Category 11 and/or Category 50 records because the Commission rules, other applicable law and industry standards require traffic to be rated based on the NPA-NXX of the calling and called parties. Cox denies that “OCN” is an acronym for “Official Company Number” and further states that an Operating Company Number or OCN, which is assigned by National Exchange Carrier Association (NECA) is used to uniquely identify a telecommunications service provider per industry standard ATIS-0300251 and is not used for rating traffic....¹⁴⁵ (emphasis in original)

Cox could have used its own switch records and the Signaling System 7 (“SS7”) messages to create accurate billing records or audit its billing processes. SS7 messages are sent among and between switches and telecommunications equipment about calls. The SS7 messages are used to set up and terminate a call. The SS7 messages are also used to send calling number for services like caller id, call forwarding, call waiting, call screening, call transfer, and others.¹⁴⁶

¹⁴⁵ Answer of Cox California Telcom, LLC DBA Cox Communications to Complaint of O1 Communications, Inc., Docket No. C. 09-09-010 (Oct. 26, 2009) at para. 21. Category 11 and Category 50 records are referred to in this Brief as EMI records.

¹⁴⁶ Exhibit 51 at p. 21, lines 18-23 and p. 22, lines 1-3.

In order to provide the call routing information AT&T needs to deliver Vaya traffic to Cox, Vaya provides the available SS7 call routing information to AT&T, and AT&T passes this information along to Cox when delivering the Vaya traffic to Cox. The SS7 messages received by Cox include calling and called party numbers, if available. The called number is needed to set up the call. The calling number is sent by Vaya to AT&T for delivery to Cox if available. As shown in Attachment 8 to Mr. Mertz' testimony, Vaya sent AT&T for termination to Cox both the calling party numbers and the called party numbers for 85.2% of the Vaya traffic in dispute here.¹⁴⁷

Cox's switching equipment generates AMA call detail records from the SS7 information that include some of the same data contained in the EMI records that Cox receives from AT&T including data fields for call date, call time and terminating number.¹⁴⁸ Cox has not disclosed these records to Vaya nor has it produced them in the evidentiary record. Nor did Cox rely on them to create its invoices. If these records are supplemented with available information, as is done by Vaya, and otherwise are comparable to those maintained by Vaya, Cox could have used these AMA records to validate the invoices it created based on the AT&T EMI records which lacked the calling telephone number information in the majority of instances. In any event, even if this is not possible for some reason, Cox could have conducted the same analysis of the significant effect on the bills after AT&T populated the EMI records with calling number

¹⁴⁷ Exhibit 51 at p. 22, lines 4-20.

¹⁴⁸ Exhibit 51 at p. 29, lines 16-18, p. 30, lines 1-6; see also Transcript at p. 140, lines 17-24.

in the San Diego LATA that Mr. Mertz performed on Robert Allen's' Confidential Attachment RLA-2.

In its Answer in the O1 case, Cox admits that it should have used the information in its switch to create its switched access bills here by denying that O1 could do what it does here, pointing out that carriers should not rely on EMI records alone to create invoices for intercarrier compensation because they do not contain the calling party number and without the calling party number, it is "impossible" for the billing carrier to accurately determine the jurisdiction of a call:

...Cox denies that records O1 receives from the ILECs are the sole records necessary for invoicing Cox or any other carrier because such records do not capture the calling party number (CPN). Without the CPN, it is impossible for O1 to properly and accurately determine if a call should be rated as a local call or intrastate toll call. CPN is captured in local switch records made at either or both the originating and terminating carrier switches.¹⁴⁹

In sum, this critical flaw in the EMI records was known to Cox in 2009 was also readily apparent upon review of the AT&T EMI records. Vaya's CDRs are the most accurate and complete records of these calls. The Vaya CDRs show that Cox improperly billed Vaya intrastate switched access charges for interstate, intraMTA CMRS and local calls identified by the calling party and called party numbers on the Vaya CDRs.¹⁵⁰

¹⁴⁹ Answer of Cox California Telcom, LLC DBA Cox Communications to Complaint of O1 Communications, Inc., CPUC Docket No. C. 09-09-010 (Oct. 26, 2009) at para. 22.

¹⁵⁰ In addition, the FCC's 2001 *ISP Remand Order* determined that traffic defined in that Order as "ISP-bound traffic," despite appearing to be intrastate based on called and calling party numbers, is jurisdictionally interstate, and subject to a maximum call termination charge of \$0.0007 per MOU, which would require further corrections to Cox's invoices not quantified by Vaya's study. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier*

Cox could have taken reasonable steps to avoid this problem. Cox's reliance on the Settlement Field of the AT&T EMI records resulted in an inaccurate determination of the portion of the Vaya traffic categorized as intrastate intraLATA MOUs, particularly when compared to the more accurate alternative data that Cox actually had available as well as the data it could have had available with reasonable effort beyond simply using the EMI Record Settlement Field without verification.

C. Vaya's CDRs and Corresponding Analysis

See Section VII.B above re Vaya's Claims Concerning Cox Invoices.

VIII. TARIFF ISSUES

A. Cox Tariff.

Cox's California intrastate switched access tariff is the document that Cox claims governs the parties' rights and obligations in this matter. For all of the reasons stated herein, Vaya disagrees. Not only is the traffic not the type of traffic that is covered by the tariff but the tariff also does not apply to the traffic here because Vaya does not qualify as a "Customer" of Cox's "Switched Access Service" under the express terms of the tariff.

On December 22, 2011 Cox filed Advice Letter No. 933 implementing the change of law contained in the FCC *ICC Reform Order* that on a transitional basis, which imposed a new call termination charge regime on toll VoIP-PSTN Traffic.¹⁵¹ Prior to this

Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISPRO*").

¹⁵¹ Exhibit 61; Cox California Advice Letter 993, filed December 22, 2011 (Effective December 29, 2011)

filing, Cox's tariff did not include language relating to VoIP-PSTN Traffic. Even subsequent to this filing, however, Cox's intrastate switched access tariff does not apply to the traffic involved here. First, Cox did not modify the definition of "Customer" or the other provisions of the tariff that require Cox or Vaya to take particular action before the obligations of the tariff would apply to traffic transmitted by Vaya to Cox. Second, Cox has offered no evidence to demonstrate that its VoIP-PSTN tariff changes comply with the *ICC Reform Order* or that it billed Vaya subsequent to the effective date of the *Order* consistent with the requirements of the *Order* or its tariff.

B. Vaya's Claims Concerning the Inapplicability of the Cox Tariff.

1. Vaya Is Not a Customer as Defined by the Tariff

As stated above, Cox's tariff defines "Customer" as: "The person, firm or corporation which orders service and is responsible for the payment of charges and compliance with the terms and conditions of this tariff."¹⁵² The tariff defines "Service Order" as "The written request for Cox services executed by the Customer and the Company in the format devised by the Company. The signing of a Service Order Form by the Customer and acceptance by the Company initiates the respective obligations of the parties as set forth therein and pursuant to this tariff."¹⁵³ Mr. Mertz testified that Vaya never ordered service from Cox under its tariff. Vaya never signed or submitted a written Service Order Form.¹⁵⁴ The tariff does not provide for any other method for a customer to become a Customer of Cox's intrastate switched access service. Many

¹⁵² Exhibit 61, First Revised Cal. P.U.C. Sheet No. 62-T.

¹⁵³ Exhibit 61, First Revised Cal. P.U.C. Sheet No. 64-T.

¹⁵⁴ Exhibit 51, p.33, lines 17-23, p.34, lines 1-9.

switched access tariffs, including Cox's interstate tariff, include some form of "constructive ordering" language which provides that an interexchange carrier becomes a "customer" of the switched access service by simply using the service without the need to submit a service order.¹⁵⁵ Cox could have included constructive ordering language in its intrastate switched access tariff. It chose not to. Because Vaya has not signed or submitted a Service Order, any Customer obligations contained in the tariff do not apply to Vaya.

Additional provisions in Cox's tariff require actions by Cox or the "Customer" to initiate customer obligations under the tariff. For example, the tariff states, "Customers desiring to obtain Dedicated and Switched Access Service to must complete the Company's standard service order form."¹⁵⁶ Rule 9 regarding payment band billing and collection provides, "At such time as the Company completes installation or connection of the necessary facilities and or equipment to provide Cox Service, the Company shall conduct appropriate tests thereon. Upon successful completion of such test the Company shall notify Customer that such services are available for use, and the date of such notice shall be called the "Service Date" and shall be the starting date for billing."¹⁵⁷ Cox has not notified Vaya that services are available for use by creating a

¹⁵⁵ See Cox Communications, Inc. Interstate Switched Access Tariff, FCC Tariff No. 4, Original Page 8, Effective February 4, 1998; see also Comcast Phone of California, LLC, Schedule Cal. P.U.C. No. 2, Original Cal. P.U.C. Sheet No. 21.1-T filed December 21, 2011, Effective December 29, 2011 ("Orders for Switched Access are deemed made by the Customer, and initiation of the respective obligations of the parties as set forth in this Tariff takes place, upon the routing of calls by the Customer to and from the Company.")

¹⁵⁶ Rule 3 Application for Service, Exhibit 61 First Revised Cal. P.U.C. Sheet No. 66-T.

¹⁵⁷ Exhibit 61 First Revised Cal. P.U.C. Sheet No. 70-T.

“Service Date” for the start of billing.¹⁵⁸ Section 4.6.2 regarding Local Transport on Sheet No. 52-T states “The Company will determine whether the Switched Access Service is to be routed directly to an end office switch or through an access tandem switch provided by another local exchange company. The method of routing will be determined based on the Customer’s requested busy hour minutes of capacity basis or on a per trunk basis.” Cox has not requested from Vaya, and Vaya has not provided, a busy hour minutes of capacity basis or per trunk basis forecast.¹⁵⁹ None of these provisions were changed by Cox in December 2011 when it modified the tariff to implement the *ICC Reform Order’s* VoIP-PSTN traffic change of law.

Furthermore, to the extent that Vaya is acting as a provider of information services to its customers, it is not an interexchange carrier providing long distance telecommunications services and had no reason to order or use Cox access services

Because Vaya does not fall within the definition of “Customer” to which Cox’s intrastate switched access tariff obligations apply and Cox and Vaya have not performed other prerequisites to trigger a “Customer’s” obligations under the tariff, Vaya is not obligated to compensate Cox as alleged in Cox’s Complaint in this matter, even for VoIP-PSTN Traffic sent by Vaya to Cox after December 29, 2011.

¹⁵⁸ Exhibit 51, p.34, lines 19-20.

¹⁵⁹ Exhibit 50, p.35, lines 2-4.

2. Cox's Intrastate Switched Access Tariff Does Not Apply to the VoIP Traffic Contained in the Invoices Subject to this Dispute.

a. Pre-ICC Reform Order

As demonstrated above, in Sections IV and V, VoIP to PSTN, PSTN to VoIP and VoIP to VoIP traffic like that involved in this case is information services traffic that is not subject to state intrastate access tariffs. VoIP is an interstate service under the FCC's *Vonage Order*, not subject to intrastate tariffing jurisdiction. Additionally, until December 29, 2011, VoIP traffic was exempt from access charges because it is not defined as telecommunications traffic; rather it is an enhanced service or an information service. In its provision of VoIP services, Vaya provides its customers with an information service since it offers the capability to perform a net protocol conversion from IP to TDM. In addition, Vaya utilizes a database that associates IP addresses with 10-digit telephone numbers in order enable its VoIP customers or their customer's customers to communicate with a caller served by TDM technology. Finally, in conjunction with its VoIP service provider customers, Vaya provides the capability to VoIP end users to allow the end users "to generate, acquire, store, transform, process, retrieve, utilize or make available information." As discussed above, FCC precedent and courts that have examined the issue have determined that intrastate switched access tariffs such as Cox's tariff involved here do not apply to VoIP services.

b. Post ICC Reform Order

After the effective date of the *ICC Reform Order*, intrastate toll VoIP-PSTN Traffic is still not defined as a telecommunications service, but it is subject to a new federal

regime of call termination charges because the FCC decided that VoIP-PSTN Traffic is subject to Section 251(b)(5).

The Cox tariff amendment filed to implement the ICC Reform Order defines “VoIP PSTN Traffic” subject to its tariff to include:

... traffic exchanged between a Cox end user and the customer in time division multiplexing (“TDM”) format that originates and/or terminates in Internet Protocol (“IP”) format. This section governs the identification of VoIP-PSTN Traffic that is required to be compensated at rates equivalent to interstate access rates (unless the parties have agreed otherwise) by the Federal Communications Commission in its Report and Order in WC Docket No. 10-90 etc., FCC Release No. 11-161 (Nov. 18, 2011) (“FCC ICC Order”). Specifically this section establishes the method of separating such traffic (referred to in this tariff as “VoIP-PSTN Traffic”) from the customer’s traditional intrastate access traffic so that such VoIP-PSTN Traffic can be billed in accordance with the FCC Order.¹⁶⁰

The tariff amendment provides that intrastate toll VoIP-PSTN Traffic will be “billed at rates equal to Cox’s applicable tariffed interstate switched access rates as provided in Cox Communications Tariff FCC No. 4.”¹⁶¹ Nowhere in the record has Cox provided evidence that the invoices submitted to Vaya after the *ICC Reform Order* contain rates consistent with those contained in Cox’s interstate tariff. Nor has Cox provided evidence that it limited its application of the tariff to “intrastate” toll VoIP-PSTN Traffic.

Cox’s amended tariff also provides that it will develop a Percent VoIP Usage (“PVU”) Factor and sets forth the methodology to develop the factor as well as how it will apply the PVU to traffic subject to the tariff.¹⁶² Nowhere in the record has Cox

¹⁶⁰ Cox Advice Letter No. 993, Section 4.6(5)(a), Second Revised Cal. P.U.C. Sheet No. 59-T.

¹⁶¹ *Id.*, at Section 4.6(5)(b).

¹⁶² *Id.*, at Section 4.6(5)(c).

provided evidence that it applied the PVU Factor consistent with the terms of its tariff when it created the invoices submitted to Vaya after the *ICC Reform Order*.

Even if the Commission were to find that Cox implemented its tariff changes in a manner consistent with the *ICC Reform Order*, the mischaracterization of the Vaya traffic discussed in Section VII B above continued into the Cox invoices analyzed by Mr. Mertz subsequent to the effective date of the tariff amendment, as demonstrated by the continuing lack of proper assignment of jurisdiction, and Cox has not provided any evidence that it modified its billing methodology since that time. Consequently, the pool of minutes Cox contained in its invoices as intrastate switched access traffic, including that treated as intrastate toll VoIP-PSTN traffic, continues to be overstated even after Cox's implementation of the *ICC Reform Order*.

For these reasons, the Commission should not find that Vaya is obligated to compensate Cox according to its invoices for usage after December 29, 2011.

3. Cox's Intrastate Switched Access Tariff Does Not Apply to IntraMTA CMRS Traffic.

As discussed above in Section V. F. Cox's intrastate switched access tariff does not apply to intraMTA CMRS traffic identified in this case. No evidence exists to demonstrate that it was not VoIP originated and therefore to be considered and treated any different than other VoIP traffic, which is not subject to Cox's intrastate switched access tariff. Even if the Commission were to find that some of this traffic is not VoIP originated CMRS traffic, as a matter of law intraMTA CMRS traffic is subject to reciprocal compensation, not access charges. Before the *ICC Reform Order*, tariffs were not enforceable to assess intrastate switched access charges on intraMTA CMRS

traffic. In addition, as of December 29, 2011, intraMTA CMRS traffic is subject to a default bill-and-keep compensation methodology including when a CMRS originated or CMRS terminated call is transited through a third party provider, like Vaya.

Accordingly, if this Commission finds that any of the traffic identified in the Vaya study as intraMTA CMRS traffic is not VoIP traffic, it should not award Cox intrastate switched access revenue relating to such traffic since, as a matter of law, it is not subject to Cox's intrastate switched access tariff.

IX. RELIEF REQUESTED

Vaya requests that the Commission deny all relief requested in the Complaint and dismiss Cox's Complaint with prejudice.

X. CONCLUSION

For all of the reasons stated herein, Cox failed to meet its burden of proof to demonstrate that the Cox invoices accurately categorized the Vaya traffic as intrastate toll traffic or properly took account of applicable law concerning information services and other interstate services, or properly recognized the implications of its providing VoIP services and IP services like SIP trunks to a material portion of its customers. Cox failed to present evidence quantifying the number of the Vaya traffic MOU that were terminated to Cox VoIP customers. Cox further failed to question the accuracy of any portion of Vaya's detailed analysis demonstrating many, but not all, of the inaccuracies and anomalies of its invoices based on a detailed and fully documented comparison of the Cox invoices with the detailed, call-by-call Vaya Call Detail Records, all of which are part of the record and were never challenged by Cox.

For all of these reasons, independently and particularly in light of their cumulative weight, Cox has failed to prove that Vaya should pay Cox any of the amounts set forth in its invoices, and its Complaint should be denied and dismissed with prejudice.

Dated: July 23, 2012, at Tiburon, California.

Respectfully submitted,

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