

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554**

|                                      |   |                      |
|--------------------------------------|---|----------------------|
| In the Matter of                     | ) |                      |
|                                      | ) |                      |
| Vonage Holdings                      | ) |                      |
| Corporation                          | ) |                      |
|                                      | ) |                      |
| Petition for Declaratory Ruling      | ) | WC Docket No. 03-211 |
| Concerning an Order of the Minnesota | ) |                      |
| Public Utilities Commission          | ) |                      |

**REPLY**

BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively “BellSouth”), responds to comments filed in this proceeding.

**I. THE COMMISSION SHOULD IMMEDIATELY ESTABLISH A RULEMAKING PROCEEDING TO FULLY CONSIDER THE NUMEROUS ISSUES IMPLICATED BY THE VONAGE PETITION**

The comments make clear that the Commission should direct its available resources toward initiating a rulemaking proceeding that establishes a generally applicable regulatory framework for Voice over Internet Protocol (“VoIP”) and similar services.<sup>1</sup> The Chairman’s announcement that the Commission will initiate a Notice of Public Rulemaking to inquire about the migration of voice services to IP-based networks and gather public comment on the appropriate regulatory environment for these services is good news for the industry.<sup>2</sup> By signaling to the states and the courts that it is willing and able to address the important

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<sup>1</sup> See, e.g., *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Comments of Level3 Communications, LLC at 16; Comments of Qwest Communications International at 3-4; Comments of Iowa Utilities Board at 3 (“Iowa Utilities Board”); Comments of NASUCA at 11.

<sup>2</sup> FCC to Begin Internet Telephony Proceedings, FCC News Release (Nov. 6, 2003).

competition, consumer interest, and public safety issues in a comprehensive national VoIP policy in the near term, the Commission can prevent piecemeal development of conflicting regulatory and legal requirements that will inhibit development of innovative technologies, force artificial pigeon-holing of new technologies in existing regulatory categories, and discourage regulatory arbitrage.<sup>3</sup>

**1. Even if it Were Inclined to Consider the Vonage Petition, the Commission Still Needs to Address Other Forms of VoIP.**

The many forms of VoIP continue to evolve. Ranging from traditional phone-to-phone voice telephone service (in which carriers use intra-network IP technologies to transmit voice messages via digital packets for reasons of network efficiency and economy), to communications transmissions originating and terminating between “intelligent” (software-driven) personal computers in which multiple voice and data transmissions occur between various points throughout the world by way of individually addressed and separately routed data packets, these forms present different challenges.

In the first case, the jurisdictional aspects of the service may be clearly identified, as is the case with the specific phone-to-phone IP service provided by AT&T and described in its pending petition.<sup>4</sup> In the second case, it may be problematic to undertake any sort of meaningful jurisdictional analysis. For the forms in between, especially those Internet-based applications in which packets containing voice and data are sent across a multitude of international transmission routes by way of a broadband connection to the World Wide Web, or the “Internet,” the

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<sup>3</sup> See, e.g., Comments of Motorola, Inc. at 5-8; Comments of the Voice on the Net (VON) Coalition at 13-15 (“VON Coalition”); Comments of Time Warner Telecom, Inc. at 3-4.

<sup>4</sup> *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361 (filed Oct. 18, 2002). SBC demonstrates that the FCC should promptly reject AT&T’s petition, and thus eliminate incentives for carriers to engage in access charge arbitrage. Comments of SBC Communications, Inc. at 7-9 (“SBC”).

jurisdictional analysis may be more or less complicated. In light of this Internet nexus, BellSouth agrees with those parties that demonstrate that the particular offering that Vonage provides is inherently an interstate service,<sup>5</sup> and that it is critical that this Commission establish a comprehensive regulatory framework for it and similar services.<sup>6</sup>

BellSouth agrees with commenters who demonstrate that (1) services like Vonage's should not be subject to full Title II common carrier regulation (whether provided by ILECs, CLECs, or ISPs);<sup>7</sup> and (2) where Vonage-like services use other carriers' networks, those other carriers have a right to be compensated.<sup>8</sup> As one commenter put it, the Commission "should avoid, at all costs, implementing an asymmetrical approach to its future regulation" by ensuring that all substitutable offerings are treated the same, "no matter by whom provided or no matter the underlying applications or facilities used to provide them."<sup>9</sup> *Accord* Iowa Utilities Board at 2-3 (if the standards and regulation of telecommunications services are not technologically neutral, then different treatments for similar services and artificial advantages and disadvantages that are not market-based would be created); Comments of Communications Workers of America at 11 (Commission, in context of comprehensive VoIP rulemaking, must develop mechanisms to ensure that all voice telephony carriers, including those providing voice telephony over the Internet, are subject to similar regulatory requirements); Comments of Sprint

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<sup>5</sup> See, e.g., Comments of the High Tech Broadband Coalition at 3; SBC at 2; Comments of Verizon at 12-13 ("Verizon"); VON Coalition at 15.

<sup>6</sup> SBC at 2.

<sup>7</sup> Verizon at 13-15.

<sup>8</sup> See, e.g., Comments of the National Exchange Carrier Association, Inc. at 4; Initial Comments of the National Telecommunications Cooperative Association at 8-9; Verizon at 14.

<sup>9</sup> Comments of DJE Teleconsulting, LLC at 4-5.

Corporation at 4 (advocating standard to “help to ensure competitive regulatory parity among all functionally equivalent services”).<sup>10</sup>

**2. The Commission Should Undertake a Comprehensive and Critical Reexamination of its Precedent in the Upcoming Proceeding.**

In light of the District Court’s removal of any regulatory uncertainty about its service offering in Minnesota, BellSouth takes no position on the regulatory classification of Vonage’s service. However, a number of commenters did not hold back, and offered their analysis as to why Vonage’s service is either a telecommunications service or an information service. BellSouth continues to believe, however, that the question of how Vonage-like VoIP services are ultimately classified under the Telecommunications Act service dichotomy should be left to the upcoming NPRM where a full discussion of the corresponding policy issues can be addressed.

The comments demonstrate that Commission precedent can be invoked to advocate both that the Vonage service is a telecommunications service and an information service, albeit an information service that apparently “quacks.” In the upcoming NPRM, therefore, the Commission should pose questions to interested parties based on the record of this proceeding that challenge the various analytical approaches employed. While Vonage and other VoIP providers will no doubt respond to the “quacks like a duck” arguments, the Commission must recognize the different contexts in which the relevant regulatory and legislative precedents were established and consider the current environment when considering the old rules.

Fundamentally, the Commission must ask for comment on whether, in light of the fact that its old rules were established for an old communications world previously dominated by common carriers with existing telecommunications networks providing heavily regulated, state-

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<sup>10</sup> BellSouth cites these four examples as illustrative of the widespread acknowledgment of the need for competitive regulatory parity, and not as an endorsement of these parties’ particular view (or lack of view) of the appropriate regulatory classification of the Vonage service.

sanctioned monopoly local exchange and exchange access services (both pre- and post-divestiture), these rules should continue to apply in a radically changed and rapidly changing environment. Moreover, BellSouth believes the Commission must develop a more equitable and contemporary set of rules for the Vonage-like services, regardless of how they are classified and regardless of who provides them.<sup>11</sup> A number of commenters who argue that Vonage provides a telephone service appear to presuppose without discussion that Vonage is a common carrier that is automatically subject to these rules.<sup>12</sup>

The Commission should also ask what relevance its existing dichotomy has when the VoIP offering constitutes “an *application* over the Internet that is fundamentally inseparable from the enhanced nature of Internet access itself.”<sup>13</sup> A number of comments seem focused on the “voice” aspect of the Vonage service,<sup>14</sup> but Vonage apparently provides more than voice alone, including such enhanced functionalities as voicemail, web access to voicemail, web-based call logs, web-based activation and deactivation of call forwarding, and Internet routing to redirect phone numbers to customer locations.<sup>15</sup> Thus, much of what Vonage provides are clearly information services. To regulate only the “voice” packets in such a diverse, jurisdictionally interstate stream, would introduce unwarranted regulatory intrusion into the developing market for evolving, Internet-based technologies. Because commenters apply the

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<sup>11</sup> See comments cited in text associated with note 10, *supra*.

<sup>12</sup> *But see* Comments of CenturyTel, Inc. at 6-8 (“CenturyTel”) (arguing that Vonage meets *NARUC* definition of common carrier).

<sup>13</sup> Vonage Holdings Corporation Petition for Declaratory Ruling at 13 (“Vonage Petition”) (emphasis in original).

<sup>14</sup> Comments of Cinergy Communications Company at 1; Verizon at 9.

<sup>15</sup> [www.vonage.com](http://www.vonage.com).

Commission's pre-1996 precedent to these functionalities to find a "telecommunications service", the Commission should develop a fuller record on this point as explained below.

The Commission might further ask the extent to which the provision of "voice" services should be determinative, and whether, as some commenters state, it is clear from pre-1996 precedent that all voice services are to be basic.<sup>16</sup> Commenters who advocate this position should be asked to address the fact that this Commission long ago determined that a regulatory classification scheme grounded on treating all voice services as telecommunications services was inappropriate and unsustainable as advanced communications technologies evolved. Commenters should also be asked whether, when the Commission expressly abandoned the distinction between "voice" and "non-voice" services," it did so in order to recognize that existing telephone companies were not foreclosed from providing optional services to facilitate the use of traditional telephone service. The Commission should seek comment on whether, if it were to focus on the "voice" aspects of VoIP offerings, its earlier concern articulated in its *Computer II* decision will be realized, namely, that the "use of 'voice' and 'non-voice' terminology may result in an artificial voice/data service distinction that will eventually fall of its own weight as technology evolves."<sup>17</sup>

The Commission should also seek comment, in the context of the appropriate application of earlier Commission considerations of various protocol processing functions, on whether, as some parties state, where "it's voice going in and voice coming out," the service is not enhanced.<sup>18</sup> The Commission should ask commenters who advocate this position whether it is

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<sup>16</sup> *Supra* note 14.

<sup>17</sup> *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, *Final Decision*, 77 F.C.C.2d 384, 417, ¶ 88 (1980).

<sup>18</sup> *See, e.g.*, CenturyTel at 4; Verizon at 10.

their particular interpretation of the principle acknowledged by Vonage: services that result in no net protocol conversion to the end user continue to be classified as basic services.<sup>19</sup> Vonage, however, makes clear that that the particular service it has brought before the Commission involves a *net* protocol conversion.<sup>20</sup> As Vonage explains:

The net conversion test examines the service on an end-to-end basis from the demarcation point at the premises of the originating caller to the demarcation point where the call will be terminated. Vonage's VoIP service does not originate and terminate in the same format and therefore satisfies the net protocol conversion test, therefore qualifying it as an information service.<sup>21</sup>

The Commission should ask parties who disagree with this assertion to articulate the legal basis for their claim that Vonage has not accurately described the "net conversion test."

Some commenters appear to rely on pre-1996 precedent to classify Vonage's service as a "telecommunication" service without regard to the new definitions established by Congress itself in the Telecommunications Act, and the Commission's post-1996 work in the area, including the *Report to Congress* and the *Non-Accounting Safeguards Order*. In its upcoming NPRM, the Commission should ask commenters who advocate treating Vonage-like services as telecommunications services to consider the analysis in these subsequent agency actions. The Commission should further ask commenters to address whether it is appropriate to consider its 1983 statement concerning the "intent" of its enhanced services definition in light of the *Report to Congress*, various federal and state legislative approaches to Internet regulation, and VoIP

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<sup>19</sup> Vonage Petition at 13, citing *In the Matter of Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Gen. Docket No. 80-756, Memorandum Opinion, Order, and Statement of Principles, 95 F.C.C.2d 584 (1983) ("*Protocols Principles Order*").

<sup>20</sup> Vonage Petition at 12-13.

<sup>21</sup> *Id.* at 13 & n.21, distinguishing the Vonage service from phone-to-phone VoIP services.

offerings consisting of applications provided over the Internet that are fundamentally inseparable from the enhanced nature of Internet access itself.

The Commission should also seek comment on the applicability of the “new technologies” exception to the enhanced service definition. In light of the fact that the Commission indicated that this exception was introduced to cover those instances in which basic telecommunications network technology is introduced piecemeal, and appropriate conversion equipment is used within the telecommunications network to maintain compatibility between user equipment and the telecommunications network, commenters should distinguish the application of this exception to other new VoIP service applications where entities, including telecommunications carriers, are not introducing new basic telecommunications network technology piecemeal into their telecommunications networks.

## **II. CONCLUSION**

The Commission should initiate and conclude its announced NPRM as soon as possible. This proceeding should address relevant competition and public interest issues, and the questions put to interested parties should ensure a thorough consideration of how pre-Telecom Act legacy regulation should apply to 21<sup>st</sup> century Internet-based service applications. The Commission should in the meantime solve thorny intercarrier compensation issues by adopting a simplified bill and keep regime; and should conclude its universal service proceeding in which it should require VoIP carriers to contribute to universal service funding. The Commission should clarify that its current ESP access exemption does not apply to VoIP functional equivalents to voice telephony services, even if the Commission ultimately classifies those services as information services.

Respectfully submitted,

**BELLSOUTH CORPORATION**

By: /s/ Theodore R. Kingsley  
Theodore R. Kingsley

Its Attorney

Suite 4300  
675 West Peachtree Street, N. E.  
Atlanta, Georgia 30375-0001  
(404) 335-0720

Date: November 24, 2003

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this 24th of November 2003 served the following parties to this action with a copy of the foregoing **Reply** by electronic filing, electronic mail and/or by placing a copy of same in United States Mail, addressed to the parties listed on the attached service list.

/s/ Juanita H. Lee  
Juanita H. Lee

Service List WC Docket No. 03-211

Matthew D. Bennett  
Policy Director  
Alliance for Public Technology  
919 18<sup>th</sup> Street, N. W.  
Suite 900  
Washington, D. C. 20006

Robert M. Gurs  
Director, legal & Government Affairs  
Association of Public-Safety Communications  
Officials-International, Inc.  
1725 DeSales Street, NW, Suite 808  
Washington, DC 20036

Paul M. Hartman  
Beacon Telecommunications Advisors, LLC  
8801 South Yale Avenue, Suite 450  
Tulsa, OK 74137

Albert E. Cinelli  
Robert A. Bye  
Cinergy Communications Company  
8829 Bond Street  
Overland Park, KS 66214

John F. Jones  
CenturyTel, Inc.  
100 Century Park Drive  
Monroe, Louisiana 71203

Karen Brinkmann  
CenturyTel, Inc.  
Latham & Watkins  
555 Eleventh Street, N. W.  
Washington, D. C. 20004

Jeff Campbell  
Director  
Technology and Communications Policy  
Cisco Systems, Inc.  
601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Scott Blake Harris  
Maureen K. Flood  
Cisco Systems, Inc.  
Harris, Wiltshire & Grannis LLP  
1200 18<sup>th</sup> Street, NW  
Washington, D.C. 20036

Debbie Goldman  
George Kohl  
Communications Workers of America  
501 Third Street, N. W.  
Washington, D. C. 20001

Donald J. Elardo  
DJE Teleconsulting, LLC  
9122 Potomac Ridge Road  
Great Falls, VA 22066

Gregg C. Sayre  
Frontier and Citizens Telephone Companies  
180 South Clinton Avenue  
Rochester, New York 14646-0700

Scott Blake Harris  
Maureen K. Flood  
High Tech Broadband Coalition  
Harris, Wiltshire & Grannis LLP  
1200 18<sup>th</sup> Street, N. W.  
Washington, D.C. 20036

Jan F. Reimers  
President  
ICORE, Inc.  
326 S. 2<sup>nd</sup> Street  
Emmaus, PA 18049

Gary M. Zingaretti  
Senior Vice President  
ICORE, Inc.  
326 S 2<sup>nd</sup> Street  
Emmaus, PA 18049

Karen Brinkmann  
Independent Telephone &  
Telecommunications Alliance  
Latham & Watkins  
555 Eleventh Street, N. W., Suite 1000  
Washington, D. C. 20036

David Lynch  
John Ridway  
Dennis Rosauer  
Iowa Utilities Board  
350 Maple Street  
Des Moines, Iowa 50319

Staci L. Pies  
Director, Federal Regulatory Affairs  
Level 3 Communicaitons, LLC  
8270 Greensboro Drive  
Suite 900  
McLean, VA 22102

Nancy A. Pollock  
Executive Director  
Metropolitan 911 Board  
2099 University Avenue West  
St. Paul, MN 55104-3431

Edward Garvey  
Deputy Commissioner  
Minnesota Department of Commerce  
85 7<sup>th</sup> Place East, Suite 500  
St. Paul, MN 55101-2198

Richard J. Johnson  
Minnesota Independent Coalition  
Moss & Barnett  
4800 Wells Fargo Center  
90 South 7<sup>th</sup> Street  
Minneapolis, MN 55402

Mike Hatch  
Mary R. McKinley  
Minnesota Office of the  
Attorney General  
Atty. Reg. No. 0299224  
445 Minnesota Street, Suite 900  
St. Paul, Minnesota 55101-2127

Jeanne M. Cochran  
Assistant Attorney General  
Atty. Reg. No. 0246116  
445 Minnesota Street, Suite 900  
St. Paul, Minnesota 55101-2109

LeRoy Koppendrayer, Chair  
R. Marshall Johnson, Commissioner  
Ken Nickolai, Commissioner  
Phyllis Reha, Commissioner  
Gregory Scott, Commissioner  
Minnesota Public Utilities Commission  
121 Seventh Place East, Suite 350  
ST. Paul, MN 55101-2147

James R. Beutelspacher, ENP  
Minnesota Statewide 911 Program  
Room 510, 658 Cedar Street  
Saint Paul, Minnesota 55155

Michael C. Strand  
CEO & General Counsel  
Montana Independent  
Telecommunications Association  
P. O. Box 5239  
Helena, MT 59604-5239

Geoffrey A. Feiss, General Manager  
Montana Telecommunications Association  
208 North Montana Avenue, Suite 207  
Helena, Montana 59601

Jeanine Poltronieri  
Director  
Telecommunications Strategy  
And Regulation  
Motorola, Inc.  
1350 I Street, N. W.  
Washington, D. C. 20005-6896

Willkie Farr & Gallagher LLP  
Motorola, Inc.  
1875 K Street, N. W.  
Washington, D. C. 20006-1238

David C. Bergmann  
Assistant Consumers' Counsel  
NASUCA Telecommunications  
Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485

NASUCA  
8300 Colesville Road  
Suite 101  
Silver Spring, MD 20910

Richard A. Askoff  
National Exchange Carrier  
Association, Inc.  
80 South Jefferson Road  
Whippany, New Jersey 07981

L. Marie Guillory  
Daniel Mitchell  
National Telecommunications  
Cooperative Association  
4121 Wilson Boulevard, 10<sup>th</sup> Floor  
Arlington, VA 22203

Dawn Jabloski Ryman  
General Counsel  
Public Service Commission  
Of the State of New York  
Three Empire State Plaza  
Albany, New York 12223-1350

Stuart Polikoff  
Director of Government Relations  
OPASTCO  
Jeffrey Smith  
Policy Analyst  
21 Dupont Circle, NW, Suite 700  
Washington, D. C. 20036

Eric J. Branfman  
Harry N. Malone  
PAETEC Communications, Inc.  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, NW, Suite 300  
Washington, DC 20007

Randolph L. Wu  
Helen M. Mickiewicz  
Ellen S. Levine  
People of the State of California and the  
California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102

Steven T. Nourse  
Matthew J. Satterwhite  
Assistant Attorneys General  
Public Utilities Section of Ohio  
180 E. Broad Street, 7<sup>th</sup> Floor  
Columbus, OH 43215

Sharon J. Devine  
Robert B. McKenna  
Daphne E. Butler  
Qwest Communicaitons International, Inc.  
Suite 950  
607 14th Street, N. W.  
Washington, D.C 20005

Thomas G. Fisher, Jr.  
Rural Iowa Independent  
Telephone Association  
Whitfield & Eddy, P.L.C.  
317 Sixth Avenue, Suite 1200  
Des Moines, Iowa 50309-4195

Christopher M. Heimann  
Gary L. Phillips  
Paul K. Mancini  
SBC Communications, Inc.  
1401 Eye Street, N. W.  
Washington, D C. 20005

John H. Harwood III  
Lynn R. Charytan  
SBC Communicaitons, Inc.  
Wilmer, Cutler & Pickering  
2445 M Street, N. W.  
Washington, D. C 20037-1420

Norina Moy  
Richard Juhnke  
Sprint Corporation  
401 9<sup>th</sup> Street, Suite 400  
Washington, D. C. 20004

Paul J. Feldman, Esq.  
SureWest Communications  
Fletcher, Heald & Hildreth, PLC  
1300 North 17<sup>th</sup> Street  
11<sup>th</sup> Floor  
Arlington, Virginia 22209

TCA, Inc. – Telcom Consulting Associates  
1465 Kelly Johnson Blvd, Suite 200  
Colorado Springs, CO 80920

Rupaco T. Gonzalez, Jr.  
Richard A. Muscat  
Texas 9-1-1 Agencies  
The Gonzalez Law Firm, P. C.  
PMB #117  
8127 Mesa rive, B206  
Austin, Texas 78759

Bruce D Jacobs  
Glenn S. Richards  
Susan M. Hafeli  
The Voice on the Net Coalition  
Shaw Pittman LLP  
2300 N Street, N. W.  
Washington, D C. 20037

Thomas Jones  
Time Warner Telecom, Inc.  
Willkie Farr & Gallagher LLP  
1875 K Street, N. W.  
Washington, D. C. 20006-1238

Patrick W. Kelly  
Deputy General Counsel  
Office of the General Counsel  
Federal Bureau of Investigation  
J. Edgar Hoover Building  
935 Pennsylvania Avenue, N. W.  
Room 7427  
Washington, D. C. 20535

John G. Malcolm  
Deputy Assistant Attorney General  
Criminal Division  
United States Department of Justice  
950 Pennsylvania Avenue, N. W.  
Suite 2113  
Washington, D. C. 20530

Andrew D. Lipman  
USA DataNet  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, N. W., Suite 300  
Washington, D.C. 20007

Indra Sehdev Chalk  
Michael T. McMenamain  
Robin E. Tuttle  
United States Telecom Association  
1401 H Street, N. W.  
Suite 600  
Washington, D. C. 20005

John M. Goodman  
The Verizon telephone companies  
1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201

William J. Warinner  
Managing Principal  
Warinner, Gesinger & Associates, LLC  
10561 Barkley Street, Suite 550  
Overland Park, Kansas 66212

Robert G. Oenning  
Vonage  
Washington State E911 Administrator  
Building 20  
Camp Murray, WA 98430-5011

Jonathan Lee  
Vice President, Regulatory Affairs  
Competitive Telecommunications Assoc.  
1900 M Street, N. W., Suite 800  
Washington, D. C. 20036

Richard S. Whitt  
Henry Hultquist  
Kecia B. Lewis  
WorldCom, d/b/a MCI  
1133 19<sup>th</sup> Street, N. W.  
Washington, D. C. 20036

Mark D. Schneider  
Ian T. Graham  
WorldCom, Inc. d/b/a MCI  
Jenner & Block, LLC  
601 13<sup>th</sup> Street, N. W.  
Washington, D. C. 20005

Byran Martin  
Chief Executive Officer  
8X8, Inc.  
2445 Mission College Boulevard  
Santa Clara, CA 95054

Christy C. Kunin  
Larry A. Blosser  
Michael A. Schneider  
8x8, Inc.  
Gray Cary Ware & Friedenrich, LLP  
1625 Massachusetts Avenue, NW  
Suite 300  
Washington, D. C. 20036

+Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
The Portals, 445 12<sup>th</sup> Street, S. W.  
Room TW-A325  
Washington, D. C. 20554

+Qualex International  
The Portals, 445 12<sup>th</sup> Street, S. W.  
Room CY-B402  
Washington, D. C. 20554

\*Janice M. Myles  
Wireline Competition Bureau  
Competition Policy Division  
Federal Communications Commission  
The Portals, 445 12<sup>th</sup> Street, S. W.  
Room 5-C327  
Washington, D. C. 20554  
[Janice.myles@fcc.gov](mailto:Janice.myles@fcc.gov)

+ **VIA ELECTRONIC FILING**  
\* **VIA ELECTRONIC MAIL**