

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109

**COMMENTS OF
CBEYOND, INC., INTEGRA TELECOM, INC., AND TW TELECOM INC.**

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Cbeyond, Inc. (“Cbeyond”), Integra Telecom, Inc. (“Integra”), and tw telecom inc. (“tw telecom”) (collectively, the “Joint Commenters”), through their undersigned counsel, hereby submit these comments on Section XV of the *USF/ICC Transformation NPRM*¹ in the above-captioned proceedings.

¹ See *Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011) (“*USF/ICC Transformation NPRM*” or “*NPRM*”).

I. INTRODUCTION AND SUMMARY.

The Joint Commenters applaud this Commission's commitment to reform the intercarrier compensation system "as soon as possible."² As the *NPRM* recognizes, the Commission must swiftly reform a regime that, among other things, is characterized by regulatory uncertainty, creates opportunities for arbitrage, and results in inefficient and wasteful use of resources.³

In particular, there is an urgent need for the Commission to address the intercarrier compensation rates that apply to interconnected VoIP traffic. The FCC's continual failure to establish compensation rules for the exchange of interconnected VoIP traffic has led to numerous billing disputes and has created opportunities for inappropriate self-help. For example, Verizon Business has unilaterally "re-rated" Cbeyond's access service down to \$0.0007 per minute, thereby forcing Cbeyond to expend substantial amounts of time and money on a collection action in federal court.

The Commission should eliminate this regulatory uncertainty and its attendant harms by applying the same intercarrier rates—i.e., intrastate access, interstate access, and reciprocal compensation—to interconnected VoIP traffic that apply to other voice telephone traffic. This approach is sound because, among other things, the FCC's intercarrier compensation rules should not favor one form of voice service over another based on the technology used to transmit the voice signals.

As discussed herein, the easiest way for the FCC to apply the same intercarrier rates to all voice telephone traffic, including interconnected VoIP traffic, is by clarifying that interconnected VoIP service is a "telecommunications service." There is no doubt that providers of

² FCC Commissioners, "Making Universal Service and Intercarrier Compensation Reform Happen," <http://reboot.fcc.gov/blog?entryId=1335527> (last visited Mar. 28, 2011).

³ See *NPRM* ¶¶ 35-39, 603-606.

interconnected VoIP service offer end users the same functionality—voice transmission—as traditional circuit-switched telephone service, and that interconnected VoIP service falls squarely within the statutory definition of “telecommunications service.” Moreover, clarifying that interconnected VoIP service is a telecommunications service would have benefits beyond facilitating intercarrier compensation reform, including safeguarding competitors’ rights to interconnection and unbundled network elements.

There is also an immediate need for the Commission to eliminate traffic pumping schemes. Such schemes force competitors to either subsidize traffic pumpers’ illegitimate businesses or engage in expensive and burdensome litigation. For instance, rather than negotiating an interconnection agreement with Integra for reciprocal compensation, North County Communications, a self-styled “competitive LEC,” unilaterally sets exorbitant rates for the termination of local traffic and then directs high volumes of local “adult” chat-line traffic from Integra customers to North County’s network. North County has brought actions in multiple jurisdictions in an attempt to collect its unlawful charges, thereby forcing Integra to spend significant resources defending itself in these cases. Importantly, the proposal in the *NPRM* for addressing traffic pumping, while helpful, would not stop North County from continuing to perpetuate its scheme because that scheme is designed to generate revenue streams from high reciprocal compensation rates rather than high access charges. Accordingly, the Commission should supplement its proposed traffic pumping rules with rules designed to address these types of schemes. In particular, in the absence of an agreement governing the exchange of local traffic between them, competitive LECs should be prohibited from charging any reciprocal compensation until such an agreement is reached. At the same time, the FCC should not adopt

proposals for addressing traffic pumping that would impose regulatory burdens on carriers that do not engage in such conduct.

II. THE COMMISSION SHOULD CLARIFY THAT INTERCONNECTED VOIP SERVICE IS A TELECOMMUNICATIONS SERVICE AND APPLY THE SAME INTERCARRIER RATES TO INTERCONNECTED VOIP TRAFFIC THAT APPLY TO OTHER VOICE TELEPHONE TRAFFIC.

A. The FCC Should Apply The Same Intercarrier Rates To All Voice Telephone Traffic, Including Interconnected VoIP Traffic.

In the *NPRM*, the Commission seeks comment on the appropriate treatment of interconnected VoIP traffic for purposes of intercarrier compensation.⁴ The Joint Commenters urge the FCC to subject interconnected VoIP traffic to the same intercarrier rates—i.e., intrastate access, interstate access, and reciprocal compensation—as other voice telephone traffic. This approach is sound as a matter of policy and practicality.

First, applying the same intercarrier rates to all voice traffic would level the playing field among providers of voice services. As the Commission has recognized in the universal service context, the FCC’s rules should “neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.”⁵ Based on this policy, the FCC imposed universal service contribution obligations on interconnected VoIP service providers to “reduce[] the possibility that carriers with universal service obligations will compete directly with providers without such obligations.”⁶ The same policy of “competitive

⁴ See *NPRM* ¶¶ 608-619.

⁵ *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, ¶ 44 (2006) (“*Universal Service Contribution Methodology Report and Order*” or “*Report and Order*”) (internal citation omitted).

⁶ *Id.*; see *id.* (“Moreover, we do not want contribution obligations to shape decisions regarding the technology that interconnected VoIP providers use to offer voice services to customers or to create opportunities for regulatory arbitrage.”).

neutrality”⁷ should apply here. That is, the FCC’s intercarrier compensation rules should not favor one form of voice service over another based on the technology used to provide the service by permitting different intercarrier rates for interconnected VoIP traffic and other voice traffic. Discriminating in favor of one technology distorts competition between providers of IP voice services and circuit-switched voice services, and it skews investment decisions. Competitive outcomes should be determined by the relative efficiencies of the services offered to customers—not by differential input pricing established by regulators.

Second, permitting different intercarrier rates for interconnected VoIP traffic and other voice traffic will lead to costly disputes about which rates apply. As the Commission recognizes in the *NPRM*, the FCC’s failure to establish intercarrier compensation rules for interconnected VoIP traffic has already resulted in numerous billing disputes and litigation.⁸ For instance, Cbeyond has been forced to engage in costly litigation against Verizon Business (“Verizon”) for Verizon’s failure to pay the tariffed access charges for Verizon long distance calls that originate or terminate on Cbeyond’s IP network.⁹ Rather than paying the tariffed rates, Verizon has chosen to play the role of regulator and unilaterally “re-rated” Cbeyond’s access service down to \$0.0007 per minute for interstate and intrastate calls.¹⁰ Applying the same intercarrier rates to all

⁷ *Id.*

⁸ See *NPRM* ¶ 608 & n.913, ¶ 610.

⁹ See Complaint, *Cbeyond Communications, LLC v. MCI Communications Services, Inc. d/b/a Verizon Business*, No. 1:11-cv-0693 (N.D. Ga.) (filed Mar. 4, 2011) (attached hereto as “Attachment A”) (“*Cbeyond Complaint*”); see also Answer to Complaint, *Cbeyond Communications, LLC v. MCI Communications Services, Inc. d/b/a Verizon Business*, No. 1:11-cv-0693-TCB, ¶ 45 (N.D. Ga.) (filed Mar. 28, 2011) (“Verizon Business admits that, since August 2010, it has refused to pay tariffed switched access charges for traffic that it exchanges with Cbeyond that originates and/or terminates in IP format, on the ground that access charges do not apply to that traffic.”).

¹⁰ See *Cbeyond Complaint* ¶¶ 5, 44.

voice traffic will eliminate opportunities for such unlawful self-help and thereby prevent similar disputes in the future.

Third, applying the same intercarrier rates to all voice traffic makes sense because, in the Joint Commenters' experience, it is not technically feasible to differentiate interconnected VoIP traffic from other voice traffic terminating on their networks. If the FCC applies a different intercarrier rate to interconnected VoIP traffic than the rates applicable to other voice traffic, a terminating carrier would be forced to rely on the transmitting carrier or carriers to identify the type of voice traffic at issue. Transmitting carriers would in turn have the incentive to identify all of their voice traffic in a manner that minimizes their intercarrier compensation liability (i.e., to identify all of their voice traffic as interconnected VoIP traffic if there is a lower intercarrier rate for interconnected VoIP traffic than for other voice traffic).

For these same reasons, the Commission should not apply bill and keep to interconnected VoIP traffic¹¹ or apply a special rate to interconnected VoIP traffic.¹² If the FCC applied a lower rate to interconnected VoIP traffic than the rates applicable to other voice traffic, opportunities for arbitrage and inefficient behavior would only continue. For example, interexchange carriers may have an incentive to disguise circuit-switched traffic originating on the PSTN as VoIP traffic in order to pay reduced access charges. Furthermore, it makes little sense to apply a different rate to interconnected VoIP traffic when, as the Commission recognizes, the market is evolving toward all-IP networks.¹³

¹¹ See *NPRM* ¶ 615.

¹² See *id.* ¶ 616.

¹³ *Id.* ¶ 609.

B. The Simplest Way For The FCC To Apply The Same Inter-carrier Rates To All Voice Telephone Traffic, Including Interconnected VoIP Traffic, Is By Clarifying That Interconnected VoIP Service Is A “Telecommunications Service.”

The most straightforward way for the Commission to apply the same inter-carrier rates to interconnected VoIP traffic that already apply to other voice traffic is by clarifying that interconnected VoIP service is a “telecommunications service” under Section 3(46) of the Act.¹⁴ In particular, under Section 69.5(b) of the Commission’s rules, access charges apply to the provision of interstate “telecommunications services”¹⁵ and would thus apply to interstate interconnected VoIP traffic. In addition, because Section 251(b)(5) of the Act imposes the duty to establish reciprocal compensation arrangements for the transport and termination of “telecommunications,”¹⁶ reciprocal compensation would apply to the termination of local interconnected VoIP traffic. (That is, the statutory definition of “telecommunications service” encompasses “telecommunications”¹⁷ and if interconnected VoIP service were classified as a telecommunications service, then interconnected VoIP traffic would be “telecommunications” traffic subject to Section 251(b)(5).)

¹⁴ 47 U.S.C. § 153(46).

¹⁵ 47 C.F.R. § 69.5(b). Rule 69.5(b) provides that “[c]arrier’s carrier [access] charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.” *Id.* As the Commission has noted, “[d]epending on the nature of the traffic, carriers such as commercial mobile radio service (CMRS) providers, incumbent LECs, and competitive LECs may qualify as interexchange carriers for purposes of this rule.” *See Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd. 7457, n.80 (2004).

¹⁶ 47 U.S.C. § 251(b)(5).

¹⁷ *See id.* § 153(46).

Clarifying that VoIP service is a telecommunications service would also facilitate long-term reform of intercarrier rates under Section 251(b)(5).¹⁸ Specifically, it would ensure that the Commission could unify all terminating rates, including those for interconnected VoIP calls, under Section 251(b)(5) (which, as mentioned, governs the transport and termination of “telecommunications”).¹⁹

Although the Commission suggests that it can exercise jurisdiction over interconnected VoIP traffic under Section 251(b)(5) without clarifying the regulatory classification of interconnected VoIP,²⁰ it is not clear that this is correct. In the *NPRM*, the Commission—citing to the *Universal Service Contribution Methodology Report and Order*—states that “interconnected VoIP traffic is ‘telecommunications’ traffic” (and could therefore be subject to the Section 251(b)(5) framework).²¹ But that *Report and Order* does not necessarily support the proposition that interconnected VoIP traffic is “telecommunications” traffic. There, the FCC held that interconnected VoIP providers “provide ‘telecommunications’” because they purchase access to and from the public switched telephone network (“PSTN”) from telecommunications carriers and in turn supply PSTN transmission (as a component of a finished voice service) to

¹⁸ See *NPRM* ¶¶ 550-555 (proposing to “bring all traffic within the reciprocal compensation framework of [S]ection 251(b)(5) at the initiation of the [reform] transition, and set a glide path to gradually reduce all intercarrier compensation rates”).

¹⁹ Again, because the statutory definition of “telecommunications service” encompasses “telecommunications,” 47 U.S.C. § 153(46), if the FCC clarified that interconnected VoIP service is a telecommunications service, then interconnected VoIP traffic would be “telecommunications” traffic subject to Section 251(b)(5).

²⁰ See *NPRM* ¶ 615 (“We note that [S]ection 251(b)(5) requires LECs ‘to establish reciprocal compensation arrangements for the transport and termination of telecommunications,’ and that interconnected VoIP traffic is ‘telecommunications’ traffic, regardless of whether interconnected VoIP service were to be classified as a telecommunications service or information service.”).

²¹ See *id.* ¶ 615 & n.927 (citing *Universal Service Contribution Methodology Report and Order* ¶¶ 39-41).

their end-user customers.²² But a finding that an interconnected VoIP provider “provides ‘telecommunications’” by supplying the underlying transmission for its end-user customers to access the PSTN does not necessarily lead to the conclusion that *the VoIP traffic riding on top of that underlying transmission* is also “telecommunications.” Accordingly, it would be far safer from a legal perspective for the FCC to unify all terminating rates, including for interconnected VoIP traffic, under Section 251(b)(5) by clarifying that interconnected VoIP service is a telecommunications service.

C. Interconnected VoIP Service Meets The Statutory Definition Of “Telecommunications Service.”

The FCC should clarify that interconnected VoIP service is a telecommunications service because interconnected VoIP service satisfies the statutory definition of “telecommunications service.” The classification of a service as a telecommunications service or an “information service” under the 1996 Act “turns on the nature of the functions the end user is offered.”²³ “Telecommunications” is defined in the statute 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.”²⁴ In other words, “the heart of ‘telecommunications’ is transmission.”²⁵ Building on the definition of telecommunications, the

²² See *Universal Service Contribution Methodology Report and Order* ¶¶ 40-41.

²³ See *id.* ¶ 40 (quoting *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶ 38 (2002), *aff’d sub nom. National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)); see also *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶ 86 (1998) (“1998 Report to Congress”).

²⁴ 47 U.S.C. § 153(43).

²⁵ *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd. 3307, ¶ 9 (2004).

1996 Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”²⁶ Thus, an “‘offering’ of pure [voice] transmission capability ‘for a fee directly to the public’”²⁷ is a telecommunications service regardless of the technology used to transmit the voice signals.

Here, interconnected VoIP services (whether managed VoIP services²⁸ or over-the-top VoIP services²⁹) offer end users the ability to transmit, between or among points specified by the end user, voice signals of the end user’s choosing without change in the form or content of those voice signals.³⁰ Stated differently, providers of managed VoIP service and over-the-top VoIP

²⁶ 47 U.S.C. § 153(46). By contrast, “information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . 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.” 47 U.S.C. § 153(20). The FCC has found that the terms “telecommunication service” and “information service” used in the 1996 Act are similar to the terms “basic service” and “enhanced service” used by the Commission prior to 1996. See *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 4826, ¶ 16 (2005) (“*AT&T Prepaid Card Order*”).

²⁷ *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd. 7290, ¶ 12 (2006) (“*Prepaid Card Declaratory Ruling*”).

²⁸ Managed VoIP service, an interconnected VoIP service, consists of the packetized transport of voice and/or video telephony service using Internet Protocol whereby the packets are transported and/or delivered as a specialized class of traffic requiring a particular quality-of-service standard. Unlike so-called “over-the-top” VoIP providers, managed VoIP is not provided via the public Internet.

²⁹ In these comments, the term “over-the-top VoIP service” refers to interconnected over-the-top VoIP service.

³⁰ Managed VoIP service and over-the-top interconnected VoIP service offer subscribers transmission that is essentially “transparent” to the end user. This is the *sine qua non* of telecommunications. See *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, ¶ 96 (1980).

service offer end users the same functionality—voice transmission—as providers of circuit-switched telephone service. The Commission has repeatedly recognized this fact³¹ and used it as the basis for imposing a number of regulations applicable to providers of telecommunications services on providers of interconnected VoIP services.³² Moreover, managed VoIP providers³³

³¹ See, e.g., *IP-Enabled Services; E-911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 10245, ¶ 24 (2005) (“*VoIP E911 Order*”) (using the term “VoIP” “generally to include any IP-enabled services offering real-time multidirectional voice functionality, including but not limited to, services that mimic traditional telephony”); *1998 Report to Congress* ¶ 84 (“‘IP telephony’ services enable real-time voice transmission using Internet protocols.”).

³² See, e.g., *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15712, ¶ 18 (2007) (imposing regulatory fees payment obligations on interconnection VoIP service providers because such providers “offer a service that is almost indistinguishable, from the consumers’ point of view, from the service offered by interstate telecommunications service providers”); *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information; IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 6927, ¶ 56 (2007) (applying the FCC’s CPNI rules to interconnected VoIP service providers on the ground that it is “reasonable for American consumers to expect that their telephone calls are private irrespective of whether the call is made using the services of a wireline carrier, a wireless carrier, or an interconnected VoIP provider, given that these services, from the perspective of a customer making an ordinary telephone call, are virtually indistinguishable”); *Communications Assistance for Law Enforcement Act and Broadband Access Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 14989, ¶ 42 (2006) (“We determine that a service that is increasingly used to replace analog service is exactly the type of service that Congress intended the [Substantial Replacement Provision of CALEA] to reach. Moreover, commenters offer no evidence to dispute the use of interconnected VoIP to obtain voice service capability, among other features.”); *Universal Service Contribution Methodology Report and Order* ¶ 43 (imposing universal service contribution obligations on interconnected VoIP service providers on the basis that “much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN, which is supported by universal service mechanisms”); *VoIP E911 Order* ¶ 23 (imposing E911 obligations on interconnected VoIP service providers on the basis that “a service that enables a customer to do everything (or nearly everything) the customer could do using an analog telephone, and more, can at least reasonably be expected and required to route 911 calls to the appropriate destination”).

³³ See, e.g., Charter Communications, Charter Phone: Save Big With Cable Phone Service From Charter, <http://www.charter.com/phone/savings> (last visited Mar. 28, 2011) (offering Charter Phone service with unlimited local and long distance for \$29.99 per month up to 12 months); Cox Communications, Residential Phone Pricing,

and most over-the-top VoIP providers³⁴ offer this transmission capability for a fee directly to the public.

Importantly, while some VoIP calls undergo a net protocol conversion during transmission,³⁵ such conversion does not render the VoIP service an “information service” under the 1996 Act. *First*, while the FCC has concluded that services involving net protocol conversion are generally information services,³⁶ this rule has never been used as the basis for treating telephone service as an unregulated service. For instance, although a net protocol conversion can take place when traffic is exchanged between CMRS networks (e.g., from GSM to CDMA), CMRS service remains a telecommunications service. Otherwise, telephone service would be almost entirely deregulated.

Second, the FCC has held that services involving net protocol conversions “in connection with the introduction of a new basic network technology” (i.e., new technology for the provision

<http://ww2.cox.com/residential/northernvirginia/phone/pricing.cox> (last visited Mar. 28, 2011) (offering Cox Digital Telephone service with monthly pricing in northern Virginia).

³⁴ See, e.g., Vonage, Compare Phone Plans, Domestic & Worldwide Phone Service, http://www.vonage.com/residential_calling_plans/compare_plans.php (last visited Mar. 28, 2011) (offering residential calling plans with monthly pricing); Skype, What Does It All Cost <http://www.skype.com/intl/en-us/prices/> (last visited Mar. 28, 2011) (offering non-Skype-to-Skype calls for a fee); magicJack – Knowledgebase/FAQ, <http://www.magicjack.com/5/faq/> (last visited Mar. 28, 2011) (offering one year of free local and long distance calling with the purchase of a magicJack device for \$39.95 plus shipping and handling and each additional year of phone service for \$19.95).

³⁵ For example, when a subscriber of managed VoIP service or over-the-top VoIP service calls a circuit-switched telephone service subscriber, the call begins in IP format, is transported in IP format to the VoIP provider’s gateway for translation into TDM format, and delivered in TDM format to the called party.

³⁶ See *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, ¶ 104 (1996) (“*Non-Accounting Safeguards Order*”).

of “telecommunications”) are telecommunications services.³⁷ As the Commission has explained, such technology is often introduced “piecemeal” and “appropriate conversion equipment is used within the network to maintain compatibility.”³⁸ This is precisely the manner in which IP technology is being deployed for the provision of telephone service. That is, IP technology is being introduced piecemeal into the network to enhance the efficiency and flexibility of circuit-switched telephone service. While some conversions between IP and the protocols used in legacy networks are necessary, such conversions do not change the classification of managed VoIP service or over-the-top VoIP service as a telecommunications service.

The fact that providers of managed VoIP service and over-the-top VoIP service also offer services and capabilities that might fall within the literal definition of an information service does not change the classification of these VoIP services as telecommunications services. For instance, the FCC has held that services that “facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service” (known as “adjunct-to-basic” services) are themselves telecommunications services.³⁹ Such services include caller ID, call forwarding, call return, speed dial, and repeat dialing.⁴⁰

³⁷ *Non-Accounting Safeguards Order* ¶ 106.

³⁸ *Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, Memorandum Opinion, Order, and Statement of Principles, 95 F.C.C.2d 584, ¶ 16 (1983). A prime example is the “[t]ransitional [i]ntroduction” of digital loop technology and the “[r]equisite analog-to-digital and digital-to-analog equipment” into the telephone network. *Id.* As the Commission recognized decades ago, even with the conversion “from a digital to an analog protocol between the ends of [a] call,” “the service itself would remain a switched message service otherwise unchanged except for the characteristics of the electrical interface.” *Id.*

³⁹ See *Non-Accounting Safeguards Order* ¶ 107 (citing *North American Telecommunications Association Petition for Declaratory Ruling Under § 64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*,

Nor does the bundling of an information service that does not qualify as an adjunct-to-basic service with managed VoIP service or over-the-top VoIP service change the telecommunications services classification of these VoIP services. Instead, the VoIP provider is merely offering “two distinct services, one of which is a telecommunications service.”⁴¹ Stated differently, merely packaging an information service (e.g., voicemail) with telephone service does not create a single, integrated information service.⁴² This is especially true where, as is the case with managed VoIP service⁴³ and over-the-top VoIP service,⁴⁴ the service is marketed in

Memorandum Opinion and Order, 101 F.C.C.2d 349, ¶¶ 24-28 (1985)). Adjunct-to-basic services are covered by the “telecommunications management exception” to the statutory definition of information service (*see* 47 U.S.C. § 153(20)) and therefore are treated as telecommunications services under the 1996 Act. *See Non-Accounting Safeguards Order* ¶ 107; *see also AT&T Prepaid Card Order* ¶ 16.

⁴⁰ *See Non-Accounting Safeguards Order* n.245.

⁴¹ *Prepaid Card Declaratory Ruling* ¶ 14 (internal citation omitted).

⁴² *See id.*

⁴³ *See, e.g.,* Cox Communications, Residential Phone Answers Overview, <http://ww2.cox.com/residential/northernvirginia/phone/answers-about-phone.cox> (last visited Mar. 28, 2011) (“What is Cox phone service? Cox phone is the same primary line telephone service you’ve known for years inside your home”); Charter Communications, Charter Phone Frequently Asked Questions, <http://www.myaccount.charter.com/customers/support.aspx?supportarticleid=1351#ChartervsTraditional> (last visited Mar. 28, 2011) (“Just like traditional wire line services, Charter Phone works through regular telephone jacks and phones, and provides access to 911 emergency services and directory listings. The difference between Charter Phone and the phone companies’ traditional wire line service is that Charter takes advantage of the latest technology, which allows us to deliver crystal-clear calls and advanced calling features. Cable phone service uses Internet protocol for transporting calls over our own private network.”).

⁴⁴ *See, e.g.,* Vonage, Voice over Internet Protocol from Vonage, How VoIP Works, http://www.vonage.com/how_vonage_works/ (last visited Mar. 28, 2011) (“Vonage routes your phone calls over the Internet using Voice over Internet Protocol, rather than telephone lines. But even though your phone uses the Internet, it has nothing to do with your computer. In fact, your computer doesn’t have to be on to use Vonage. The people you call don’t need to have Vonage or the Internet to get your call – just a phone. And when someone calls you, the phone rings as usual.”).

large part as offering consumers the ability to make “traditional telephone calls.”⁴⁵

D. Clarifying That Interconnected VoIP Service Is A Telecommunications Service Would Have Benefits Beyond Facilitating Intercarrier Compensation Reform.

Clarifying that interconnected VoIP service is a telecommunications service would have additional benefits beyond facilitating near-term and long-term intercarrier compensation reform. In particular, this clarification would eliminate any uncertainty regarding competitors’ rights to interconnection and unbundled network elements (“UNEs”) for purposes of providing interconnected VoIP service.

For example, under Section 251(c)(2) of the Act, incumbent LECs have a duty to provide cost-based interconnection for the “transmission and routing of telephone exchange service and exchange access.”⁴⁶ In order to qualify as “telephone exchange service” or “exchange access” service, however, it is likely that a service must be a telecommunications service. Accordingly, clarifying that interconnected VoIP service is a telecommunications service would ensure that incumbent LECs would not be able to evade their duty to interconnect with competitors seeking to provide interconnected VoIP service on the basis that such service is not a telephone exchange service or exchange access.

In addition, Section 251(c)(3) of the Act gives competitors the right to UNEs only to the extent that they use such facilities to provide a “telecommunications service.”⁴⁷ Clarifying that interconnected VoIP service is a telecommunications service would ensure that competitors have the right to these critical inputs for the provision of interconnected VoIP service. In so doing, the

⁴⁵ *Prepaid Card Declaratory Ruling* ¶ 13.

⁴⁶ 47 U.S.C. § 251(c)(2).

⁴⁷ *Id.* § 251(c)(3).

Commission would maintain the preconditions for competition at a time when consumer demand for VoIP services continues to rise.⁴⁸

III. THE COMMISSION'S RULES SHOULD ADDRESS TRAFFIC PUMPING SCHEMES THAT RELY ON HIGH RECIPROCAL COMPENSATION RATES.

In the *NPRM*, the FCC seeks comment on specific revisions to its interstate access rules to reduce access stimulation.⁴⁹ In particular, the Commission proposes to adopt rules triggered by the existence of access revenue sharing agreements.⁵⁰ As a general matter, the Joint Commenters support adoption of these rules as a reasonable approach to addressing traffic pumping schemes that are designed to generate profits from high access charges.⁵¹

The Commission should, however, supplement its proposed rules to address traffic pumping schemes that are designed to generate profits from high reciprocal compensation rates.⁵² For example, rather than entering into interconnection agreements for reciprocal compensation with Integra, North County Communications has filed unilateral state tariffs and

⁴⁸ See *NPRM* ¶ 610 & n.917.

⁴⁹ See *id.* ¶¶ 659-666 & Appendix C.

⁵⁰ See *id.*

⁵¹ However, the Commission should ensure that its proposed access stimulation rules require only competitive LECs that enter revenue sharing agreements *and* charge rates higher than those prescribed in the access tariff of the RBOC in the state (or the incumbent LEC with the largest number of access lines in the state if there is no RBOC in that state) to re-file their interstate switched access tariffs. As written, the Commission's proposed Rule 61.26(g)(1) would unnecessarily require all competitive LECs that enter into revenue sharing agreements to re-file their interstate switched access tariffs even if they do not charge rates above the RBOC or large incumbent LEC access rate. See *id.*, Appendix C.

⁵² See *id.* ¶¶ 671-674 (seeking comment on how to address traffic stimulation strategies with respect to reciprocal compensation rates).

price lists purporting to govern the termination of local exchange traffic⁵³ and then directed large volumes of traffic to a chat-line company that it serves.⁵⁴ To collect these unlawful charges, North County has filed lawsuits against Integra in several jurisdictions and forced Integra to spend substantial amounts of time and money on defending itself in these cases.⁵⁵

In order to eliminate these types of schemes, the FCC should adopt a rule under which, in the absence of an agreement governing the exchange of local traffic, competitive LECs are not permitted to charge any reciprocal compensation until such an agreement is reached. Once such an agreement has been reached, the requirement in Section 51.711(a)(2) of the Commission's rules that reciprocal compensation rates be symmetrical would apply.⁵⁶ When adopting the Joint

⁵³ See, e.g., North County Communications Corporation, Arizona Local Tariff No. 1-T § III.B (effective Oct. 9, 2006) (providing that “[i]n the event that the Company and an interconnecting carrier have not established reciprocal compensation arrangements, the Company will terminate traffic originated by the connecting carrier” at between \$0.0050 and \$0.2000 per access minute of use).

⁵⁴ Notably, the Joint Commenters' proposal is not triggered by the existence of a revenue sharing agreement because North County's traffic pumping scheme does not appear to include an explicit revenue sharing agreement. Rather, it is Integra's understanding that the same individual, Todd Lesser, owns both North County and HFT, Inc., the chat-line company served by North County. According to Verizon, Mr. Lesser is also the owner of another chat-line company, Jartel, Inc. See Letter from Donna Epps, Vice President Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-135, at 3 (filed Dec. 6, 2010).

⁵⁵ See, e.g., Order, *North County Communications Corp. v. McLeodUSA Telecommunications Services, Inc. et al.*, No. CV-09-2063-PHX-GMS, 2010 WL 1779445 (D. Ariz. May 3, 2010) (granting Motion to Dismiss of Integra's subsidiary, Electric Lightwave, LLC, and other defendants), *recon. denied*, 2010 WL 2079754 (D. Ariz. May 24, 2010); Minute Entry, *North County Communications Corp. v. McLeodUSA Telecommunications Services Inc. et al.*, CV 2010-025497 (Ariz. Sup. Ct. Maricopa County Feb. 15, 2011) (granting the Joint Motion to Dismiss of Electric Lightwave, LLC and other defendants); Defendants Comcast Phone of Oregon, LLC, Electric Lightwave, LLC, Eschelon Telecom, Inc., Eschelon Telecom of Oregon, Inc., and Integra Telecom of Oregon, Inc.'s Answer and Affirmative Defenses, *North County Communications Corp. v. 360 Networks (USA), Inc. et al.*, Case No. 1001-00546 (Or. Cir. Ct. Multnomah County) (filed Feb. 28, 2011).

⁵⁶ See 47 C.F.R. § 51.711(a)(2).

Commenters' proposed rule, the Commission should also reiterate that all LECs have the duty to establish reciprocal compensation arrangements under Section 251(b)(5) of the Act⁵⁷ and Section 51.703(a) of the Commission's rules.⁵⁸ Adoption of the Joint Commenters' proposed rule would prevent a bad actor like North County from charging any reciprocal compensation rate that it chooses and would compel it to fulfill its statutory obligation to establish reciprocal compensation arrangements.

In all events, the Joint Commenters agree with the Commission that it should "address access stimulation while minimizing additional burdens on LECs not engaged in access stimulation."⁵⁹ Any proposals to reduce traffic pumping that are adopted by the FCC should not impose regulatory costs on carriers that do not engage in such conduct. For this reason, the Commission was correct to reject proposals that rely on certifications or additional reporting.⁶⁰

IV. CONCLUSION

For the foregoing reasons, the Commission should adopt the proposals discussed herein.

⁵⁷ See 47 U.S.C. § 251(b)(5).

⁵⁸ See 47 C.F.R. § 51.703(a). Accordingly, a competitive LEC would not be permitted to refuse to enter into an agreement setting rates for the exchange of traffic subject to Section 251(b)(5).

⁵⁹ NPRM ¶ 658.

⁶⁰ See *id.* & n.1021.

Respectfully submitted,

/s/ Thomas Jones _____

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April 1, 2011

ATTACHMENT A

MAR 04 2011

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

JAMES N. HATTEN, Clerk
By:  CLERK

CBEYOND COMMUNICATIONS, LLC)
)
 Plaintiff,)
)
 vs.)
)
 MCI COMMUNICATIONS)
 SERVICES, INC. d/b/a)
 VERIZON BUSINESS)
)
 Defendant.)

CIVIL ACTION NO.

1 : 11 - CV - 069 3

COMPLAINT

Plaintiff Cbeyond Communications, LLC ("Cbeyond"), by and through its attorneys, hereby files its Complaint against Defendant MCI Communications Services, Inc. ("MCI"), doing business as "Verizon Business." In support of this Complaint, Cbeyond states as follows:

NATURE OF THE ACTION

1. This is a tariff collection action arising from Verizon Business's unlawful refusal to pay amounts it owes Cbeyond for the use of Cbeyond's network to facilitate long distance telephone calls made by Verizon Business's long distance customers.

2. With respect to the present action, Verizon Business acts as an “Interexchange Carrier” (“IXC”). IXCs are commonly called long-distance telephone companies. In general terms, when a person makes a long distance telephone call, the caller’s Local Exchange Carrier (“LEC”) routes the call to the customer’s IXC/long distance carrier, who in turn delivers the call to the LEC for the person being called. Cbeyond is a LEC.

3. Pursuant to both federal and state law, the IXC must compensate the LECs for the use of their networks to either originate or terminate these long distance calls for the IXC’s customers. Such carrier-to-carrier charges associated with long distance calls are generally referred to as “access charges.”

4. Pursuant to federal law, the rate Cbeyond charges for originating or terminating interstate long distance calls is set forth in a tariff filed with the Federal Communication Commission (“FCC”). For intrastate long distance calls, Cbeyond’s rate is set forth in a tariff filed with the relevant state regulatory authority.

5. Verizon Business has used Cbeyond’s network to originate and terminate long distance calls for Verizon Business’s customers, but refuses to pay Cbeyond the rates set forth in Cbeyond’s filed federal and state tariffs for these services. Instead, Verizon Business has made up its own rate for such services,

purporting to unilaterally “re-rate” Cbeyond’s service down to \$0.0007 per minute. To date, Verizon Business's underpayments to Cbeyond are in excess of \$900,000.00 and are continuing to increase. Cbeyond is entitled to recover these underpayments and late fees pursuant to the applicable tariffs and federal law.

PARTIES

6. Plaintiff Cbeyond is a limited liability company organized under the laws of the State of Delaware with its principal place of business located at 320 Interstate North Parkway, Atlanta, Georgia 30339.

7. Defendant Verizon Business is a corporation organized under the laws of the State of Delaware and has its principal place of business in Virginia. Defendant can be served through its registered agent for service of process, CT Corporation System, at 1201 Peachtree St. NE, Atlanta, Georgia 30361.

8. Defendant is engaged in the business of providing interstate and intrastate telecommunications and telecommunications related services in the State of Georgia and other states.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the claims herein pursuant 28 U.S.C. § 1331 because this case arises under federal law, the Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq. (including the Telecommunications Act

of 1996), and tariffs filed with the FCC and state regulatory authorities pursuant to same. Because Cbeyond's alternative state law claims form part of the same case or controversy as the Communications Act claims, the Court has supplemental jurisdiction over the pendent state law claims pursuant to 28 U.S.C. §1367(a).

10. The federal district court is the appropriate forum for this tariff collection case, as the FCC repeatedly has stated that it will not entertain or adjudicate tariff collection actions and that such actions should proceed in federal district court. *See, e.g., Contel of the South, Inc. v. Operator Communications, Inc.*, 23 FCC Rcd 548, 551, 555-56, ¶¶ 7, 19 (2008) (quoting *U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc.*, 19 FCC Rcd 24552, 24555-56, ¶ 8 (2004) (“[T]he Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges”)); *Qwest Comm. Corp. v. Farmers and Merchants Mutual Tel. Corp.*, 22 FCC Rcd 17973, 17984-85, ¶ 29 (2007) (“[A]ny complaint by Farmers to recover [tariffed access] fees allegedly owed by Qwest would constitute a ‘collection action,’ which the Commission has repeatedly declined to entertain”).

11. This Court has personal jurisdiction over Verizon Business because it is engaged in the systematic and continuous conduct of business in Georgia. Defendant provides telecommunications services in Georgia. Defendant's contacts

in the State of Georgia are such that it can reasonably anticipate that it would be subject to the jurisdiction of courts in Georgia.

12. Venue is proper in this judicial district under 28 U.S.C. § 1391.

Defendant conducts substantial and continuous business in the Northern District of Georgia, is subject to personal jurisdiction in Georgia and therefore “resides” in this District within the meaning of 28 U.S.C. § 1391(c). Venue is also proper in this judicial district under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the claims alleged herein occurred in this District, as Cbeyond is headquartered in this District.

FACTS COMMON TO ALL CLAIMS

13. Cbeyond is a LEC engaged in the business of providing telecommunications services and telecommunications related services in, among other places, the states of Georgia, California, Colorado, Florida, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Texas, Virginia and Washington.

14. The present action involves Verizon Business’s refusal to pay Cbeyond the lawful rates for the use of Cbeyond’s network to either originate or terminate long distance telephone traffic carried by Verizon Business for its long distance customers.

15. A long distance telephone call “originates” with an end user who places a call and “terminates” with a different end user who answers that call.

16. An IXC that carries a long distance call is required to compensate LECs for the use of their networks in originating or terminating calls for the IXC’s long distance customers.

17. This intercarrier compensation for long distance calls is generally referred to as “access charges.”

18. Cbeyond is a common carrier.

19. The duty of all common carriers, whether they are telecommunications, railway or bus carriers, is to offer service in a non-discriminatory fashion and at non-discriminatory rates.

20. Cbeyond accomplishes its obligation to provide telecommunications services at a non-discriminatory rate by, among other things, setting forth its access charge rates in a tariff filed with the appropriate regulatory authority.

21. In addition to having the force of law, Cbeyond’s filed tariffs are contract offerings equally available to all customers (in this case, all IXCs).

22. When an IXC uses Cbeyond’s service, it is agreeing to pay the contract rate for that service, as set forth in the applicable tariff.

23. A customer cannot choose to use a service and then refuse to pay the contract/tariff rate for the service, and instead make up its own rate.

24. Not only does Verizon Business's behavior damage Cbeyond, by unilaterally choosing to pay a rate less than its competitors pay, Verizon Business provides itself with an unfair advantage over its competitors who pay the tariff rate.

A. Cbeyond's Filed Tariffs for the Access Charges at Issue

25. From prior to August 1, 2010 through the date of the filing of this action, Cbeyond had a tariff on file with the FCC that established the access charge rate Cbeyond would bill IXC's for the use of Cbeyond's network when the IXC's customer's made interstate long distance calls that either originated or terminated on Cbeyond's network.

26. Cbeyond's tariff filed with the FCC provides that Cbeyond shall charge IXC's the following per minute of use rates for the use of Cbeyond's network to originate or terminate, directly connected, interstate long distance calls for an IXC:

<u>State:</u>	Cbeyond FCC Tariffed Switched Access Rate <u>Per Minute of Use:</u>
California	\$0.007844

Colorado	\$0.003312
District of Columbia	\$0.003895
Florida	\$0.003746
Georgia	\$0.003746
Illinois	\$0.003778
Maryland	\$0.003895
Massachusetts	\$0.003895
Michigan	\$0.003778
Minnesota	\$0.003312
Texas (SBC Area)	\$0.003599
Texas (Verizon Area)	\$0.003022
Virginia	\$0.003895
Washington (Qwest Area)	\$0.003312
Washington (Frontier Area)	\$0.002276

27. From prior to August 1, 2010 through the date of the filing of this action, Cbeyond had filed tariffs with the appropriate state regulating authorities setting forth the compensation that an IXC would owe to Cbeyond when the IXC's intrastate long distance calls used Cbeyond's network to originate or terminate

such calls in the states of Georgia, California, Colorado, Florida, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Texas, Virginia and Washington.

28. From prior to August 1, 2010 to the present, Verizon Business has carried interstate long distance calls where Cbeyond was the originating or terminating LEC, as well as intrastate calls where Cbeyond was the originating or terminating LEC in all of the following jurisdictions: Georgia, California, Colorado, Florida, Illinois, Maryland, Michigan, Minnesota, Texas, Virginia, Washington and the District of Columbia.

29. When Verizon Business carries a long distance call for its customers and that call originates or terminates on Cbeyond's network, Verizon Business is required to compensate Cbeyond.

30. Cbeyond has always billed and continues to bill Verizon Business the switched access rates contained in its applicable interstate and intrastate tariffs for long distance usage that Cbeyond has originated or terminated for Verizon Business.

31. Since Cbeyond's inception in 2001 and until August 2010, Verizon Business compensated Cbeyond pursuant to Cbeyond's filed tariff rates where Verizon Business's long distance calls either originated or terminated on Cbeyond's network.

B. Verizon Business Has Not Challenged Cbeyond's Tariffs

32. Pursuant to federal law, Cbeyond's filed tariffs have the force of law.

33. With respect to tariffs for interstate access charges, 47 U.S.C. § 204(a)(3) provides in pertinent part that LEC tariffs filed on 15 days notice (or seven days notice when rates are reduced in the new tariff) are "deemed lawful" following the notice period unless rejected or suspended and investigated by the FCC.

34. Pursuant to federal telecommunications law, a "tariff that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect." *ACS of Anchorage, Inc. v. F.C.C.*, 290 F.3d 403, 411 (D.C. Cir. 2002) (quoting *Implementation of Section 401(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, ¶ 19 (1997)).

35. Pursuant to federal law, a tariff filed with the FCC that takes effect without suspension or investigation remains lawful unless and until the FCC rules otherwise in a formal complaint proceeding under Section 208 of the Telecommunications Act of 1996 (the "Act") or a hearing before under Section 205 of the Act. *See, e.g., In the Matter Implementation of Section 402(b)(1)(A) of*

the Telecommunications Act of 1996, Order on Reconsideration, 17 FCC Rcd 17,040, September 12, 2002.

36. The FCC's regulations and procedures provide means whereby a party such as Verizon Business can challenge a LEC's FCC tariff, including Cbeyond's relevant FCC tariff at issue here.

37. Likewise, the relevant state regulatory authorities in all of the states mentioned above provide means whereby a party such as Verizon Business can challenge Cbeyond's state tariffs.

38. Verizon Business has not availed itself of the FCC procedures and mechanisms for challenging Cbeyond's FCC tariff.

39. That is, Verizon Business has not filed with the FCC any objection, complaint or other challenge to Cbeyond's tariff filed with the FCC.

40. Likewise, Verizon Business has not challenged, at the state regulatory level, any of the applicable state tariffs filed by Cbeyond.

41. Cbeyond's filed tariffs with the FCC and state regulatory authorities for the services at issue here have not been suspended or otherwise set aside by the FCC or any of the relevant state regulatory authorities.

42. Accordingly, Cbeyond's filed tariff rates for the services at issue here are conclusively presumed reasonable and Cbeyond's filed tariffs are "deemed lawful."

C. Verizon Business Refuses to Pay Cbeyond's Filed Tariff Rates

43. Nonetheless, in August 2010, Verizon Business informed Cbeyond that Verizon Business would no longer pay Cbeyond the tariff rates for Verizon Business's long distance calls that originated or terminated on Cbeyond's network.

44. Specifically, Verizon Business made up its own rate that it would pay for Cbeyond's services, purporting to unilaterally "re-rate" Cbeyond's intercarrier compensation charges down to a rate of \$0.0007 per minute of use. Verizon Business has "re-rated" Cbeyond's intercarrier compensation charges down to \$0.0007 per minute of use for interstate calls, as well as intrastate calls.

45. Thus, despite the fact that Verizon Business has used and continues to use Cbeyond's network and services to originate or terminate long distance calls from Verizon Business's customers, Verizon Business is refusing to pay the tariff rates for such charges.

46. To date, the difference between the amount Verizon Business has paid at its chosen rate of \$0.0007 per minute and the amounts due under the tariff rates exceeds \$900,000.00.

47. The FCC does not permit LECs to practice self-help by blocking or refusing to accept terminating traffic from IXCs that refuse to pay in accordance with an applicable tariff. Accordingly, Cbeyond continues to receive terminating long distance traffic from Verizon Business for which Verizon continues to make up its own rate.

48. Thus, Cbeyond is obligated to continue to provide services to Verizon Business by terminating long distance calls routed to Cbeyond by Verizon Business, even though Verizon Business refuses to pay Cbeyond its tariff rates for this service, and instead pays Cbeyond only at Verizon Business's chosen rate of \$0.0007 per minute of use.

49. Therefore, the total amount that Verizon Business refuses to pay Cbeyond continues to increase.

50. Verizon Business's continuing refusal to pay Cbeyond the proper tariff rates for long distance calls for which Cbeyond is the originating or terminating LEC has inflicted, and continues to inflict, substantial damage and hardship upon Cbeyond.

COUNT I

Collection Action Pursuant to Tariff Filed With FCC

51. Cbeyond hereby incorporates the allegations set forth in Paragraphs 1-50 of this Complaint as if set forth fully herein.

52. Cbeyond has filed a tariff with the FCC that sets forth the rates Cbeyond will charge IXC's such as Verizon Business for interstate long distance calls that originate or terminate on Cbeyond's network.

53. When Verizon Business carries interstate long distance phone calls for its customers and those calls either originate or terminate on Cbeyond's network, Verizon Business is required to compensate Cbeyond for such services at the rates set forth in Cbeyond's FCC tariff.

54. Verizon Business has, in fact, carried interstate long distance calls that originated and/or terminated on Cbeyond's network.

55. Cbeyond has billed Verizon Business for such calls at the rates set forth in Cbeyond's relevant tariff filed with the FCC.

56. Verizon Business refuses to compensate Cbeyond at the rates set forth in the FCC tariff when Verizon Business carries interstate long distance calls that originate or terminate on Cbeyond's network.

57. As a result, Verizon Business is liable to Cbeyond for the amounts it has underpaid, as well as the late fees specified in the tariff.

58. Cbeyond has been damaged by Verizon Business's refusal to pay for such services at the tariff rate in an amount to be proven at trial.

COUNT II

Collection Action Pursuant to State Tariffs

59. Cbeyond hereby incorporates the allegations set forth in Paragraphs 1-58 of this Complaint as if set forth fully herein.

60. Cbeyond has filed tariffs with the states of Georgia, California, Colorado, Florida, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Texas, Virginia and Washington that set forth the rate Cbeyond will charge IXC's such as Verizon Business for intrastate long distance calls that originate or terminate on Cbeyond's network.

61. When Verizon Business carries intrastate long distance phone calls for its customers and those calls either originate or terminate on Cbeyond's network, Verizon Business is required to compensate Cbeyond for such services at the rates set forth in the relevant state tariff.

62. Verizon Business has, in fact, carried intrastate long distance calls that originated and/or terminated on Cbeyond's network.

63. Cbeyond has billed Verizon Business for such calls at the rate set forth in Cbeyond's tariffs filed with the relevant state regulatory authority.

64. Verizon Business refuses to compensate Cbeyond at the rate set forth in the relevant state tariffs when Verizon Business carries intrastate long distance calls that originate or terminate on Cbeyond's network.

65. As a result, Verizon Business is liable to Cbeyond for the amounts it has underpaid, as well as the late fees specified in the tariffs.

66. Cbeyond has been damaged by Verizon Business's refusal to pay for such services at the tariff rates in an amount to be proven at trial.

COUNT III

Alternative Claim for Breach of Contract

67. Cbeyond hereby incorporates the allegations set forth in Paragraphs 1-66 of this Complaint as if set forth fully herein.

68. Cbeyond has filed tariffs establishing the applicable intercarrier compensation charges due to Cbeyond where it acts as the originating or terminating LEC for long distance calls.

69. These tariffs constitute binding contracts between Cbeyond and IXC's that carry long distance calls for which Cbeyond is the originating or terminating LEC.

70. Cbeyond has originated and terminated long distance calls for Verizon Business, for which Cbeyond has invoiced Verizon Business pursuant to the rates set forth in the applicable federal and state tariffs.

71. Verizon Business has refused to pay the invoiced amounts.

72. By failing to pay the rates required by the applicable tariffs as set forth in Cbeyond's invoices, Verizon Business has materially breached its contracts with Cbeyond.

73. As a result of Verizon Business's breach of these contracts, Cbeyond has suffered and will continue to suffer damages in an amount to be proven at trial.

COUNT IV

Alternative Claim for Breach of Implied Contract

74. Cbeyond hereby incorporates the allegations set forth in Paragraphs 1-73 of this Complaint as if set forth fully herein.

75. By making use of Cbeyond's network to either originate or terminate long distance calls, Verizon Business entered into an implied contract with Cbeyond to pay for such services at the tariff rate, as reflected in the invoices Cbeyond submitted to Verizon Business.

76. Verizon Business's conduct described above constitutes a breach of its implied contracts with Cbeyond.

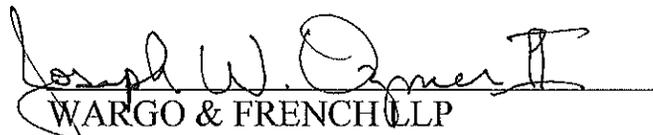
77. As a result of Verizon Business's breach of these implied contracts, Cbeyond has suffered and will continue to suffer damages in an amount to be shown at trial.

WHEREFORE, Cbeyond respectfully requests that this Court enter a judgment in favor of Cbeyond and against Verizon Business for damages, attorneys' fees, costs, expenses and prejudgment interest and post-judgment interest, and such additional and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff Cbeyond demands a trial by jury on all issues so triable.

Respectfully submitted, this 4th day of March, 2011.



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