

September 21, 2012

**VIA ECFS**

***EX PARTE***

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

**Re: *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; Universal Service Reform – Mobility Fund, WT Docket No. 10-208***

Dear Ms. Dortch:

Onvoy, Inc. (“Onvoy”) and its affiliate, 360networks (USA) inc. (“360networks”), through their undersigned counsel, submit this letter urging the Commission to grant in a timely manner their pending Petition for Clarification or Reconsideration (“Petition”)<sup>1</sup> of one aspect of the Commission’s *ICC/USF Reform Order*<sup>2</sup> in the above-captioned proceedings. Specifically, the Commission should promptly clarify that where a LEC has already entered into an interconnection agreement to exchange local and toll VoIP-PSTN traffic on a bill-and-keep basis with another provider of voice service, the default transitional rates adopted in the *Order* do not apply even if the agreement contains a change-of-

---

<sup>1</sup> Petition for Clarification or Reconsideration of Onvoy, Inc. and 360networks (USA) inc., WC Dkt. Nos. 10-90, *et al.* (filed Dec. 23, 2011) (“Petition”).

<sup>2</sup> *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (rel. Nov. 18, 2011) (“*ICC/USF Reform Order*” or “*Order*”).

law provision. Doing so will prevent inconsistent approaches stemming from, and significant time and money spent on, state arbitration proceedings interpreting such interconnection agreements.

The *ICC/USF Reform Order* unambiguously establishes a national policy in favor of exchanging voice traffic on a bill-and-keep basis.<sup>3</sup> As Onvoy and 360networks explained in the Petition, the *ICC/USF Reform Order* suggests that the Commission intended that parties in this situation continue exchanging traffic on a bill-and-keep basis despite such change-of-law provisions.<sup>4</sup> Allowing LECs that have already agreed to bill-and-keep arrangements to temporarily charge higher intercarrier compensation rates conflicts with the *Order's* policy objectives, including establishing bill-and-keep as the end goal.<sup>5</sup>

360networks currently exchanges local and toll VoIP-PSTN voice traffic with CenturyLink/Qwest pursuant to interconnection agreements in 15 states.<sup>6</sup> These agreements contain provisions requiring amendments to reflect changes in law. In light of the terms and underlying logic of the *ICC/USF Reform Order*, Onvoy and 360networks argued in the Petition that the Commission should either clarify or reconsider the *Order*, as necessary, to ensure that change-of-law provisions do not in fact require that LECs cease to honor preexisting bill-and-keep arrangements.

As Onvoy and 360networks have explained, CenturyLink's arguments opposing this outcome lack merit. CenturyLink argued that the Commission's transitional rates for VoIP-PSTN traffic are an "offset" to the significant revenue reductions required elsewhere in the *Order*.<sup>7</sup> But there is no basis

---

<sup>3</sup> See *Order* ¶¶ 736-759.

<sup>4</sup> See Petition at 2 (noting that the Commission repeatedly held that LECs are permitted to tariff the default transitional rates established in the *Order* for toll VoIP-PSTN traffic "in the absence of an agreement for different intercarrier compensation." (quoting *Order* ¶¶ 933, 944)); *id.* at 2-3 (noting this approach is consistent with the decision to bring access traffic within the framework of Section 251(b)(5) and that the *Order* states that "carriers remain free to enter into negotiated agreements that differ from the default rates . . . , consistent with the negotiated agreement framework that Congress envisioned for the 251(b)(5) regime to which access traffic is transitioned" (quoting *Order* ¶ 812)).

<sup>5</sup> See *id.* at 3 (noting that the Commission recognized that existing bill-and-keep arrangements in effect on December 29, 2011 would remain in place unless both parties mutually agreed to an alternative arrangement); Reply Comments of Onvoy, Inc., WC Dkt. Nos. 10-90, *et al.*, at 2-3 (filed Feb. 21, 2012) ("Onvoy Reply Comments") (discussing how the *Order* described the significant policy advantages of bill-and-keep (citing *Order* ¶¶ 738, 741, 742-752)).

<sup>6</sup> The states in which the carriers exchange voice traffic under bill-and-keep are Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

<sup>7</sup> See Opposition of CenturyLink, WC Dkt. Nos. 10-90, *et al.*, at 21 (filed Feb. 9, 2012) ("CenturyLink Opposition"); Onvoy Reply Comments at 3.

for this argument in the text of the *Order*.<sup>8</sup> Moreover, the purported “offset” would result in a deficit for net payers of new intercarrier compensation charges, who would experience an even greater revenue *reduction* under the *Order* if the Commission adopted CenturyLink’s interpretation.<sup>9</sup> And because carriers that voluntarily exchanged traffic in the past without charge are obviously not harmed by the requirement that they continue to do so, no “offset” is needed.<sup>10</sup>

Equally without merit is CenturyLink’s argument that granting Onvoy and 360network’s Petition would violate the *Mobile-Sierra* doctrine.<sup>11</sup> That doctrine grants the Commission authority to abrogate change-of-law provisions where doing so is necessary to prevent subversion of a policy objective established by the agency.<sup>12</sup> In the *ICC/USF Reform Order*, the Commission mandated comprehensive changes to the complex rules governing intercarrier compensation for the purpose of establishing bill-and-keep because it concluded that bill-and-keep is in the public interest.<sup>13</sup> In light of that conclusion, the Commission can abrogate change-of-law provisions that, if applied, would conflict with the transition to bill-and-keep.<sup>14</sup>

It is critical that the Commission exercises this authority soon to resolve the dispute between Onvoy/360networks and CenturyLink/Qwest. If the Commission does not do so, there is a significant risk that 360networks will be forced to arbitrate its interconnection agreements with CenturyLink/Qwest in the 15 states referenced above. This would be extremely costly and burdensome. 360networks estimates that it would incur \$50,000 to \$75,000 in outside counsel fees per state to arbitrate this issue, yielding a total cost to the company of between \$750,000 and \$1.13 million. Further, arbitration proceedings would be time-consuming and inefficient, potentially

---

<sup>8</sup> See Onvoy Reply Comments at 3.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See CenturyLink Opposition at 22. The Supreme Court established the *Mobile-Sierra* doctrine in two cases that both held that agencies can abrogate private contracts when doing so is in the public interest. See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956); *Fed. Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956).

<sup>12</sup> See Onvoy Reply Comments at 4 & n.12 (citing *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., LLC*, 425 F.3d 964, 969-70 (11th Cir. 2005)).

<sup>13</sup> See *id.* at 4.

<sup>14</sup> See *id.*

yielding different results in different states. These are precisely the costs and complex inconsistencies that the Commission sought to eliminate in establishing a national policy in favor of bill-and-keep.<sup>15</sup>

Accordingly, Onvoy and 360networks urge the Commission to promptly clarify that where parties to an interconnection agreement had contracted to exchange local and toll VoIP-PSTN traffic on a bill-and-keep basis, the *ICC/USF Reform Order*'s default transitional rates do not apply, regardless of any change-of-law provision in the agreement.

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

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones

Jessica Greffenius

*Counsel for Onvoy and 360networks*

cc (via email): Deena Shetler  
Victoria Goldberg  
Randy Clarke  
Pamela Arluk  
John Hunter  
Travis Litman

---

<sup>15</sup> See, e.g., *Order* ¶ 743 (“[B]ill-and-keep reduces the significant regulatory costs and uncertainty associated with [the Commission and/or state regulators] choosing [] a rate, which would require complicated, time consuming regulatory proceedings, based on factors such as demand elasticities for subscription and usage as well as the nature and extent of competition.”).