

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

In the Matter of)	
)	
tw telecom, inc. Petition for Declaratory)	WC Docket No. 11-119
Ruling Regarding Direct IP-to-IP)	
Interconnection Pursuant To)	
Section 251(c) of the Communications Act)	

REPLY COMMENTS OF EARTHLINK, INC.

EarthLink, Inc., on behalf of its operating subsidiaries,¹ (“EarthLink”) submits these Reply Comments in support of the Petition for Declaratory Ruling (“Petition”) filed with the Commission on June 30, 2011, by tw telecom inc. (“TWTC”).²

I. INTRODUCTION AND SUMMARY

A key finding of the National Broadband Plan was that the Commission should take “expedited action” to clarify interconnection rights and obligations and encourage the shift to IP-IP interconnection where efficient.³ Because the Commission has failed to act, TWTC petitioned for a declaratory ruling to affirm its rights to IP-IP interconnection under section 251(c)(2). The

¹ EarthLink, Inc.’s operating subsidiaries include New Edge Networks, Inc., DeltaCom, Inc., Business Telecom, Inc., and the operating subsidiaries of One Communications Corp.

² *In the Matter of TW Telecom Inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act*, WC Docket No. 11-119, Petition (June 30, 2011) (“Petition”).

³ National Broadband Plan, at 36. To date, the Commission has only clarified interconnection rights by issuing a declaratory ruling affirming that rural LECs are obligated to comply with their section 251(a) and (b) duties. *See Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended, A National Broadband Plan for Our Future, Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling, WC Docket No. 10-143, GN Docket No. 09-51, CC Docket No. 01-92, FCC 11-83 (rel. May 26, 2011).

Commission should reject AT&T's and Verizon's objections and grant TWTC's petition. Even assuming, *arguendo*, that interconnected VoIP may be classified as an information service generally, TWTC could still exercise its section 251(c)(2) rights either by holding itself out as offering a telecommunications service or exchanging its information service traffic through the same interconnection arrangement it established for the exchange of telecommunications services. Notwithstanding their "unbuilt" network argument, the RBOCs admit that they have deployed IP networks, either directly or through their affiliates. The Commission's rules require the RBOCs to modify those networks, if necessary, to accommodate technically feasible IP-IP interconnection requests.

EarthLink continues to advocate that the Commission adopt the detailed legal analysis that confirms IP-IP interconnection is a section 251(c)(2) right and obligation. Competitive carriers with established section 251(c)(2) arrangements cannot be forced to negotiate separate commercial arrangements merely because the industry is moving from mixed TDM and IP to primarily IP-based networks. The transition to IP network technology will continue over an extended period of time with carriers executing conversions and network expansions to support their individual business strategies. Where carriers have deployed IP facilities to connect end users to their network and to connect switches (packet and circuit) within their network, the benefits of deploying these broadband networks cannot be realized fully unless and until they are connected to other broadband networks via IP-IP interconnections for the exchange of voice traffic. The record in the universal service and intercarrier compensation proceeding confirms that IP-IP interconnections have lagged internal network deployments because of legal uncertainty. The Commission should remove this roadblock by granting TWTC's petition and affirming that requesting carriers may seek IP-IP interconnection with incumbents under section

251(c)(2). Providing certainty regarding IP-IP interconnection rights and obligations will spur new broadband investment by existing carriers and new entrants and support the objectives of the National Broadband Plan.

II. TWTC'S USE OF IP IN ITS NETWORK DOES NOT CHANGE ITS STATUS AS A REQUESTING CARRIER ENTITLED TO SECTION 251(C)(2) INTERCONNECTION

The Act's definition of "telecommunications service" is technologically neutral, nothing restricts it to TDM-based service offerings. "Telecommunications service" is the offering of transmission of *information of the user's choosing* without change in the form or content of the information as sent and received⁴ for a fee directly to the public, *regardless of facilities used*.⁵ As the Commission has determined, IP telephony services "enable real-time voice *transmission*."⁶

Providers such as TWTC may self-classify this transmission as a telecommunications service even if the FCC determines that the retail service qualifies as an information service. "The Commission, on numerous occasions, has determined that a particular service can be offered on a non-common carrier or common carrier basis at the service provider's option."⁷ For example, the FCC found that a facilities-based provider of broadband Internet access that self-provides telecommunications transmission as a part of its broadband offering is offering an integrated information service, not a telecommunications service, to the end user.⁸ The FCC

⁴ 47 U.S.C. 153 (43).

⁵ 47 U.S.C. 153(46).

⁶ *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, FCC 99-181, ¶ 177 (1999).

⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, at ¶ 94 & n.280 (2005) ("*Wireline Broadband Order*") (citing "several prior instances, [in which] the Commission has permitted carriers to decide how to offer a service (*i.e.*, as non-common or common carriage).").

⁸ *Id.*, at ¶¶ 104-105.

nevertheless permitted facilities-based providers to self-classify the integrated transmission component of their information service as a telecommunications service.⁹ The FCC gave facilities-based providers this flexibility in order “to enable facilities-based wireline Internet access providers to maximize their ability to deploy broadband Internet access services and facilities in competition with other platform providers.”¹⁰ Similarly, competitive carriers such as TWTC may self-classify their facilities-based VoIP service as a telecommunications service in order to exercise their section 251(c)(2) interconnection rights for the exchange of such traffic. Such flexibility will “maximize their ability to deploy... services and facilities in competition with other platform providers”¹¹ including incumbent LECs.

Even assuming, *arguendo*, that VoIP is an information service, carriers that provide telephone exchange service or exchange access through section 251(c)(2) interconnection arrangements are entitled to use such arrangements for any VoIP traffic. Section 251(c)(2) does not *limit* the use of such interconnection to only the transmission and routing of telephone exchange service and exchange access. As the Commission has explained, “the fact that a telecommunications carrier is also providing a non-telecommunications service is not dispositive of its [interconnection] rights.”¹² Rather, Commission rule 51.100(b) establishes the right of “a telecommunication carrier that has interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, [to] offer information services through the same

⁹ *Id.*, at ¶ 94.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513, n.39 (2007) (“Time Warner Cable Order”) (“we make clear that the rights of telecommunications carriers under sections 251(a) and (b) apply regardless of whether the telecommunications services are wholesale or retail”).

arrangement.”¹³ Requesting carriers such as TWTC have the right to utilize interconnection for the exchange of VoIP information services so long as they also offer a telecommunications service “through the same arrangement.”¹⁴ Indeed, many LECs that carry circuit-switched traffic carry VoIP traffic as well, and interconnect in TDM with other LECs to exchange both. To EarthLink’s knowledge, most LECs use a combination of IP and TDM end-user connections within their network. Verizon, for example, offers FIOS and traditional TDM end user connections. But EarthLink’s carrier operating subsidiaries do not have two separate interconnection arrangements with Verizon, one for FIOS and another for TDM. Rather, they exchange all voice traffic through the same section 251(c)(2) arrangement.

TWTC’s right to offer telecommunications and information services through the same arrangement does not depend on the *method of interconnection*, whether TDM or IP. As the Commission stated in the *Local Competition Order*, it would “be contrary to the pro-competitive spirit of the 1996 Act” to preclude a competitor “from offering information services in competition with the incumbent LEC under the same arrangement, thus increasing the transaction cost for the competitor.”¹⁵ Requiring competitive carriers to exchange telecommunications and VoIP services “through distinct facilities or agreements” would require them “to provide some services inefficiently.”¹⁶ Competitive carriers with established section 251(c)(2) arrangements cannot be forced to negotiate separate commercial arrangements merely

¹³ 47 C.F.R. § 51.100(b).

¹⁴ 47 C.F.R. § 51.100(b).

¹⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 995 (1996) (“First Local Competition Order”) (subsequent history omitted).

¹⁶ *Id.*

because they are upgrading their networks to include IP technology or want to change their interconnection method from TDM to IP.

III. THE RBOCS HAVE DEPLOYED IP IN THEIR NETWORKS AND MUST MODIFY SUCH NETWORKS TO ACCOMMODATE IP-IP INTERCONNECTION

TWTC is not requesting interconnection to a superior, as-yet-unbuilt network.¹⁷ AT&T, selectively quoting an Eighth Circuit order out of context, argues that the “Act requires access ‘only to an incumbent LEC’s *existing* network -- not to a yet unbuilt superior one.’”¹⁸ AT&T ignores that at the same time it struck the FCC’s “superior quality” rule, the Eighth Circuit “endorse[d] the Commission’s statement that ‘the obligations imposed by sections 251(c)(2) *include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.*’”¹⁹ Indeed, the “petitioners [*i.e.*, ILECs] themselves appear to acknowledge that the Act requires some modification of their facilities” to accommodate interconnection with competitors.²⁰

AT&T and Verizon ignore the Commission’s technically feasible rules, which have been upheld. Those rules provide that: “The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible.”²¹ The Commission interpreted “feasible” as meaning “capable of being

¹⁷ Comments of Verizon and Verizon Wireless, WC Docket No. 11-119, at 2, 8-11 (Aug. 15, 2011) (“Verizon Comments”).

¹⁸ Opposition of AT&T, WC Docket No. 11-119, at 9 (Aug. 15, 2011), *quoting Iowa Utilities Board, et al., v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) (“AT&T Comments”).

¹⁹ *Iowa Utilities Board*, 120 F.3d 813, n.33.

²⁰ *Id.*

²¹ 47 C.F.R § 51.5; First Local Competition Order, at ¶¶ 198-202.

accomplished or brought about; *possible*.”²² The Commission also determined that successful interconnection “at a particular point in a network, using particular facilities, is substantial evidence that interconnection or access is technically feasible at that point or at substantially similar points in networks employing substantially similar facilities.”²³ Finally, “previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or substantially similar points, *at that level of quality*.”²⁴ As the Eighth Circuit noted, the phrase “at least equal in quality,” “*establishes a floor* below which the quality of the interconnection may not go.”²⁵

Under current Commission rules, if an ILEC uses SIP, ATM or any other IP-to-IP interconnection methods in its network, or provides such interconnection to itself, affiliates or third parties, then such method is technically feasible and becomes a mandatory method and form of interconnection under section 251(c)(2).²⁶ Verizon’s comments state that its “ILEC network — and the equipment it uses for its own interconnection — remains *primarily* TDM-based.”²⁷ By implication, Verizon admits that it uses IP in its ILEC network and for its own interconnection. Because the Act mandates that an ILEC provide interconnection in a manner “at least equal in quality” to that provided by the ILEC to itself, any interconnection method

²² First Local Competition Order, at ¶ 202 (emphasis added).

²³ First Local Competition Order, at ¶ 204.

²⁴ *Id.* (emphasis added).

²⁵ *Iowa Utilities Board*, 120 F.3d 813.

²⁶ *See, also* 47 C.F.R. § 51.305(c)-(d) (“Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.”).

²⁷ Verizon Comments, at 9 (emphasis added).

implemented, even once, by an ILEC becomes a “floor” that establishes the required level of quality.²⁸

AT&T cannot deny that it uses IP in its networks. Its 2010 Annual Report boasts that “[o]ur third major growth platform is AT&T U-verse, an integrated set of services – high quality TV with unique features and functionality, high speed Internet, and voice – all delivered over an advanced Internet Protocol network.”²⁹ Although AT&T’s comments on TWTC’s petition do not admit to using IP in its ILEC networks, it confirms that it attempts to shelter such IP capabilities by locating them in its affiliates: “it is the ILECs’ affiliates (such as their long distance affiliates) that have deployed IP networks and are offering IP-based services (including VoIP services), and that are converting IP traffic to TDM for transmission and routing on the PSTN where necessary.”³⁰ Industry reports ignore any affiliate distinction, reporting that “AT&T is gearing up a full-blown SIP transport architecture and plans to peer with a select number of Tier 1 providers.”³¹ To the extent AT&T’s characterization of its IP interconnection capabilities is accurate, it still cannot escape its section 251(c)(2) duties to offer IP interconnection. The Commission has been reversed by the courts when allowing an RBOC “to avoid its Section 251(c) obligations by setting up a wholly owned affiliate to offer”³² services. The Court held that “to allow an ILEC to sideslip § 251(c)’s requirements by simply offering telecommunications services through

²⁸ 47 U.S.C. § 251(c)(2) (emphasis added); 47 C.F.R. § 51.305(a)(2).

²⁹ See, AT&T, Inc. 2010 Annual Report at 5-6.

³⁰ AT&T Comments, at 9.

³¹ Doug Mohny, *AT&T Discusses Its SIP Peering Architecture*, at 1 (Oct. 19, 2010) (“Unlike IP peering, AT&T doesn’t believe that SIP peering will be settlement-free. Instead, there will be a number of business models (i.e., rates) with SLAs included in the service.”).

³² CompTel April 18 Comments, at 8; *Association of Communications Enterprises v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001) (The FCC acted unreasonably in allowing statutory resale obligations under section 251(c)(4) to be avoided by providing certain advanced services through a subsidiary.).

a wholly owned affiliate seems to us a circumvention of the statutory scheme.”³³ Where AT&T uses IP technology for end user connections and offers wholesale SIP and IP interconnection interfaces, either directly through its ILECs or indirectly through its affiliates, it has “built” an IP network and must offer the same capabilities to requesting LECs such as TWTC under section 251(c)(2) and the Commission’s current rules. Assertions to the contrary by AT&T are an attempt to avoid their lawful obligations under the Act to the disadvantage of their competitors.

IV. CONCLUSION

Where carriers have deployed IP facilities to connect end users to their network and to connect switches (packet and circuit) within their network, the benefits of deploying these broadband networks cannot be fully realized unless and until they are connected to other broadband networks via IP-IP interconnections for the exchange of voice traffic. The Commission should grant TWTC’s petition and affirm that requesting carriers are entitled to IP-IP interconnection with incumbents under section 251(c)(2) for the exchange of voice traffic.

Respectfully submitted,

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³³ *Association of Communications Enterprises*, 235 F.3d at 666.