

December 4, 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; 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; Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-23*

Dear Ms. Dortch:

This letter responds to two recently-filed petitions regarding the transition to a packet-mode PSTN: AT&T's petition to open a proceeding "concerning the TDM-to-IP transition"<sup>1</sup> and NTCA's petition to open a proceeding "to promote and sustain the ongoing TDM-to-IP transition."<sup>2</sup>

As explained below, in addressing the transition to a packet-mode, IP-based PSTN, the Commission should focus on the central remaining policy objective established in the National Broadband Plan—updating the Commission's competition policies to ensure that competitors are able to obtain incumbent LEC last mile facilities and interconnection on reasonable rates, terms and conditions. Updating competition policies is *the central challenge* posed by the transition to a packet-mode, IP-based PSTN. As one commentator recently explained, "The remedy" for limited investment and high prices in broadband in the U.S. "is straightforward: bring back real competition to the telecom industry. The Federal Communications Commission, the Justice Department and lawmakers have long said this is their goal. But absent new rules that promote vigorous competition among telecom companies, it simply won't happen."<sup>3</sup>

The AT&T petition seems to have been filed, at least in part, to distract the Commission from this challenge. AT&T proposes that the Commission open a "proceeding" (it does not specify what kind) to consider the elimination of Commission rules (including certain competition policies) and to conduct trials in sample wire centers for the purpose of studying the mechanics of the transition from TDM to packet-mode, IP-based services. But virtually every one of the policies that AT&T wants the Commission to address is already the subject of pending FCC proceedings. Moreover, AT&T fails to demonstrate why wire center trials would be necessary at any time, let alone years before consumers and businesses will be ready to cease purchasing TDM-based services of any kind. The Commission has no duty to waste its resources, or those of interested parties, on this distraction, and it should decline to do so.

In contrast to AT&T, NTCA appropriately observes that the Commission should focus on updating—not eliminating—its competition policies, among other policies, for a packet-mode, IP environment. NTCA is clearly correct that the Commission should retain its basic regulatory framework while assessing the extent to which individual rules and policies should be modified to suit a packet-mode environment. But it is not necessary at this time for the Commission to commence an omnibus rulemaking proceeding, as NTCA suggests, to address consumer

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<sup>1</sup> See AT&T Petition To Launch A Proceeding Concerning The TDM-To-IP Transition (filed Nov. 7, 2012) ("AT&T Petition").

<sup>2</sup> See Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution (filed Nov. 19, 2012) ("NTCA Petition").

<sup>3</sup> See David Cay Johnston, "Bad Connections," N.Y. Times (Nov. 27, 2012), available at [http://www.nytimes.com/2012/11/28/opinion/break-up-the-telecom-cartels.html?\\_r=0](http://www.nytimes.com/2012/11/28/opinion/break-up-the-telecom-cartels.html?_r=0).

protection and universal service as well as competition policies. Consumer protection and universal service issues are clearly important, but the Commission is already considering them in pending rulemaking and forbearance proceedings.<sup>4</sup> If for some reason it becomes apparent that these proceedings are insufficient to address some of the details associated with consumer protection and universal service in a packet-mode environment, the Commission can open a narrowly-tailored proceeding to address the missing pieces. For now, the Commission should focus its resources on the urgent, immediate task of updating its competition policies.

## **Background**

The National Broadband Plan established the objectives for the deployment and adoption of packet-mode, broadband services, applications and devices in the United States. Those broad objectives encompass the full range of relevant issues, including the promotion of competition, universal service reform, intercarrier compensation reform, lowering the barriers to deployment of local fiber facilities, ensuring access by the disabled to packet-mode services and devices, and spectrum policy reform. The Commission has now made considerable progress in advancing most of these policy objectives, but it has made virtually no progress toward establishing the preconditions for efficient wireline competition in a packet-mode environment.

The Commission's failure to update its competition policies poses serious problems for the broadband economy. As explained in the NBP, in order to "lay the foundation for America's broadband future," it is critical to promote competition in the wholesale wireline market.<sup>5</sup> Yet the Commission's existing rules do not achieve this objective in a packet-mode, IP-based environment:

Unfortunately, the FCC's current regulatory approach is a hodgepodge of wholesale access rights and pricing mechanisms that were developed without the benefit of a consistent, rigorous analytical framework. Similar network functionalities are regulated differently, based on the technology used. Therefore, while networks generally have been converging to integrated, packet-mode, largely-IP networks, regulatory policy regarding wholesale access has followed

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<sup>4</sup> See, e.g., Petition of USTelecom For Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Legacy Telecommunications Regulations, WC Docket No. 12-61, at 59-63 (filed Feb. 16, 2012) ("USTelecom Petition for Forbearance") (seeking forbearance from application of a wide range of Commission rules in a packet-mode, IP-based environment); *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (seeking comment on a wide range of issues associated with subsidizing broadband service) ("*ICC USF Transformation Order and FNPRM*").

<sup>5</sup> See FCC, Omnibus Broadband Initiative, Connecting America: The National Broadband Plan, GN Docket No. 09-51, at 47 (Mar. 16, 2010) ("NBP").

the opposite trajectory. This situation undermines longstanding competition policy objectives.<sup>6</sup>

In other words, the Commission's current wholesale wireline policies are not technology neutral. Unbundling requirements and special access rules apply to incumbent LEC TDM-based services, but they do not apply to packet-mode services. Yet the incumbent LECs have control over bottleneck packet-mode local transmission facilities just as they do TDM-based local transmission facilities. Similarly, incumbent LECs have insisted that Section 251(c)(2) does not govern direct interconnection of VoIP networks. Yet the incumbent LECs' vastly larger customer bases give them overwhelming leverage in interconnection negotiations in a VoIP environment just as is the case of a TDM environment. Thus, competitors' access to wireline local transmission facilities and interconnection "currently depends on factors that have little bearing on the economics of facilities-based competitive entry."<sup>7</sup>

Based on these concerns, the NBP recommended that the Commission take several key steps in order to "develop a cohesive and effective approach to advancing competition through [the FCC's] wholesale access policies."<sup>8</sup> Those steps include ensuring that incumbent LECs offer packet-mode services as well as fiber and conditioned copper local transmission facilities on just and reasonable terms and conditions.<sup>9</sup> The NBP also recommended that the Commission adopt rules ensuring that incumbent LECs offer interconnection for the exchange of VoIP traffic on just and reasonable terms and conditions.<sup>10</sup> None of these objectives has been achieved.

It is critical that the Commission now allocate the resources necessary to carry out the recommendations for competition policy in the NBP. The consequences for failing to do so would be severe. Competitive providers have been aggressively deploying packet-mode broadband services to business customers, and in so doing, they have been spurring investment by all providers of business broadband (both non-incumbent LECs and incumbent LECs) as well as increased adoption of broadband by business customers. But as incumbent LECs replace legacy TDM-based networks and copper facilities, to which current wholesale regulations apply, with packet-mode and fiber facilities, to which wholesale regulations do not apply, competitors will lose access to the last mile facilities and interconnection that have enabled them to drive deployment of packet-mode broadband services to American businesses. The result will be less competition, less innovation and less investment.<sup>11</sup>

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<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> *See id.* at 48.

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

<sup>10</sup> *See id.* at 49.

<sup>11</sup> 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

Updating Commission competition policies for a packet-mode environment will require the commitment of significant resources by the Commission and interested parties. The Commission is apparently working on a mandatory data request that will enable it (once again) to collect information from providers and purchasers of dedicated, high-capacity local transmission services. Once the Commission receives the data, it must analyze it and identify the relevant geographic and product markets in which the incumbent LECs have market power in the provision of packet-mode services. It must then design and implement policies that address this market power either by requiring incumbent LECs to provide competitors with regulated access to (1) conditioned copper and dark fiber local transmission facilities or, alternatively, (2) packet-mode local transmission facilities. In either case, Commission regulation must ensure that incumbent LECs offer the facilities or services on just and reasonable rates, terms and conditions.

Updating the Commission's competition policies also requires that it establish appropriate policies to ensure that incumbent LECs establish direct IP interconnection with providers of VoIP services. This should be accomplished by clarifying that incumbent LECs must provide such direct IP interconnection under Section 251(c)(2) of the Communications Act.

Given the importance of these undertakings, it should be clear that updating the Commission's last mile and interconnection policies for a packet-mode environment is the central remaining challenge of the transition from TDM to packet-mode, IP-based services. The Commission should allocate its scarce resources accordingly. Issues such as whether there should be a date certain by which TDM-based services are terminated and other related issues associated with the transition, while worthy of discussion at some point, cannot be allowed to divert the Commission's attention from the central issue of competition policy. This broader context should inform the Commission's consideration of the AT&T and NTCA petitions, each of which is discussed below.

### **AT&T Petition**

AT&T proposes that the Commission establish "a proceeding" to address the optimal means of ensuring the smooth transition of incumbent LECs' networks from TDM to packet-

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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)).

mode and IP.<sup>12</sup> As part of the proceeding, AT&T suggests that the Commission allow incumbent LECs to select individual wire centers in which to test the transition. This proposal suffers from numerous significant flaws that render it unworthy of serious consideration by the Commission.

*First*, AT&T ignores the need for the Commission to update its competition policies as part of the transition to packet-mode, IP-based networks.<sup>13</sup> It leaves the impression that the Commission's sole concern in the transition should be to ensure that incumbent LECs can disconnect purchasers of TDM-based services by a date certain. This is patently absurd. As explained, when incumbent LECs discontinue TDM-based services, competitors will lose the last mile and interconnection inputs that they currently use to serve business customers in every urban area in the country. Allowing incumbent LECs to cease offering TDM-based services and to replace copper with fiber facilities without at the same time updating wholesale regulations will have the effect of automatically stifling competition throughout the business market. Tens of thousands, possibly hundreds of thousands, of businesses will lose their broadband provider. Virtually all businesses will lose the benefit of competition from the firms that have been the key innovators in the provision of packet-mode, business broadband. The result would be a transition to *monopoly* packet-mode, IP-based services.

*Second*, AT&T suggests that its proposed "proceeding" be used to examine the application of certain existing FCC requirements in a packet-mode environment, but no such omnibus proceeding is necessary. For example, AT&T argues that the Commission should consider whether to apply its service discontinuance rules, notice-of-network-change rules, and equal access rules in a packet-mode environment.<sup>14</sup> But the Commission is already considering those issues the USTelecom Petition for Forbearance.<sup>15</sup> AT&T argues that the Commission should determine the regulatory status of IP-enabled services,<sup>16</sup> but that issue is already the subject of a long-pending rulemaking proceeding.<sup>17</sup> AT&T argues that the Commission should

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<sup>12</sup> See AT&T Petition at 20-23.

<sup>13</sup> The only references to competition policy in the AT&T Petition are the assertions that incumbent LECs should not be required to maintain legacy copper loops (*see id.* at 19) and that incumbent LECs should not be obligated to provide interconnection or transit service of any kind in the test wire centers (*see id.* at 21).

<sup>14</sup> See *id.* at 13-15, 18-19.

<sup>15</sup> See USTelecom Petition For Forbearance at 59-63. AT&T also vaguely states that the Commission should consider eliminating requirements relating to "ONA/CEI, record-keeping, accounting, guidebooks, payphones, and data collection" in its proposed "proceeding," (*see* AT&T Petition at 20), but the USTelecom Petition for Forbearance addresses virtually every one of these categories of regulations. See USTelecom Petition For Forbearance at 24-31 (ONA/CEI), 47-48 (record keeping), 31-43 (accounting), 51-56 (data collection).

<sup>16</sup> See AT&T Petition at 18.

<sup>17</sup> See *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

limit eligible telecommunications carrier service obligations to areas in which they receive universal service subsidies,<sup>18</sup> but the Commission is considering exactly this proposal in the *ICC USF Transformation* rulemaking proceeding.<sup>19</sup> Moreover, AT&T seeks elimination of state regulations,<sup>20</sup> but if AT&T wants the Commission to consider such arguments it should file a narrowly-tailored petition for preemption. Finally, AT&T argues that the Commission should consider elimination of existing dialing parity,<sup>21</sup> but if AT&T wants the Commission to consider such arguments it should file a petition for forbearance. In the meantime, if the Commission itself identifies specific requirements that it deems no longer necessary, it can eliminate them in a forbearance proceeding in initiates *sua sponte*. There is simply no reason to open a new, largely redundant and ill-defined proceeding to address such issues.

*Third*, wire center tests are both unnecessary and likely affirmatively harmful. The purported need for the tests is predicated on AT&T's assumption that it is necessary to adopt a date-certain by which all customers of legacy services must be required to abandon those services in favor of packet-mode, IP-based services. But it is not at all clear that this is the case. The PSTN has gone through many technology transitions, none of which required this approach. AT&T makes no attempt to demonstrate why this transition is any different from previous changes in technology. In addition, AT&T suggests that the wire center tests could be used to assess whether the existing regulations that it seeks to eliminate remain valid in a packet-mode environment.<sup>22</sup> But AT&T does not say why it is necessary to conduct elaborate sample wire center tests to make these assessments. As explained, virtually every one of these issues is already being considered in conventional agency rulemaking and forbearance proceedings. To the extent that other issues need to be addressed, further narrowly tailored proceedings would be fully sufficient for the task.

In addition, the wire center tests would divert significant resources away from the more pressing work of updating the Commission's competition policies. Choosing the test wire centers, designing the tests, conducting the tests, and analyzing the results of the tests would require an enormous allocation of Commission staff time and resources. In light of the limited benefits and massive resources required for this undertaking, it is hard to escape the impression that AT&T's primary goal is to divert attention away from the important work of updating the Commission's competition policies.

It is also worth emphasizing that AT&T's wire center test proposal would be inappropriate for assessing how to update the Commission's competition policies. As

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<sup>18</sup> See AT&T Petition at 15-18.

<sup>19</sup> See *ICC USF Transformation Order and FNPRM*, ¶¶ 1099-1101.

<sup>20</sup> See AT&T Petition at 15-18.

<sup>21</sup> See *id.* at 19.

<sup>22</sup> See *id.* at 20-23.

mentioned, that process must be conducted by systematically defining product and geographic markets, identifying areas of market failure and adopting appropriate policies to address such market failures. AT&T's and other incumbent LECs' conduct during a brief window of time in test wire centers would offer nothing of value to the analysis. Incumbent LECs would have a powerful incentive to be on their best behavior during the test periods, and their conduct during that time period would offer no basis for predicting their behavior in the future.

*Finally*, while the predicate for AT&T's petition is its planned investment in certain network upgrades, that investment in no way supports the petition. In particular, AT&T states that if consumer protection and competition policies apply (even in updated form) in a packet-mode environment, service providers will not invest in network upgrades.<sup>23</sup> But as the Commission has observed, maintaining competition policies gives incumbents and competitors alike the incentive to invest and innovate in order to remain competitive.<sup>24</sup> Thus, if the Commission were to decline to update its competition policies, as AT&T would like, incumbent LECs would have less incentive to upgrade their networks in packet-mode technology.<sup>25</sup> In fact, as many commentators have observed, AT&T's planned investment is actually quite modest.<sup>26</sup>

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<sup>23</sup> See e.g., AT&T Petition at 8 (stating that “at the margins,” “many” of AT&T's investments will “likely” be predicated on the expectation that the Commission will eliminate consumer protection and competition policies in a packet-mode environment).

<sup>24</sup> See *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160 in the Phoenix, Arizona MSA*, Memorandum Opinion and Order, 25 FCC Rcd 8622, ¶ 108 & n.313 (2010).

<sup>25</sup> Business Ethernet illustrates the point. For years, competitors have pushed the deployment of Ethernet to business customers while incumbent LECs, intent on protecting revenues from legacy services, limited their Ethernet offerings to locations where competitors offered those services. As competitors' Ethernet offerings expanded, incumbent LECs were forced to respond with further investments in their own Ethernet offerings. To be sure, if the Commission's existing competition policies were more effective, there would have been far more competition, investment and innovation in the business broadband market. But even the flawed policies in place today have spurred some competition, which in turn has accelerated incumbent LECs' networks upgrades to packet-mode service offerings for businesses.

<sup>26</sup> See Peter Svensson, Associated Press, *AT&T to Expand Wireless, Wired Broadband Reach* (Nov. 7, 2012), available at <http://www.google.com/hostednews/ap/article/ALeqM5jxe6GDZg8CYkbY-TDNIG0bWVO7Q?docId=4cd605f1d8ca4b23aacd044a748390a2> (“Not all of [AT&T's planned \$14 billion investment] represents an increase over AT&T's regular \$19 billion to \$20 billion in annual capital spending. The company expects to spend roughly \$22 billion a year for the next three years . . . before returning to more normal levels.”); *AT&T: Turning Off Copper to More than Half Territory, 99% POPs LTE in Territory, 90% Out, Fiber to Businesses, DSL Prime* (Nov. 12, 2012) available at <http://dslprime.com/dslprime/42-d/4871-atat-turning-off-copper-to-more-than-half-territory-99-pops-lte-in-territory-90-out-fiber-to-businesses> (“AT&T found some way to characterize [6 million] homes they've been reporting as served as now

AT&T will only increase its level of investment if it faces more competition. Thus, the best way to ensure that AT&T follows through on its planned investments and increases the level of those investments in the future is to update the Commission's competition policies.

### **NTCA Petition**

In its petition, NTCA asks the Commission to open a rulemaking proceeding to examine how to promote and sustain the “ongoing evolution” of the TDM network to a packet-mode, IP-based network. NTCA correctly observes that the transition to packet-mode, IP-based technology will not result in the “death of the PSTN” as some, including AT&T, have asserted, but rather the evolution of the technology used in the PSTN.<sup>27</sup> Accordingly, NTCA proposes that a rulemaking be initiated in which the Commission would assess how to modify its existing rules to promote the goals of the consumer protection, universal service and competition.<sup>28</sup>

While NTCA's petition is more sensibly framed than the AT&T petition, it seeks a proceeding that is overly broad and, at least at this point, unnecessary. The most important issues associated with the transition to packet-mode, IP-based networks are already being addressed in pending proceedings or will be addressed as part of Commission proceedings to update competition policies. The issues that NTCA suggests should be addressed in a rulemaking regarding the transition, namely application of service discontinuance and equal access in a packet-mode environment, are, as explained, already being addressed in the USTelecom forbearance petition proceeding.

In addition, NTCA argues that, in parallel with its proposed rulemaking regarding the transition to a packet-mode PSTN, the Commission should take affirmative steps to encourage investment in packet-mode, IP services. Those steps consist of clarifying that the interconnection regulations set forth in Sections 251 and 252 of the Act apply to IP traffic and services, ensuring that LECs can charge for the exchange of IP traffic through rates that allow them to recover their costs, and changing the universal service rules to subsidize stand-alone broadband services. Mandating IP-to-IP interconnection for the exchange of VoIP traffic should of course be among the Commission's highest priorities. The Commission should adopt that mandate promptly in the *ICC USF Transformation* proceeding as part of its new, updated competition policies for a packet-mode environment. Moreover, the Commission can consider NTCA's other proposals in that proceeding as well. There is no apparent reason to initiate a new rulemaking to address the issues raised by NTCA.

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unable to get service” in order to make the expansion of coverage to 33 million homes appear to be a larger increase from current levels).

<sup>27</sup> See NTCA Petition at 2.

<sup>28</sup> See *id.* at 11.

## **Conclusion**

The central remaining challenge for the Commission in connection with the transition from a TDM-based to a packet-mode, IP-based PSTN is the need to update its policies concerning last mile access and interconnection. Failure to update the Commission's competition policies in this manner will cripple competition, investment and innovation in the business broadband market. But as the Commission well knows, updating the competition rules will require the allocation of significant time and resources by the Commission and interested parties. The Commission must therefore remain laser-focused on this objective, and it must not waste scarce resources on new proceedings that are redundant of pending proceedings or that would involve unnecessary and unproductive market tests, such as those proposed by AT&T. To the extent that the Commission determines that one or more new proceedings regarding the transition to a packet-mode environment is necessary in order to consider issues other than updating competition policies, such proceedings should be narrowly tailored so as not to divert valuable resources from that primary objective.

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

Respectfully submitted,

/s/ Thomas Jones

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