September 25, 2013

VIA ECFS ***EX PARTE***

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

Re: ***Technology Transitions Policy Task Force*, GN Docket No. 13-5; *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition; Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution*, GN Docket No. 12-353; *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; *Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51**

Dear Ms. Dortch:

In recent filings in the above-referenced dockets, Verizon has attempted to manufacture a factual basis for the FCC to ignore the longstanding and well-established principle that incumbent LECs with large customer bases have no economic incentive to provide interconnection for the exchange of voice traffic on reasonable terms to their much smaller rivals. The undersigned carriers urge the Commission to reject Verizon's efforts, apply established principles of economic theory, and clarify that Section 251(c)(2) of the Communications Act applies to VoIP interconnection. This course of action represents the only way to ensure a timely and efficient transition from TDM-based interconnection to IP-based interconnection for voice services.

I. The Commission Should Base its VoIP Interconnection Policies on Established Principles of Economic Theory.

The FCC has a long history of relying on economic theory as the basis for its decisionmaking. This history dates back at least as far as the *Competitive Carrier* proceeding, in which the Commission established different regulatory frameworks for dominant and non-dominant carriers based upon "the well-established teachings of modern welfare economics."[1] Specifically, the Commission adopted a definition of market power (*i.e.*, the power to control

[1] *See Competitive Common Carrier Services (Classification of Carriers)*, First Report and Order, 85 FCC 2d 1, ¶ 55 (1980).

price)[2] that was (and still is) widely accepted in the economic literature. The FCC applied dominant carrier regulation to carriers that possess market power and non-dominant carrier regulation to those that do not possess market power. Importantly, after establishing this framework, the Commission did not revisit the definition of market power or reassess its established predictive judgment as to the inefficient incentives of firms with market power each time it classified a carrier as dominant. Doing so would have been wasteful and unnecessary.

Since the *Competitive Carrier* proceeding, the FCC has relied on longstanding economic principles as the basis for adopting prospective regulatory constraints on firms with market power in countless other contexts. For example, in implementing the local competition provisions of the Telecommunications Act of 1996, the Commission established rules to allow new competitors to share in the incumbent LECs' "economies of density, connectivity and scale."[3] Again, in so doing, the FCC did not need to reassess whether a firm with control over last mile facilities or with a much larger number of end user customers on its network had market power and the incentive to use that market power to raise rivals' costs to the detriment of consumer welfare. These principles were established and reliable bases for defining the local competition regulatory regime.

The Commission has also consistently relied on economic theory to determine the likely consequences for proposed mergers and, where appropriate, to adopt restrictions designed to prevent harms to consumer welfare posed by mergers. For example, in its order approving the merger of Bell Atlantic and NYNEX subject to conditions designed to protect local competition, the Commission relied on antitrust precedent and economic theory to assess the competitive effects of the proposed transaction.[4] Moreover, the agency did not second-guess the principles underlying this framework each time it subsequently reviewed mergers involving providers of wireline telecommunications services.[5]

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[2] *See id.* ¶ 56 (defining market power as "the control a firm can exercise in setting the price of its output" (citing F. M. Scherer, *Industrial Market Structure and Economic Performance* (2d Ed. 1980))).

[3] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and CMRS Providers*, First Report and Order, 11 FCC Rcd. 15499, ¶ 11 (1996) ("*Local Competition Order*").

[4] *See Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control*, Memorandum Opinion and Order, 12 FCC Rcd. 19985, ¶¶ 37-48 (1997).

[5] *See, e.g., Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control*, Memorandum Opinion and Order, 13 FCC Rcd. 18025, ¶¶ 15-22 (1998); *Applications of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶¶ 63-65 (1999) ("*SBC/Ameritech Merger Order*"); *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control*, Memorandum Opinion and Order, 15 FCC Rcd. 14032 ¶¶ 97-99 (2000).

As was the case in those instances, resolving the present question of whether to apply Section 251(c)(2) to VoIP interconnection simply requires the FCC to apply principles of economic theory that both the agency and outside economists have already determined to be valid. The Commission has acknowledged on several occasions that, due to the powerful network effects that exist in the market for voice services, "incumbent LECs have no economic incentive . . . to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services."[6] Rather, incumbent LECs have "strong incentives" to resist interconnection or charge competitors seeking to interconnect.[7] These incentives clearly do not depend on the transmission protocol of the traffic exchanged. Accordingly, it is not necessary for the Commission to conduct further tests to prove, again, the validity of these established principles. The Commission should instead clarify that Section 251(c)(2) applies to interconnection in IP format for the exchange of voice traffic.

II. <u>The Commission Should Reject Verizon's Attempt to Manufacture a Factual Basis for Ignoring Economic Theory.</u>

In recent filings, Verizon has argued that the well-understood economic consequences of network effects are somehow inapplicable to VoIP interconnection. Verizon claims that, contrary to these principles, its conduct demonstrates that it "has business incentives to pursue IP interconnection for VoIP traffic, and it will voluntarily negotiate commercial agreements in good faith."[8] This is nonsense. Verizon offers no basis for abandoning the economic principles governing interconnection policy merely because the protocols used to exchange traffic have changed. If anything, Verizon's conduct demonstrates the continued viability of those principles.

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[6] *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, ¶ 1337 (2011) (quoting *Local Competition Order* ¶ 55); *see also* Reply Comments of Cbeyond, EarthLink, Integra, Level 3 & tw telecom, GN Docket No. 13-5, at 7-11 (filed Aug. 7, 2013).

[7] *See id.*; *Local Competition Order* ¶ 1030 (noting that, prior to the application of interconnection obligations to traffic exchange between incumbent LECs and CMRS providers, "CMRS providers d[id] not receive reciprocal compensation for the transport and termination of traffic from incumbent LECs, and in some cases incumbent LECs require[d] CMRS providers to compensate the LEC for wireline-originated traffic terminated on their wireless systems"); *see also SBC/Ameritech Merger Order* ¶ 238 ("Because incumbent LECs compete with competitive LECs for the provision of retail local exchange services, incumbent LECs have the incentive to discriminate against competitive LECs that depend on the incumbents' inputs (such as interconnection and UNEs) to compete. We find that a discriminatory interconnection policy will be profitable for an incumbent LEC insofar as its revenue gains in the provision of retail local exchange services exceed whatever revenues it forgoes from wholesale interconnection with rivals.").

[8] Reply Comments of Verizon, GN Docket No. 13-5, at 5 (filed Aug. 7, 2013) ("Verizon Reply Comments").

First, Verizon relies heavily on its willingness to enter into one VoIP interconnection agreement as a basis for showing that it is ready and willing to enter into others.[9] However, the existence of this agreement in no way disproves the validity of the relevant economic theory. Indeed, one would expect Verizon to be willing to enter into a very small number of VoIP interconnection agreements with a favored few VoIP providers—likely those with very large customer bases—and the fact that Verizon's single VoIP interconnection agreement is with Comcast[10] is entirely consistent with this expectation. In addition, even as Verizon has trumpeted this agreement as evidence of its purportedly wholesome incentives, it has done everything in its power to prevent disclosure of the agreement's "highly valuable" terms, thereby increasing its ability to discriminate against other, smaller competitors in future negotiations.[11]

Furthermore, Verizon's single VoIP interconnection agreement stands in stark contrast with the many VoIP interconnection agreements that non-incumbent LECs have entered into with each other. For example, Sprint "currently has IP interconnection agreements with 12 major [non-incumbent LEC] carriers."[12] Similarly, tw telecom has entered into five VoIP interconnection agreements with non-incumbent LECs, including with one cable company. And Verizon is, of course, not alone among incumbent LECs in its efforts to delay these agreements. The AT&T and CenturyLink incumbent LECs have not identified a single VoIP interconnection agreement to which either is a party. Indeed, despite Sprint's success in establishing agreements with non-incumbent LECs and its apparent attempts to negotiate VoIP interconnection agreements with incumbent LECs, it "has yet to obtain IP-to-IP interconnection for voice traffic from any of the major ILECs."[13] All of the signatories to this letter are in the same position—not one of them has been able to obtain a VoIP interconnection agreement with an incumbent LEC.

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[9] *See id.* at 5-6.

[10] *See* Hearing Officer Ruling on Comcast Phone of Massachusetts, Inc. Petition to Intervene and Motion for Leave to Late File, *Investigation by the Department on its Own Motion to Determine whether an Agreement entered into by Verizon New England d/b/a Verizon Massachusetts is an Interconnection Agreement under 47 U.S.* C. *§ 251 requiring the Agreement to Be Filed with the Department for Approval in Accordance with 47 U.S. C.§ 252*, DTC 13-6, at 3-4 (August 9, 2013) (indicating that Comcast is the other signatory to Verizon's VoIP interconnection agreement), *available at* http://www.mass.gov/ocabr/docs/dtc/dockets/13-6/rulccastphninter.pdf.

[11] *Investigation by the Department on its Own Motion to Determine whether an Agreement entered into by Verizon New England Inc., d/b/a Verizon Massachusetts is an Interconnection Agreement under 47 U.S.C. § 251 Requiring the Agreement to be filed with the Department for Approval in Accordance with 47 U.S.C. § 252*, Verizon New England Inc., Motion for Confidential Treatment, Mass. D.T.C. 13-6, at 3 (filed May 30, 2013), *available at* http://www.mass.gov/ocabr/docs/dtc/dockets/13-6/vzmtnconfident.pdf.

[12] *See* Comments of Sprint, GN Docket No. 13-5, at 6 (filed July 8, 2013).

[13] *See id.* at 7.

Second, Verizon makes much of its offer to negotiate with competitors, arguing that the offer proves it has wholesome incentives to establish VoIP interconnection on efficient terms.[14] But it is no surprise that Verizon would be willing to engage in negotiations with the knowledge that, during such negotiations, it can deny any request for interconnection that does not place competitors at a competitive disadvantage. If anything, Verizon's offer to negotiate with competitors appears to have been timed to respond to the Commission's scrutiny of this issue. This supports the view, as XO observed, that only regulatory compulsion will cause Verizon to cooperate in establishing VoIP interconnection.[15]

Third, Verizon states that some competitors are avoiding VoIP interconnection negotiations solely to advance their objective of obtaining a clarification that Section 251(c)(2) applies to VoIP interconnection, but this is a mischaracterization of the competitors' conduct and motives. Cbeyond and tw telecom have both informed Verizon that they are willing to negotiate VoIP interconnection on reasonable terms and conditions.[16] However, Verizon has refused to allow these negotiations to proceed unless competitors sign non-disclosure agreements under which the parties are not permitted to disclose the content of the negotiations (even subject to a protective order) in proceedings like the above-referenced FCC proceedings in which regulators are considering the rules that should apply to VoIP interconnection. This tactic makes it impossible for competitors to seek the review of regulators if Verizon insists on unreasonable interconnection terms during negotiations. Competitors' attempts to persuade Verizon to take a more open approach have been unsuccessful. For example, Cbeyond explained to Verizon that it would engage in VoIP interconnection negotiations if the contents of the negotiations could be shared with the FCC and state regulators, subject to appropriate protective orders, in proceedings concerning the rules governing VoIP interconnection. Verizon refused, apparently because it is unwilling to sacrifice the leverage that closed-door negotiations would afford it.

In any event, to the extent that competitors have responded cautiously to Verizon's request to negotiate, that approach is entirely reasonable. The undersigned carriers have extensive experience in negotiating wholesale agreements with Verizon. Every such negotiation, even those involving interconnection agreements subject to the protections of Sections 251 and 252, has been slow and costly. Competitors run lean operations subject to strict resource allocation requirements, and an investment in expensive and time-consuming negotiations can only be justified where there is a reasonable likelihood that the undertaking will yield an

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[14] *See* Verizon Reply Comments at 5-7; Declaration of Stephen M. Owens and Jennifer E. Ross, at 2-5 (attached as "Attachment A" to Verizon Reply Comments) ("Owens & Ross Decl.").

[15] *See* Letter from Thomas Cohen & Edward A. Yorkgitis, Jr., Counsel for XO, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353, at 3 (filed Aug. 14, 2013) ("The value of a regulatory backstop could not have been demonstrated more plainly than by Verizon's behavior in the face of potential Commission action.").

[16] Integra does not operate in a significant portion of Verizon's incumbent LEC territory. As a result, Integra and Verizon have not pursued VoIP interconnection negotiations. EarthLink has discussed VoIP interconnection with Verizon, but the two companies have not yet engaged in formal negotiations.

agreement that benefits the business. Given Verizon's incentive to use its leverage to impose unfavorable interconnection terms on smaller competitors, it is entirely rational for competitors to seek legal protections against such conduct before pursuing negotiations.

III. The Commission Should Reject Verizon's Excuses for the Slow Pace of the Transition from TDM-Based Interconnection to IP-Based Interconnection.

Verizon insists that VoIP interconnection is occurring at an appropriate pace.[17] But this position simply reflects Verizon's view that such interconnection should occur when and how Verizon—rather than competition—dictates. Because the Commission has, at least so far, acquiesced to Verizon's view, the transition to VoIP interconnection is occurring more slowly and less efficiently than would be the case if market forces governed the transition.

To justify this delay, Verizon asserts that transitioning to VoIP interconnection requires lengthy and complex negotiations concerning the number, location, mode and capacity of interconnection points, the method of coding calls, and the method of indicating call signaling and set up information.[18] However, these issues clearly did not prevent Verizon from entering into its VoIP interconnection agreement with Comcast in early 2012 (indeed, Verizon implies that it has resolved many or all of these issues with Comcast),[19] and these issues have not prevented competitors from entering into numerous VoIP interconnection agreements with non-incumbent LECs across the country. Furthermore, Verizon claims that it has developed model VoIP interconnection templates that presumably address some or all of these issues,[20] but it has declined to make these templates publicly available. If Verizon were serious about promoting efficient and speedy VoIP interconnection, it would openly share its solutions to the obstacles that it claims are the cause for delay. Unfortunately, Verizon apparently has no intention of doing this. It would rather withhold disclosure of this information so that it can more effectively dictate when and how VoIP interconnection occurs.

* * *

The FCC has rightly concluded that incumbent LECs with large customer bases have no economic incentive to provide interconnection on reasonable terms to their much smaller rivals. Verizon's conduct in the area of VoIP interconnection is entirely consistent with this principle. The only way that the Commission can address the incumbent LECs' slow-rolling tactics is to

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[17] *See* Verizon Reply Comments at 11-13.

[18] *Id.* at 11-12.

[19] If Verizon's agreement with Comcast were made publically available and found to be subject to state-supervised arbitration and the exercise of opt-in rights under Section 252(i) of the Communications Act, transaction costs would significantly diminish as competitors would not have to reinvent the wheel each time they attempted to negotiate these terms with Verizon.

[20] *See* Owens & Ross Decl. ¶ 8.

clarify that Section 251(c)(2) applies to VoIP interconnection. Doing so will enable competitors that have fully embraced and promoted the transition to VoIP networks to enter into VoIP interconnection arrangements with Verizon even if Verizon would prefer to delay this process.

Respectfully submitted,

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