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VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12 Street, N.W., Room 8B201
Washington, D.C. 20554

EX PARTE

Re: In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45; In the Matter of IP-Enabled Services, WC Docket No. 04-36.

Dear Ms. Dortch:

This letter is written in response to reports that the Commission is considering expanding the revenue base for Universal Service Fund ("USF") contributions to include revenue associated with the provision of voice over Internet protocol ("VoIP") service. Reports indicate that the Commission may require VoIP providers to contribute based on a safe harbor percentage of interstate VoIP revenues. Cbeyond respectfully requests that, if such a safe harbor formulation is adopted, the Commission permit VoIP providers to opt-out of the safe harbor by conducting traffic studies or by using other appropriate means to determine actual interstate VoIP revenues and contribute on the basis of that revenue.

Allowing VoIP providers to opt-out of a safe harbor estimate of interstate revenues is consistent with the Commission's treatment of CMRS, sound public policy and required by the Communications Act. First, for eight years now, the Commission has allowed commercial mobile radio service ("CMRS") providers to contribute to USF based on actual interstate revenues determined by individual traffic studies, rather than based on a safe harbor estimate.[1] Accordingly, granting VoIP providers the right to opt out of the safe harbor would be consistent with the Commission's treatment of CMRS. Cbeyond is aware of no basis for treating VoIP differently from CMRS in this context. This is especially so since Cbeyond has determined that it would likely be able to conduct accurate traffic studies for determining its interstate and intrastate revenues for VoIP services it may offer in the future.

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[1] *See Federal-State Joint Board on Universal Service, Access Charge Reform, Petition for Reconsideration and Clarification of the Fifth Circuit Remand Order of BellSouth Corporation*, Order, 20 FCC Rcd 13779, ¶ 8 (2005); *Federal-State Joint Board on Universal Service,* Order and Order on Reconsideration, 18 FCC Rcd 1421, ¶¶ 7-8 (2003); *Federal-State Joint Board on Universal Service,* Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, ¶ 22 (2002); *Federal-State Joint Board on Universal Service,* Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, ¶¶ 5-15 (1998).

Second, allowing VoIP providers to opt-out of a safe harbor is sound policy because it increases the extent to which VoIP service providers contribute to USF in the same manner as other providers of voice services. If VoIP service providers were only permitted to contribute to USF based on a safe harbor percentage of interstate revenues, a VoIP service provider with an actual interstate revenue percentage below the safe harbor would effectively contribute to USF based on a higher contribution factor than would be the case with voice service providers that contribute to USF based on actual interstate revenues. This kind of differential treatment of voice service providers would skew market outcomes if applied to substitute voice services.

Third, the Communications Act requires that the Commission allow VoIP providers to rely on traffic studies *in lieu* of a safe harbor. To begin with, as the Fifth Circuit has held, Sections 2(b) and 254(d) prohibit the Commission from imposing USF contributions based on intrastate revenues. *See Texas Office of Public Util. Counsel v. FCC*, 183 F.3d 393, 446-448 (5th Cir. 1999). If a VoIP service provider can demonstrate that its actual percentage of interstate revenues are lower than the safe harbor, the inability to rely on the provider's actual percentage of interstate revenues would cause the Commission to unlawfully impose USF contributions on intrastate revenues. Moreover, the effective imposition of a higher contribution factor to VoIP providers with interstate revenue percentages below the safe harbor would also violate the requirement in Section 254(d) that contribution mechanisms be "equitable and nondiscriminatory." 47 U.S.C. § 254(d). This is especially so since the Commission allows CMRS providers to opt-out of the safe harbor applicable to those providers.

Pursuant to Section 1.1206 of the Commission's rules, an electronic copy of this notice is being filed in each of the above referenced proceedings.

Sincerely,

_____/s/_____

Thomas Jones
Counsel for
Cbeyond Communications LLC