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VIA E-MAIL ***EX PARTE***

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

Re: WC Dkt. Nos. 05-337, 99-68, & 04-36; CC Dkt. Nos. 01-92 & 96-45

Dear Ms. Dortch:

By this letter, tw telecom inc. ("TWTC"), One Communications Corp. ("One"), and Cbeyond Inc., briefly summarize those companies' greatest concerns with regard to the Commission's attempt to comprehensively reform intercarrier compensation and universal service. Those concerns are as follows.[1]

First, the optimal approach to this proceeding is for the FCC to address only ISP-bound traffic on November 4th and to proceed with comprehensive intercarrier compensation in a subsequent proceeding.[2] It appears, however, that the Commission is considering adopting comprehensive reform of intercarrier compensation on November 4th based in part on the concern that the Commission cannot otherwise lawfully justify retaining the existing rules governing the exchange of ISP-bound traffic. But it is our understanding that the FCC asserts in the current draft order that the savings clause in Section 251(i) grants the FCC the authority to regulate rates for the exchange of interstate traffic, even if such traffic is also subject to the terms of Section 251(b)(5). While we believe that this reading of Section 251(i) carries substantial legal risk (*see id.* at 17-19, 23-29), if we are wrong, Section 251(i)

[1] In addition to the issues discussed herein, One is extremely concerned that, if the Commission determines that terminating access charges apply to the transport and termination of voice traffic that originates in IP format, the FCC ensure that terminating access charges apply *only prospectively* and do not apply to such voice traffic on a retroactive basis. One has briefly addressed this issue in a separate letter filed in the above-referenced proceeding today.

[2] *See e.g.*, Letter of Thomas Jones, Counsel, TWTC and One Communications, to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-92 *et al.*, at 1-2 (filed Oct. 14, 2007) ("*TWTC Oct. 14 Letter*").

would appear to grant the FCC full authority to adopt an order that addresses only ISP-bound traffic at this time. Indeed, both AT&T, and Level 3 have proposed this theory as a basis for addressing only ISP-bound traffic before November 5th.[3] In any event, the FCC could forbear from application of Section 251(b)(5) to ISP-bound traffic, as Verizon and Qwest have argued.[4] To be clear, TWTC and One have explained that forbearance from application of Section 251(b)(5) to *intrastate* traffic would deprive the FCC of jurisdiction over such intrastate traffic, including the authority to promulgate a pricing methodology for intrastate traffic. *See TWTC Oct. 14 Letter* at 10. But if the FCC were to forbear from the application of Section 251(b)(5) to *interstate* traffic, it would retain authority over that traffic pursuant to Section 201. The FCC could then adopt rules governing the exchange of interstate ISP-bound traffic under Section 201 without any need to address the rules governing the exchange of other traffic.

Second, as TWTC and One have explained, if the FCC insists on undertaking comprehensive intercarrier compensation reform at this time, it should do so by adopting a reasonable transition (at least five years) to uniform terminating rates set based on the TELRIC methodology.[5] The Commission has not given sufficient consideration to, or allowed interested parties sufficient opportunity to comment on, an alternative rate-setting methodology at this time.

Third, the Commission must not classify voice traffic that originates in IP and terminates on the PSTN ("IP-PSTN voice traffic") as information service traffic. As TWTC has explained, there is no legal basis for this conclusion.[6] As the attached outline explains, doing so would threaten competitors' bedrock interconnection rights and could ultimately lead to the deregulation of voice service in the country.

Fourth, the Commission must not preempt state economic and entry regulation of fixed VoIP traffic. As TWTC has explained at length, there is no basis in law or fact for such preemption.[7]

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[3] *See* Letter of Gary L. Phillips, General Attorney and Associate General Counsel, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 *et al*. at 2-6 (filed May 9, 2008); Letter of John T. Nakahata, Counsel, Level 3 Communications, LLC, CC Dkt. Nos. 01-92 *et al.*, at 9 (filed Aug. 18, 2008).

[4] *See* Verizon White Paper, *Supplemental Comments of Verizon and Verizon Wireless on Intercarrier Payments for ISP-Bound Traffic and the WorldCom Remand*, CC Dkt. Nos. 01-92 *et al.*, at 41-45 (filed Oct. 2, 2008); Ex Parte Presentation at 7, 10, attached to Letter of Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 96-98 *et al.*, (filed Apr. 25, 2008).

[5] *See* Ex Parte Presentation at 1, attached to Letter of Thomas Jones, Counsel, TWTC and One Communications, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 (filed Oct. 6, 2008).

[6] *See* Comment pages attached to Letter of Jonathan Lechter, Counsel, TWTC, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 *et al.,* (filed Oct. 24, 2008).

[7] *See generally*, Letter of Thomas Jones, Counsel, TWTC, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 (filed Oct. 23, 2008).

Moreover, if the FCC were to preempt such state economic and entry regulation, it would jeopardize the states' authority to enforce bedrock Communications Act provisions governing, among other things, interconnection, unbundling, and collocation.

Fifth, the Commission must not require contribution to universal service for business services based on telephone numbers used for such services. As TWTC has explained, any numbers-based contribution system will cause enormous increases in the contribution requirements for certain categories of business customers, such as universities, hospitals, libraries and non-profits. *See TWTC Oct. 14 Ex Parte* at 17-19. Moreover, reducing the per number contribution from one dollar to $.85 would not come close to addressing this problem.[8]

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), a copy of this notice is being filed electronically in the above-referenced dockets.

Respectfully submitted,

_______/s/__________
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Enclosures

cc: Amy Bender
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[8] *See* Ex Parte Presentation at 3, attached to Letter of Thomas Jones, Counsel, TWTC, One Communications and Integra Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 *et al.*, (filed Oct. 24, 2008).

IMPLICATIONS OF CLASSIFICATION OF IP-PSTN TRAFFIC AS INFORMATION SERVICE TRAFFIC

Background. Telecommunications carriers are aggressively replacing the traditional "public switched telephone network" with managed packet networks (using IP technology) that deliver high quality voice transmission. Accordingly, a very large and growing volume of voice traffic is exchanged between IP and traditional telephone networks. Moreover, it is clear that IP-based networks will eventually replace traditional networks entirely. The PSTN is becoming an IP-based network.

It is our understanding that the FCC is considering classifying voice traffic that originates in IP format and terminates on circuit-switched networks ("IP-PSTN voice traffic") as information service traffic. This proposal makes no sense on its face. Deregulating telecommunications services based on the technology used to provide the service -- which is the effect of classifying IP services as information services -- is little different than deregulating mortgages based on its repackaging (for instance, into derivatives).

Indeed, any decision to classify voice services broadly used by the American people as an interstate information service is an astonishing departure from past FCC practice, and it would have far-reaching implications for the FCC's and the states' jurisdiction and for competition. Below, we list and briefly describe some of the more significant implications of the proposal.

- **Interconnection rights eliminated.** The FCC would eliminate competitors' interconnection rights, thereby freeing very large incumbents, such as Verizon and AT&T, to exploit their market power against smaller competitors and other providers (such as rural telephone companies).

- **Other input rights eliminated.** The FCC would eliminate competitors' ability to access customers through cost-based wholesale offerings (such as UNEs) that are needed to reach the vast majority of customers, thereby dramatically reducing competition.

- **State jurisdiction eliminated.** The FCC would effectively eliminate state commission jurisdiction over nearly every service that consumers today view as regulated telecommunications service, merely because the network provider has chosen to use a different technology to provision the service.

- **SPECIFIC LEGAL IMPLICATIONS FOR NETWORK INTERCONNECTION**

  - **Section 251(a) interconnection.** Under Section 251(a), all telecommunications carriers have the duty to interconnect with other telecommunications carriers. In 2007, the Wireline Competition Bureau ruled that a provider of wholesale telecommunications service transmission to a VoIP has the right to interconnection under Section 251(a) for the purpose of exchanging VoIP traffic with an ILEC. But if the conversion of voice traffic from IP to TDM causes the functionality provided by a wholesale provider to become an information service, the wholesale provider would lose the right to interconnect on behalf of the VoIP provider. Nor would a VoIP provider have the right under Section 251(a) to interconnect directly with an ILEC.

  - **Section 251(c)(2) interconnection.** Under Section 251(c)(2), competitors have the right to cost-based interconnection with ILEC networks for the "transmission and routing of telephone exchange service and exchange access." Both telephone exchange service and exchange access service are telecommunications services. The FCC has held that a service cannot be a telecommunications service and an information service; a service must be one or the other. If IP-PSTN traffic were classified as information service traffic, it would be difficult for the FCC to justify classifying IP-PSTN traffic as either telephone exchange service or exchange access service. Accordingly, the current proposal seriously jeopardizes the availability of Section 251(c)(2) interconnection for VoIP providers.

  - **Section 201(a) interconnection.** Under Section 201(a), all common carriers have the duty to provide "physical connections" (i.e., interconnection) with "other carriers." If conversion from IP to TDM causes a voice transmission to become an information service, the Section 201(a) duty to establish physical connections would arguably not apply to the exchange of traffic between voice providers using TDM and IP protocol.

  - **Physical collocation.** Under Section 251(c)(6), an ILEC has a duty to provide physical collocation for the purpose of equipment necessary for interconnection or access to UNEs. Many competitors do not purchase UNEs and utilize collocated equipment solely to interconnect with the ILEC. However, if a competitor does not have a legal right to interconnect, its equipment would not be necessary for lawful interconnection and physical collocation would be unavailable.

  - **Application to all protocol conversions.** If conversion from IP to TDM results in an information service classification, then any net protocol conversion between voice providers would arguably cause the traffic at issue to be classified as information service traffic. This has extremely broad implications since many wireless and wireline carriers that today exchange traffic use different protocols (e.g., CDMA, GSM, TDM, IP, and so on). The legal compulsion for such voice networks to interconnect would all be placed in serious jeopardy.

- **OTHER COMMUNICATIONS ACT PROVISIONS THAT ARE IMPLICATED IN THE LONG TERM**

    - **In general.** There are numerous statutory provisions that apply only to telecommunications services. Classifying IP-to-PSTN voice traffic as information service traffic goes a long way toward classifying all voice traffic originating in IP as an information service. This outcome would gut the economic and social policy regulations contained in the Communications Act. Some examples follow.

    - **UNEs**. Under Section 251(c)(3), "any requesting telecommunications carrier" has the right to obtain UNEs "for the provision of a telecommunications service." If a VoIP providers offers only information service, it would be ineligible for UNEs.

    - **Universal service**. Section 254(c) defines universal service as "an evolving level of telecommunications services" to be defined by the FCC. If VoIP service is defined as an information service, it cannot be included in the definition of supported services.

    - **Resale.** Under Section 251(c)(4), an ILEC has a duty to offer for resale at wholesale rates any "telecommunications service." This obligation does not apply to information services.

    - **Section 251(b) and (c) duties.** In addition to abrogating rights, classification of VoIP service as an information service would arguably eliminate LECs' and ILECs' duties under Sections 251(b) and (c). This is because a duty applicable to a LEC or ILEC arguably does not apply to IP physical plant used solely to provide information services.