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January 15, 2013

EX PARTE

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

Re: *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353; *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 Intercarrier 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 SuchDeployment 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:

The attached AT&T ex parte letter filed yesterday, January 14, 2013, responding to a December 4, 2012 letter filed by Cbeyond, EarthLink, Integra, and tw telecom ("Cbeyond letter"), was inadvertently filed in only one of the dockets where the Cbeyond letter was filed. I've attached here the ex parte letter which was meant to be filed in all of the above-referenced dockets.

Pursuant to section 1.1206 of the Commission's rules, this *ex parte* notification is being filed electronically for inclusion in the record of the above-referenced proceeding.

Sincerely,

/s/ Frank S. Simone

ATTACHMENT

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January 14, 2013

EX PARTE

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

Re: *Special Access Rates For Price Cap Local Exchange Carriers,*
WC Docket No. 05-25

Dear Ms. Dortch:

This submission responds to a recent *ex parte* letter filed by Cbeyond and several other CLECs[1] in opposition to AT&T's petition to launch a comprehensive empirical inquiry into the transition to all-Internet Protocol ("IP") networks.[2] Twenty-two times over the course of that ten-page letter, Cbeyond, Earthlink, Integra, and tw telecom urge the Commission to "update its competition policies" rather than open that inquiry. Their tiresome repetition of this phrase, however, does not obscure the fact that, in substance, they are calling for the precise opposite of an "update." They are actually asking the Commission to act adversely to the best interests of American consumers by slowing down the IP transition and applying legacy 1996-era regulations—adopted for a *voice*-centric environment in which ILECs owned 99% of access lines—to the emerging all-IP environment, in which ILECs have declining minority market shares and voice is just one application among many riding over converged *data*-centric networks. And they simultaneously ask the Commission to reject any empirical analysis, including AT&T's proposed wire-center trials, that would shed pragmatic light on the real-world utility of applying legacy regulatory obligations to the coming all-IP environment.

In a single stroke, therefore, these CLECs have revealed their opposition to two critical priorities of this Commission: expediting the IP transition for the benefit of all consumers, and conducting rigorous data-driven analyses to inform the Commission's regulatory decisions. Fortunately, in the days following this CLEC filing, the Commission advanced these priorities by establishing a new proceeding and a new Technology Transitions Policy Task Force to undertake precisely the inquiry that these CLECs resist: a coordinated, silo-shattering analysis of related IP-transition issues that are ready for resolution but have, until now, been considered only in myriad widely disparate proceedings.[3] That analysis will reveal that, far from seeking to "update

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1 Letter from Thomas Jones (counsel for Cbeyond, EarthLink, Integra, and tw telecom) to Marlene Dortch, WC Docket No. 10-90 *et al.* (filed Dec. 4, 2012) ("Cbeyond Letter").

2 AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353 (filed Nov. 7, 2012) ("AT&T Petition").

3 *See* "FCC Chairman Julius Genachowski Announces Formation of 'Technology Transitions Policy Task Force,'" News Release (Dec. 10, 2012), *available at*

competition policy," the CLECs' advocacy is both retrograde and deeply inimical to the interests of American consumers.

1. As AT&T has explained in its petition, the TDM-to-IP transition is the single most profound telecommunications development of the past twenty years. Whereas providers used to offer discrete communications services (such as video or voice) over separate single-purpose "cable" or "telephone" networks, all such services are increasingly offered as higher-layer applications running over unified broadband IP platforms. Such technological convergence is a boon for consumers. To begin with, IP networks are far more versatile and efficient than single-purpose networks. Just as important, convergence unleashes true competition—on the physical layer, it spurs head-to-head rivalry between facilities-based providers of competing broadband platforms; and, on the applications layer, it spurs similar head-to-head rivalry between independent providers of IP services.

Cbeyond et al. appear oblivious to these developments. In their view, "[t]he PSTN has gone through many technological transitions," and there is no reason to believe that "this transition is any different from previous changes in technology." Cbeyond Letter at 7. But this misses the whole point of the IP transition. The reason providers are investing billions in that transition is not to engraft different routing technology on the same standalone "telephone" network, but to *eliminate* any such standalone telephone network in favor of a converged IP ecosystem. And in that fully converged ecosystem, there will no longer be "ILECs" and "CLECs" and "cable companies"; there will instead be competing broadband ISPs, and voice will be merely one higher-layer application riding over alternative broadband networks.[4]

The prospect of such convergence appears positively anathema to these CLECs. At the same time that the FCC's Technical Advisory Council is urging the Commission to set an aggressive target of 2018 for the "PSTN sunset,"[5] these CLECs are quite explicitly asking the Commission to *avoid* any such sunset and to *slow down* the TDM-to-IP transition as much as possible. For example, they call it "patently absurd" even to suggest proposing a "date certain" by which providers can "discontinue TDM-based services." Cbeyond Letter at 6. But that suggestion did not originate with AT&T; instead, it is a core component of the TAC's recommendation and a corollary of the Commission's explicit desire to "facilitate the transition to an all-IP network."[6] Here, too, Cbeyond et al. reveal their true agenda: slowing down technological convergence and IP network upgrades, and thereby sacrificing consumer interests, in order to preserve their own TDM-based business plans as long as possible.

Public Notice, *Pleading Cycle Established on AT&T and NTCA Petitions*, GN Docket No. 12-353 (Dec. 14, 2012).

4 *See* Comments of AT&T, *Connect America Fund et al.*, WC Docket Nos. 10-90 *et al.*, at 40-41 (filed Feb. 24, 2012) ("AT&T FNPRM Comments"). All further references to "FNPRM Comments" refer to parties' comments in this docket, dated February 24, 2012.

5 Technology Advisory Council, *Status of Recommendations*, at 11, 15-16 (June 29, 2011), http://transition.fcc.gov/oet/tac/TACJune2011mtgfullpresentation.pdf.

6 Report & Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663, ¶ 783 (2011) ("*USF-ICC Transformation Order*").

2. As AT&T has explained, the IP transition will require reform of legacy regulatory obligations because ILECs cannot be expected to support two networks indefinitely, and phasing out the TDM network is necessary to promote investment in all-IP networks. Those observations, too, originate not with AT&T, but with the National Broadband Plan, which recognizes that "requiring an incumbent to maintain two networks" would "reduce[] the incentive for incumbents to deploy" next-generation facilities and would "siphon investments away from new networks and services."[7]

In the teeth of that finding, these CLECs argue (at 8) that extending the ILECs' monopoly-era regulatory burdens would somehow give them a *greater* "incentive to invest and innovate in order to remain competitive." But they make no serious effort to support that proposition, undoubtedly because it is as demonstrably false as it is contrary to judicial precedent.[8]

Consider the case of "Business Ethernet" services. The Cbeyond CLECs contend that the explosive success of these services somehow "illustrates the point" that increasing regulatory burdens would spur greater investment and innovation, but that success in fact proves the opposite proposition. As Cbeyond et al. acknowledge (at 8), CLECs are leading providers of Ethernet services, and ILECs have "respond[ed] with further investments in their own Ethernet offerings." Yet the Commission eliminated dominant-carrier regulation of the major ILECs' Ethernet services in 2007.[9] Although the CLECs claimed at the time that this decision would nip competitive Ethernet in the bud, it has had exactly the opposite effect: it has given CLECs and ILECs the incentives they need to deploy their own facilities-based Ethernet services. Indeed, when it analyzes the issue, the Commission will find that the Ethernet marketplace is not only booming, but exceptionally diverse, and that competitors to ILECs account for the clear majority

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[7] FCC, *Connecting America: The National Broadband Plan*, at 49, 59 (2010).

[8] *See, e.g.*, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398, 408, 414 (2004) (requiring incumbents to share facilities with new entrants is problematic because it "lessen[s] the incentive for the monopolist, the rival, or both to invest in … economically beneficial facilities"); *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) ("*USTA I*") (forced sharing "comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource"). The *Phoenix Forbearance Order*, on which Cbeyond et al. rely (at 8 n.24), cuts against their position, not for it. There the FCC found that maintaining ILEC regulatory obligations for *legacy* networks (so long as they remain in place) would increase ILEC incentives to build next-generation networks precisely because the Commission has "substantially limited" regulation of the latter networks. Memorandum Opinion & Order, *Petition of Qwest Corp. for Forbearance in the Phoenix MSA*, 25 FCC Rcd 8622, ¶ 108 (2010) (internal quotation marks omitted). The Commission would of course undermine that objective if, as Cbeyond et al. urge, it extended ILEC-specific obligations *to those next-generation networks*.

[9] *See generally* Memorandum Opinion and Order, *Petition of AT&T Inc. For Forbearance Under 47 U.S.C. § 160(c)*, 22 FCC Rcd 18705 (2007) ("*Enterprise Broadband Forbearance Order*"), *aff'd*, *Ad Hoc Telecomm. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

of Ethernet lines.[10] As a recent market analysis concluded, the cable CLECs "have grown rapidly over the last several years, from small business providers to recognized forces offering a wide range of network and managed services to the mid-market and large business market."[11] In short, it is patently implausible to claim, as Cbeyond does (at 8), that "there would have been far *more* competition, investment and innovation in the business broadband market" if only the FCC had saddled ILECs with extra regulatory burdens and allowed CLECs to piggy-back at will on ILEC investments.

The Cbeyond CLECs likewise cannot begin to support their related advocacy for reversing the Commission's even longer-standing policy of insulating Ethernet and other packet-switched services from unbundling mandates under 47 U.S.C. § 251(c)(3).[12] Since the *Triennial Review Order* of 2003, the Commission has concluded that forced sharing obligations for packetized infrastructure would do far more harm than good because they would suppress appropriate investment incentives and chill "the deployment of advanced services" without any commensurate benefit.[13] Again, this was plainly the right call: the Commission's light-touch regulatory approach to packetized facilities and services has succeeded at promoting innovation and facilities-based investment by ILECs and CLECs alike, and consumers have been the winners.

Against this backdrop, it is particularly ironic that these CLECs now call for "bring[ing] back real competition to the telecom industry." Cbeyond Letter at 2. In fact, "competition [in] the telecom industry" has never been stronger; that is why ILECs are hemorrhaging access lines year after year and now serve fewer than one third of U.S. households.[14] For these CLECs,

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10 Tellingly, one of the signatories to the Cbeyond CLEC letter—tw telecom—has boasted that "we are one of the top three market share providers of Business Ethernet in the country." tw telecom, Business Ethernet, http://www.twtelecom.com/telecom-solutions/voice-solutions/business-ethernet-services/ (last visited Jan. 3, 2013); *see also* PRNewswire, *tw telecom Launches Ubiquitous Availability of National Ethernet Solution for Carriers*, http://www.prnewswire.com/news-releases/tw-telecom-launches-ubiquitous-availability-of-national-ethernet-solution-for-carriers-183801431.html (last visited Jan. 3, 2013) (reporting that "tw telecom, . . . a leading provider of managed services, including Business Ethernet, converged and IP VPN solutions for enterprises throughout the U.S. and globally, today announced wide availability of its newest national Ethernet service solution . . . . tw telecom is the first to offer national E-Access Ethernet connectivity based on the new MEF 33 standards").

11 Charles Carr, Frost & Sullivan, *Time Warner Cable Business Class Winning the Hearts and Minds of Business* 3 (Nov. 2012).

12 *See* Letter from Chip Pickering, Capitol Resources LLC, *et al.*, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 et al., at 5 (filed Oct. 31, 2012).

13 *Enterprise Broadband Forbearance Order*, 22 FCC Rcd at 18710 ¶ 8 (citing Report & Order and Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, 18 FCC Rcd 16978, ¶¶ 272-95, 541 (2003), *aff'd in relevant part, United States Telecom Ass'n v. FCC,* 359 F.3d 554, 580-85 (D.C. Cir. 2004)).

14 *See* Reply Comments of AT&T, *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 14 (filed April 24, 2012) ("AT&T USTelecom Comments").

however, "real competition" is simply code for what the D.C. Circuit has aptly called "synthetic competition"—competition based on leasing other providers' facilities at regulated, below-market rates.[15] And the reason they try so hard to conceal the success of facilities-based competition is that it undermines their policy argument for synthetic competition, on which these CLECs have apparently staked their 1990s-era business plans.

3. These CLECs similarly urge the FCC to impose a new generation of interconnection obligations for IP networks, combined with TELRIC-style "cost" proceedings, on the theory that otherwise "incumbent LECs' vastly larger customer bases" would "give them overwhelming leverage in interconnection negotiations in a VoIP environment just as is the case [in] a TDM environment." Cbeyond Letter at 4, 9. This argument is untenable on two levels.

First, although these and other CLECs present IP-to-IP interconnection as a futuristic endeavor that could never succeed in the absence of regulatory compulsion, such interconnection has in fact been both ubiquitous and unregulated for decades, and it certainly does not need to be "updated" with a new generation of interconnection rules, cost proceedings, and intercarrier compensation disputes. Specifically, hundreds of thousands of IP networks have interconnected directly or indirectly since the dawn of the commercial Internet, all in the absence of any interconnection mandate from the United States or any other governmental or regulatory entity in the world. *See* AT&T FNPRM Comments at 10-16. Contrary to the CLEC's suggestions, the entire world found a way to interconnect to create the Internet as we know it without a single regulatory mandate, order or overseeing regulatory body. The result is the phenomenally successful modern Internet, whose constituent IP networks consist of the same physical facilities that providers use today to provide VoIP services, whether "managed" or "over-the-top." The same unregulated economic dynamics that produce efficient interconnection arrangements for the exchange of *non*-voice traffic will also continue to produce efficient interconnection arrangements for the exchange of voice traffic.

Indeed, every consumer with a Skype account has already experienced that phenomenon first-hand. When two Skype subscribers connect to the Internet via separate ISPs, their calls to each other go through—not because their ISPs have any regulatory obligation to interconnect (they do not), but because it is in their mutual self-interest to arrange for such interconnection. This is not to say that coordination between interconnecting VoIP providers will be straightforward or that the Commission will have no role in supervising it.

In this submission and others, the CLECs also try to justify unprecedented physical-layer regulation of IP networks by emphasizing the familiar distinction between "over-the-top" and "managed" VoIP. But that distinction is both exaggerated and exceptionally fluid. Both technological categories include higher-layer voice services that ride over the same physical-layer IP networks; the main difference is whether those networks give special treatment to "voice"-related IP packets within otherwise indivisible streams of "data"-related IP packets. *See* AT&T FNPRM Comments at 17-25. The success of over-the-top VoIP services such as Skype and Vonage establishes that over-the-top voice services and their associated packets do not need special packet-handling to provide acceptable quality services for mass market consumers.

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15 *USTA I*, 290 F.3d at 424 (noting the potential for "synthetic competition" to undermine "incentives for innovation and investment in facilities").

As Comcast has explained, moreover, even if some providers do continue to use special handling for plain-vanilla voice services, "technological changes" may well "blur the distinction" between "facilities-based" and over-the-top VoIP, including in the arrangements used for traffic exchanges. Comcast FNPRM Comments at 27. Indeed, Comcast adds, "*all* VoIP traffic may ultimately be exchanged *pursuant to the same peering and transit arrangements as other Internet traffic*." *Id.* (emphasis added). Comcast thus appropriately warns that interconnection regulation for any VoIP traffic "could suddenly catapult the Commission into the regulation of the Internet backbone, even if it agrees, as it should, that this is a line it should and will not cross." *Id.* In short, these CLECs' advocacy for "updating competition policy" would threaten to expose the Internet itself to the very regulatory dysfunction that characterized the last several decades of PSTN-based interconnection and intercarrier compensation disputes.

Second, even if there were some reason to treat "IP-to-IP interconnection for the exchange of VoIP traffic" differently from "IP-to-IP interconnection for the exchange of *all other* IP traffic" on the Internet, it would not remotely follow that ILECs would have "vastly larger customer bases" (Cbeyond Letter at 4) and should thus be subject to greater regulation than any other VoIP provider. The providers with "vastly larger" VoIP customer bases today are not ILECs at all, but over-the-top VoIP providers and cable companies. *See* AT&T USTelecom Comments at 15. Yet Cbeyond tellingly does *not* ask the Commission to subject Skype or Comcast to dominant-carrier regulation in their capacities as the largest over-the-top and largest managed VoIP providers, respectively. Nor could they. As the US Telecom Petition for Non-Dominance asserts, there is no *dominant communications service in the marketplace today*, let alone a service that remotely resembles the monopoly wireline voice monopolies of a generation ago.[16]

More generally, the category of "ILECs" is not a rational proxy for market power in any relevant market for IP-enabled services, just as the legal term "ILEC" does not accurately describe any class of ILEC-associated providers of VoIP and other information services (see AT&T FNPRM Comments at 39-41). For example, when Sprint (a Tier 1 backbone provider) interconnects with a mid-sized ILEC for the exchange of IP traffic, the mid-sized ILEC will obviously have no special negotiating leverage; if anything, Sprint will. The same will be true when Sprint, with its tens of millions of mobile subscribers, and the mid-sized ILEC transition all of their current voice subscribers to IP networks. Cbeyond et al. suggest that the mid-sized ILEC could somehow bully the much larger Sprint into accepting unfavorable interconnection arrangements, but that is implausible. Once again, Cbeyond makes these claims only because it clings to the perspective of 1996, when ILECs controlled 99% of local access lines rather than a rapidly dwindling minority share, and when interconnection arrangements were local rather than regional or global. That regional and global perspective is the only accurate one for the emerging all-IP environment because, as Sprint itself explains, scale economies will strongly favor exchanging even managed VoIP traffic in "locations where [providers] currently

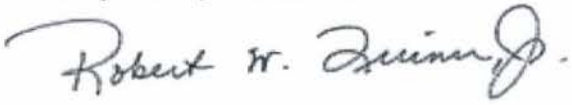
[16] Petition of USTelecom for Declaratory Ruling that Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services, WC Docket No. 13-3 (filed Dec. 19, 2012).

exchange[] non-voice IP traffic" rather than via "smaller (and much less efficient) interconnection facilities" used for the exchange of "IP voice traffic only."[17]

4. The final theme that pervades this CLEC letter is contempt for data-driven decisionmaking. These CLECs stress that several of the issues that AT&T's proposed trials would examine are presented in more abstract form in other FCC proceedings, some of which have been pending for many years. As an initial matter, it is precisely because these varied but integrally related issues are currently being considered in disconnected proceedings that a unified framework for considering them is needed, and the Commission itself decided as much when it launched the Technology Transitions Policy Task Force. AT&T filed its petition not to duplicate its prior submissions in existing proceedings, but to propose a coordinated framework for addressing these related issues and to offer a constructive means of testing the empirical disputes that various proceedings have generated. Whereas those other proceedings are high-level and abstract, the wire-center trials AT&T proposes here would be rigorously empirical, and they would provide otherwise unavailable insights into the real-world effects of different regulatory strategies.

According to these CLECs, however, nothing could be more pointless than "[c]hoosing the test wire centers, designing the tests, conducting the tests, and analyzing the results of the tests." Cbeyond Letter at 7. Yet this is the essence of reasoned agency decisionmaking: gathering the real-world experience needed to make educated decisions about whether particular forms of regulation are justified or not. The CLECs do not want the Commission to gain that experience because they fear that it will lead to a faster and more market-oriented transition to all-IP networks, and it will thus require these CLECs to wean themselves more quickly from their antiquated reliance on 20th-century ILEC networks. But that same outcome would do exactly what the Commission itself has called for: it would "facilitate the transition" away from those networks to the "all-IP" networks of the 21st century and, in the process, generate incalculable consumer benefits. *USF-ICC Transformation Order* ¶ 783.

Respectfully submitted,



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17 Sprint FNPRM Comments at 20, 22; *see also* XO FNPRM Comments at 2 ("the most efficient arrangements" for VoIP traffic exchanges "may ultimately include co-mingling voice traffic over current IP peering arrangements"); Cricket FNPRM Comments at 12 ("[T]hese same Internet exchange points and peering and transit arrangements are already used to carry IP-voice traffic today.").