

November 2, 2012

VIA ECFS

NOTICE OF EX PARTE PRESENTATION

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; Developing an Unified Inter-carrier Compensation Regime, CC Docket No. 01-92; Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Legacy Telecommunications Requirements, WC Docket No. 12-61; Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services, WC Docket No. 12-60; Petition of tw telecom inc. et al. to Establish Regulatory Parity in the Provision of Non-TDM-Based Broadband Transmission Services, WC Docket No. 11-188; Petition for Declaratory Ruling That tw telecom inc. Has the Right to Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act, as Amended, for the Transmission and Routing of tw telecom’s Facilities-Based VoIP Services and IP-in-the-Middle Voice Services, WC Docket No. 11-119; Business Broadband Marketplace, WC Docket No. 10-188; Framework for Broadband Internet Service, GN Docket No. 10-127; Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act, WC Docket No. 09-223; Petition for Expedited Rulemaking to Adopt Rules Pertaining to the Provision by Regional Bell Operating Companies of Certain Network Elements Pursuant to 47 U.S.C. § 271(c)(2)(B) of the Act, WC Docket No. 09-222; Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 09-137; Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers, RM-11358; Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25; IP-Enabled Services, WC Docket No. 04-36*

Dear Ms. Dortch:

On November 1, 2012, Jerry James, CEO of COMPTTEL, Chris Murray, Senior Vice President of Public Policy for EarthLink, Inc., Roger Fleming of Northfork Strategies, LLC, representing Integra Telecom, Inc., Norina Moy, Director of Government Affairs for Sprint Nextel Corp., Lisa Youngers, Vice President and Assistant General Counsel, Federal Affairs, for XO Communications, LLC, and Thomas Jones of Willkie Farr & Gallagher LLP, outside counsel to Cbeyond, Inc., EarthLink, Inc., Integra Telecom, Inc., and tw telecom inc. (collectively, the “competitive provider participants”),

Colleen Boothby of Levine, Blaszak, Block & Boothby, LLP, outside counsel for Ad Hoc Telecommunications Users Committee (“Ad Hoc”), and John Bergmayer, Senior Staff Attorney for Public Knowledge (“Public Knowledge”) met with Commissioner Rosenworcel and Priscilla Delgado Argeris, Legal Advisor to Commissioner Rosenworcel. The purpose of the meeting was to discuss the appropriate means of encouraging a transition to a packet-mode Public Switched Telephone Network (“PSTN”) that is consistent with the Commission’s longstanding competition policy goals.

The competitive provider participants and Ad Hoc explained that American businesses are transitioning to packet-mode services such as Ethernet and Multiprotocol Label Switching (“MPLS”) services. Competitive providers have been aggressively deploying these services, and in so doing, spurring investment in broadband deployment by all providers of business broadband (both non-incumbent LECs and incumbent LECs) as well as increased adoption of broadband by business customers. In particular, competitors such as Cbeyond, EarthLink, Integra, Sprint, tw telecom, and XO are deploying packet-mode services of all capacities—from relatively low-capacity services (*e.g.*, 1 to 20 Mbps) for the vast number of locations with low-volume requirements to the highest capacity services at locations with substantial volume needs. These competitive providers—who have been at the forefront of bringing innovations to U.S. businesses for more than a decade—have introduced innovative packet-mode services that, for example, allow businesses to dynamically allocate bandwidth depending on their needs¹ and provide very high-capacity connections to meet the needs of the most sophisticated customers.² Competitors are also deploying packet-mode services to make cloud services cost-effective for small and medium-sized businesses.³

The competitive provider participants pointed out that competition, investment and innovation

¹ See, *e.g.*, Press Release, tw telecom inc., *tw telecom, Vertical Systems Group Present Oct. 23rd Webinar “Networks That Work Smarter: The Intelligent Network,”* Oct. 22, 2012, available at <http://newsroom.twtelecom.com/2012-10-22-tw-telecom-Vertical-Systems-Group-Present-Oct.-23rd-Webinar-Networks-That-Work-Smarter-The-Intelligent-Network> (describing tw telecom’s “Dynamic Capacity” solution, which allows customers of its packet-mode transmission services to “increase network capacity in seconds . . . and see the cost impacts of these changes so [businesses] can budget more closely and allocate costs more efficiently”).

² For example, XO’s “Wavelength” solution, with “[b]andwidth available up to 100 Gbps,” enables enterprise customers “to move large amounts of data, provide disaster recovery or large bandwidth redundancy, carry real-time video, connect large data centers, or provide near real-time transaction processing.” See XO Communications, *Wavelength*, available at <http://www.xo.com/services/network/Pages/wavelength.aspx> (last visited Oct. 26, 2012).

³ See, *e.g.*, Press Release, Cbeyond, Inc., *Cbeyond Offers Businesses More Secure, Customized Access to the Cloud*, Oct. 15, 2012, available at <http://www.cbeyond.net/press-releases/details/article/713317>; Press Release, EarthLink, Inc., *independenceIT Chooses EarthLink for Virtualized Cloud Hosting Services*, Sept. 25, 2012, available at http://www.earthlink.net/about/press/pressrelease_printpage.faces?id=925.

in business broadband face a serious threat as incumbent LECs transition their networks to packet-mode technology for two reasons. *First*, the largest incumbent LECs have interpreted the FCC's current interconnection policies to apply only to packet-mode services if those services are classified as telecommunications services.⁴ *Second*, the Commission's existing unbundling and special access policies are not technology neutral. Thanks in part to cherry-picking petitions filed by the biggest incumbent LECs, the Commission's rules apply only to DSn and conditioned copper loop last-mile facilities—not packet-mode last-mile facilities.⁵ Competitors already struggle to overcome the unreasonable pricing and practices of incumbent LECs over the inputs currently available to them in order to drive innovation and investment in packet-mode services for business customers. And if the Commission neglects to confirm, and where necessary, update its competition policies as PSTN transmission technologies transition to packet-mode, competitors will no longer have any forum to ensure they can obtain access to last-mile facilities and interconnection on reasonable rates, terms and conditions.⁶

⁴ See, e.g., Comments of AT&T, WC Dkt. Nos. 10-90 *et al.*, at 47-48 (filed Feb. 24, 2012) (arguing that only telecommunications carriers are “eligible to invoke Section 251 interconnection rights with circuit-switched ILECs”); Comments of Verizon, WC Dkt. Nos. 10-90 *et al.*, at 27-29 (filed Feb. 24, 2012) (asserting that the interconnection provisions of Sections 251(a) and (c) of the Act “all apply only to telecommunications carriers”).

⁵ See, e.g., Petition of tw telecom inc. *et al.* to Establish Regulatory Parity in the Provision of Non-TDM-Based Broadband Transmission Services, WC Dkt. No. 11-188, at 4-15 (filed Oct. 4, 2011) (discussing the FCC inaction that resulted in complete deregulation of Verizon's packet-mode special access services and the *Orders* that resulted in forbearance from dominant carrier regulation of several other incumbent LECs' packet-mode special access services); see also Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3), WC Dkt. No. 09-223, at 6-10 (filed Nov. 16, 2009) (discussing the *Orders* that resulted in the Commission's existing unbundling framework).

⁶ Incumbent LECs are already trying to eliminate the only remaining network unbundling and access rights upon which competitors can rely to provide business broadband. They are doing so by seeking to eliminate DSn service offerings. See, e.g., Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, and Chief Privacy Officer, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 10-90 *et al.*, Attachment, at 1 (filed Aug. 30, 2012) (“*AT&T August 30, 2012 Letter*”). They are also doing so by retiring copper loops. See, e.g., Verizon Regulatory – Network Disclosures, available at http://www2.verizon.com/regulatory/reg_ntw_dsc12012.html (last visited Oct. 23, 2012) (disclosing planned network changes, including retirement of copper facilities in Pennsylvania and Florida); CenturyLink Network Disclosure Announcement No. 12-004, “Copper Retirements in Florida, Illinois, Missouri, North Carolina, Pennsylvania, and Wisconsin” (posted May 14, 2012), available at http://www.centurylink.com/wholesale/downloads/2012/120508/12_004_Century_Link_Copper_Retirements_in_FL_IL_MO_NC_PA_and_WI.doc; CenturyLink Network Disclosure Announcement No. 12-003, “Copper Retirements in Arkansas, Illinois, and Pennsylvania” (posted Mar. 20, 2012), available at

The competitive provider participants and Ad Hoc explained that the result would be a steep dive off of a “business broadband cliff.” Competitors would be unable to serve the majority of business customer locations they serve today. Tens of thousands of American businesses would lose their broadband provider. Competitors would also be forced to decrease investment and innovation in business broadband. Importantly, incumbent LECs would also reduce their investments in business broadband. While competitors have pushed deployment and innovation in packet-mode services for businesses, incumbent LECs have sought to avoid cannibalizing their more profitable legacy business services, such as high-priced DS3 services. As a result, the largest incumbent LECs have deployed next-generation packet-mode business services more slowly than competitors and only in response to innovations by competitors. Elimination of competition-friendly policies will therefore diminish incumbent LECs’ incentives to invest in newer, more efficient business broadband services. Thus, failure to maintain market-opening policies in a packet-mode environment would cause a major reduction in investment and innovation throughout the business broadband marketplace.⁷

In order to avoid these severe consequences, the FCC should maintain several technology-neutral competition policies, as envisioned by the 1996 Act, that will safeguard competitors’ access and interconnection rights in a packet-mode environment. In so doing, the Commission will reaffirm its longstanding competitive policy objectives.

First, the competitive provider participants and Ad Hoc urged the FCC to ensure a technology-neutral approach to unbundling by applying the established impairment standard to packet-mode unbundled loops. Where competitors are impaired in the absence of packet-mode loops, the FCC should enforce reasonable unbundling policies.

http://www.centurylink.com/wholesale/downloads/2012/120314/12_003_Century_Link_Copper_Retirements_in_AR_IL_PA.doc. Moreover, some incumbent LECs have already claimed that there is no basis for voice interconnection because TDM-based voice services are being replaced with IP-based voice services. *See, e.g., AT&T August 30, 2012 Letter, Attachment, at 1-2.*

⁷ The history since the adoption of the Telecommunications Act of 1996 demonstrates that investment by competitors and incumbents decreases when market-opening regulations do not apply. As economists at Economics and Technology, Inc. have found, “‘competition unfriendly’” policies between 2002 and 2007 resulted in less broadband investment by both competitive LECs and incumbent LECs and fewer jobs in the telecommunications sector during that period than between 1996 and 2001. *See* Susan M. Gately *et al.*, Economics and Technology, Inc., *Regulation, Investment and Jobs: How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs*, at 1-3 & 6-11 (February 2010) (*attached to* Letter from Harold J. Feld, Legal Director, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 09-51, WC Dkt. Nos. 05-25, 06-172, 07-97, 09-135, 09-222, 09-223 (filed Feb. 12, 2012)). There is every reason to believe that the same fate awaits on the other side of the business broadband cliff.

Second, the competitive provider participants and Ad Hoc urged the Commission to maintain a technology-neutral approach to special access by applying appropriate price and non-price policies in product and geographic markets in which incumbent LECs have market power over packet-mode special access services. This approach is necessary because, as Ad Hoc's enterprise customer members have found, incumbent LECs are more likely to offer packet-mode services in response to requests for proposal in locations where the incumbent LEC faces competition from a competitive provider.

Furthermore, as EarthLink explained, Verizon in particular should have no objection to this approach because it has already told U.K. regulators that, as a purchaser of wholesale access inputs used to serve business customers in the U.K., "Verizon holds the view that continued regulatory controls must remain in place to safeguard access to the necessary wholesale inputs and thereby support competition to the benefit of customers."⁸ Verizon has also urged Ofcom to adopt appropriate price regulation where necessary because:

As a general principle, Verizon considers that the prices of core access products should be as low as possible in order to facilitate a genuinely competitive marketplace and drive down prices for customers. It is clear that the most effective way to achieve this is to ensure that operators who have [significant market power] in the relevant markets adhere to strict [price] controls.⁹

The same "general principle" should apply in the context of packet-mode special access inputs in the U.S.

Third, the competitive provider participants and Ad Hoc urged the FCC to pursue a technology-neutral approach to interconnection by ensuring that interconnection policies, which are fundamental to competition regardless of technology, are applied to packet-mode networks. This means, among other things, that incumbent LECs must provide competitive providers of voice service with direct interconnection to incumbent LECs' VoIP networks in IP format on reasonable rates, terms, and conditions.

Fourth, the competitive provider participants urged the Commission to adopt a technology-neutral approach to copper loop retirement so as to eliminate uneconomic and anti-competitive regulatory incentives for incumbent LECs to retire copper before the end of its useful life, especially in cases where no wholesale packet-mode last-mile facility is available on reasonable rates, terms, and conditions.

⁸ See Verizon Business Response to Ofcom – BCMR Call for inputs, at 1 (June 2011), available at <http://stakeholders.ofcom.org.uk/binaries/consultations/bcmr-inputs/responses/Verizon.pdf>.

⁹ *Id.* at 2-3.

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The competitive provider participants and Ad Hoc reiterated that if the FCC fails to reaffirm its longstanding competition goals in this manner, it will slow the very transition to a packet-mode PSTN that it seeks to encourage.

Finally, Public Knowledge agreed with the need to maintain technology-neutral competition policies – not in spite of, but indeed because of the ongoing transition to new technologies. Public Knowledge explained that the pro-competitive principles at the core of the telecommunications system and the current PSTN are not an artifact of earlier technologies, regulations, or business arrangements. These principles remain as necessary as ever to protect consumers by promoting competition. Direct interconnection policies, along with Commission policies that constrain incumbents' continued exercise of market power and anti-competitive conduct in their delivery of packet-mode services, are vital to continued broadband deployment and adoption. Such policies also will prevent disruption to current PSTN customers by ensuring that there is one unified phone system, and that one customer can call any other customer. They will promote universal and nondiscriminatory access to communication services as well as access to emergency services. In short, Public Knowledge emphasized that the values the PSTN promotes, and the goals it serves, are not limited to a particular technology. These values have just as much of a place in a packet-switched world as a circuit-switched world, and should endure regardless of whether calls and messages are delivered over fiber, copper, cable, or wireless.

Please do not hesitate to contact the undersigned if you have any questions or concerns regarding this submission.

Respectfully submitted,

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