

October 12, 2011

**VIA ECFS**

***EX PARTE***

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW, Room TW-A325  
Washington, DC 20554

**Re: GN Docket No. 09-51; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, 06-122, 04-36; CC Docket Nos. 01-92, 96-45, 99-200, 96-98, 99-68**

Dear Ms. Dortch:

The undersigned, on behalf of Cbeyond, Inc., Integra Telecom, Inc., and tw telecom inc., (“Joint CLECs”) discussed intercarrier compensation reform on October 7, 2011 with Angie Kronenberg, legal advisor to Commissioner Mignon Clyburn, and on October 11, 2011 with Margaret McCarthy, legal advisor to Commissioner Michael Copps. During the discussions, I made two points.

*First*, I argued that the Commission should ensure that incumbent LECs are not granted a longer transition to the target rate for intercarrier compensation reform than competitive LECs are permitted. For example, under the price cap incumbent LECs’ America’s Broadband Connectivity Plan (“ILEC Plan”), incumbent LECs that experience significant net revenue losses as a result of intercarrier compensation reform are eligible to receive subsidies from the so-called access replacement mechanism (“ARM”).<sup>1</sup> Under the ILEC Plan, ARM subsidies are available until July 2020, even though all carriers (e.g., incumbent LECs, competitive LECs, and wireless carriers) must complete the transition to the target rate of \$.0007 by July 2017.<sup>2</sup> This means that incumbent LECs that receive subsidies from the ARM (“ARM ILECs”) have a seven and a half year transition to adjust to the target rate whereas competitive LECs that compete with such incumbent LECs have a five year transition to adjust to the target rate. As a result of the longer transition, until July 2020, an ARM ILEC would effectively be permitted to receive higher compensation for traffic terminated on the

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<sup>1</sup> See Letter from Robert W. Quinn, Jr., AT&T, et al., to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, 06-122, 04-36; CC Docket Nos. 01-92, 96-45, 99-200, 96-98, 99-68 (July 29, 2011) (“ILEC Plan”).

<sup>2</sup> See *id.*, Attachment A, at 11.

ARM ILEC network than a competitive LEC would receive for traffic terminated on the competitive LEC's network.<sup>3</sup> This is true even though competitive LECs likely experience at least as significant a proportional net loss of overall revenues as a result of intercarrier compensation reform as ARM ILECs.<sup>4</sup> Accordingly, the Commission should extend the transition from intrastate access rates to interstate access rate levels for competitive LECs by the amount of time necessary to ensure that competitive LECs reach the target rate on the date when the ARM is eliminated (e.g., by three years under the timeline proposed in the ILEC Plan). In this manner, the Commission would place incumbent LECs and competitive LECs on an equal footing.

*Second*, I argued that the Commission should do everything possible to establish the preconditions for efficient IP-to-IP interconnection for the exchange of VoIP traffic. At the very least, the Commission could rule that, if a firm offers facilities-based interconnected VoIP<sup>5</sup> as a telephone exchange telecommunications service or an exchange access telecommunications service, such a service provider would have the right to direct IP-to-IP interconnection with an ILEC under Section 251(c)(2).

This approach is consistent with the terms of Section 251(c)(2) and Commission precedent. Section 251(c)(2) states that an incumbent LEC has the duty to provide interconnection to "any requesting telecommunications carrier" for "the transmission and routing of telephone exchange service and exchange access."<sup>6</sup> The Commission has held that "[a] 'telephone exchange service' is a

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<sup>3</sup> The effective differential in ARM ILEC and competitive LEC rates is also inconsistent with the logic of the Commission's decision to permit competitive LECs to tariff interstate switched access rates that equal those of the incumbent LEC in whose territory the competitive LEC serves customers. *See Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, ¶¶ 45-63 (2001).

<sup>4</sup> Competitive LECs in some states have been permitted to charge intrastate access charges that exceed those of the incumbent LEC in the same state. In states where this is the case, the reduction of intrastate access rates to interstate access rate levels will cause competitive LECs to incur greater losses than incumbent LECs. Moreover, incumbent LECs have a broad base of differently situated customers from which to recover lost intercarrier compensation revenues and incumbent LECs face little or no competition in serving a material percentage of those customers. In contrast, competitive LECs face competition for every single customer they serve, thereby diminishing their ability to recover lost intercarrier compensation revenue from their customers.

<sup>5</sup> *See Petition for Declaratory Ruling of tw telecom inc.*, WC Docket No. 11-119, n.3 (June 30, 2011) (defining facilities-based interconnected VoIP in accord in Commission precedent).

<sup>6</sup> 47 U.S.C. § 251(c)(2).

type of ‘telecommunications service,’”<sup>7</sup> and that exchange access service is a telecommunications service.<sup>8</sup> The Commission has further held that packet-switched services can qualify as telephone exchange services and exchange access.<sup>9</sup> The Commission has also held that the incumbent LECs’ “interconnection obligations set forth in Section 251(c)(2) apply to packet-switched services” such as VoIP.<sup>10</sup> These precedents establish that a provider of facilities-based VoIP can certify to the Commission that its service is a telecommunications service as well as either a telephone exchange or exchange access service (“Qualifying VoIP”), thereby qualifying such a VoIP service provider for Section 251(c)(2) interconnection.

In particular, to meet the Qualifying VoIP criteria a service provider could certify in a simple filing with the FCC that its facilities-based interconnected VoIP service offers customers a telecommunications service consisting of (1) “intercommunicating service,” among customers in the same local exchange area for a fee (telephone exchange service) and/or (2) origination or termination to end users of telephone toll service (exchange access service).<sup>11</sup> A firm that files such a certification with the FCC would be eligible for direct IP-to-IP interconnection with an incumbent LEC pursuant to the requirements of Section 251(c)(2) and the Commission’s rules for the purpose of transmitting and routing the Qualifying VoIP traffic.<sup>12</sup> There would be no need to adopt any further requirements associated with IP-to-IP interconnection. The provider of Qualifying VoIP and the incumbent LEC would negotiate in good faith the technical arrangements needed to establish direct IP-to-IP interconnection in an interconnection agreement subject to the requirements and limitations of Sections 251 and 252. State commissions would serve as arbitrators of disputes between the parties regarding direct IP-to-IP interconnection. Finally, providers of Qualifying VoIP would of course be required to comply with the regulations that apply to a telecommunications service.

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<sup>7</sup> See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd. 385, n.41 (1999) (“*Advanced Services Order*”).

<sup>8</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15499, ¶ 356 (1996) (stating that “exchange access” is “a telecommunications service”).

<sup>9</sup> See *Advanced Services Order* n.72 (telephone exchange service), ¶¶ 36, 40-41 (exchange access).

<sup>10</sup> See *id.* ¶ 22.

<sup>11</sup> See 47 U.S.C. §§ 153(47), (16); *Advanced Services Order* ¶¶ 20-32, 35-45 (discussing the statutory definitions of telephone exchange service and exchange access).

<sup>12</sup> An incumbent LEC would not be permitted to evade this obligation by placing the facilities it uses to transmit and route VoIP traffic in a separate affiliate. See *Ass’n of Commc’ns. Enters. v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001), *amended by Ass’n of Commc’ns. Enters. v. FCC*, 2001 U.S. App. LEXIS 1499 (D.C. Cir. Jan. 18, 2001).

Requiring incumbent LECs to provide direct IP-to-IP interconnection for the transmission and routing of Qualifying VoIP service serves several important policy objectives. In the *National Broadband Plan*, the Commission stated that the current regulatory system “creates disincentives to migrate to all IP-based networks” and that Commission should determine “what actions it could take to encourage transitions to IP-to-IP interconnection where that is the most efficient approach.”<sup>13</sup> Enabling Qualifying VoIP service providers to directly interconnect with incumbent LECs under Section 251(c)(2) would advance the goal of encouraging “transitions to IP-to-IP interconnection.” The Commission has also held that deployment of VoIP has the effect of promoting deployment of broadband services, thereby advancing the policy goals of Section 706.<sup>14</sup> Thus, enabling Qualifying VoIP providers to interconnect with incumbent LECs pursuant to Section 251(c)(2) will spur the increased deployment of VoIP, thereby advancing the goals of Section 706.

Moreover, the Commission has in the past permitted service providers to voluntarily treat a service as a telecommunications service, thereby triggering certain rights. For example, in the *Wireline Classification Order*, the Commission classified broadband Internet access service as an information service, but the Commission stated that providers of broadband Internet access service would be permitted to voluntarily offer such services as telecommunications services.<sup>15</sup> Just as that policy advanced the Section 706 policy of spurring broadband by enabling providers of broadband Internet access services as telecommunications services to participate in NECA pooling, so, here, enabling VoIP providers to treat their VoIP service offerings as telecommunications services and telephone exchange/exchange access would advance the Section 706 policy of promoting the deployment of broadband packetized networks used to transmit VoIP traffic.

At the same time, this approach would not cause the Commission to impose any legal obligations on providers of VoIP service. Qualifying VoIP status would be entirely optional. Accordingly, the approach described herein would allow the Commission to leave to another day consideration of whether some or all VoIP services must be classified as telecommunications services. The approach would also allow the Commission to leave to another day the related question of the extent to which incumbent LECs should be required to provide interconnection under Section 251(c)(2) to providers of VoIP services that are not classified as telecommunications services.

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<sup>13</sup> See *Connecting America: The National Broadband Plan*, at 49 (rel. Mar. 16, 2010).

<sup>14</sup> See, e.g., *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 10245, ¶ 31 (2005) (stating that increasing “consumer demand for interconnected VoIP services” would “driv[e] demand for broadband connections, and consequently encourag[e] more broadband investment and deployment consistent with the goals of section 706”).

<sup>15</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, ¶ 90 (2005).

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Please do not hesitate to contact me at (202) 303-1111 if you have any questions or concerns regarding this submission.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones

*Counsel for Cbeyond, Inc., Integra Telecom, Inc.,  
and tw telecom inc.*

cc (via email): Angie Kronenberg  
Margaret McCarthy