

May 14, 2014

VIA ECFS

EX PARTE

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

Re: *GN Docket Nos. 13-5, 12-353*

Dear Ms. Dortch:

On May 14, 2014, Joe Cavender, of Level 3 Communications, LLC, Roger Fleming, representing Integra Telecom, Inc., and the undersigned, representing Cbeyond, Inc. (“Cbeyond”), Integra Telecom, Inc., Level 3 Communications, LLC and tw telecom inc. (“tw telecom”), met with Linda Oliver, Tim Stelzig, Matthew DelNero, and Michele Berlove. In addition, Greg Darnell of Cbeyond and Julia Strow representing Cbeyond, and Rochelle Jones of tw telecom participated in the meeting by phone. Jerry Watts of EarthLink, Inc. listened to a portion of the meeting by phone, but did not participate in the discussion. During the meeting, we made the points outlined in the attached document regarding the AT&T proposal for a technology experiment.¹

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

Respectfully submitted,

/s/ Thomas Jones

cc: Meeting participants

¹ See AT&T Proposal for Wire Center Trials, GN Docket Nos. 13-5 & 12-353 (filed Feb 27, 2014).

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- I. The FCC should ensure that the benefits of AT&T's proposed Experiment outweigh the costs; those costs are considerable given that:
 - a. Assessing the Proposal and, if approved, overseeing the Experiment requires allocation of significant FCC resources and diverts such resources away from other important Commission responsibilities;
 - b. Competitors and other interested parties must incur the considerable costs associated with participating in the FCC proceeding and, to the extent they operate in the wire centers chosen for the Experiment, they will likely need to participate in the Experiment itself; and
 - c. Customers in the chosen wire centers must participate in the Experiment, and may be harmed in doing so

- II. In the Technology Experiments Order ("TEO")², the FCC established detailed, mandatory conditions applicable to wholesale services provided by an incumbent LEC as part of an Experiment
 - a. "[I]n evaluating proposals, it will be critical for the Commission to understand: (1) the applicant's plan to ensure that the same types of wholesale customers can continue to use its network; (2) the applicant's plan to ensure that the access provided during the experiment -- whether provided through unbundling, resale, or purchase of special access -- is functionally equivalent to that provided immediately before the experiment; (3) the applicant's plan to ensure that the prices or costs of such access do not increase as a result of the experiment; (4) the applicant's plan to ensure that neither wholesale nor retail customers are penalized as a result of the experiment (e.g., purchases of alternative services count towards discounts for purchases outside of the experiment areas, early termination fees are waived if early termination is caused by the experiment); and (5) whether the experiment will have any other impact on the provider's wholesale customers." (TEO, App B ¶ 35)

- III. AT&T failed to comply with these conditions
 - a. AT&T refuses to disclose the price, terms, and conditions on which it plans to make Ethernet available in the wire centers chosen for the Experiment
 - b. This makes it impossible for the FCC or customers to assess AT&T's compliance with the requirements set forth in paragraph 35 of Appendix B of the TEO

² See *Technology Transitions*, Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposed and Ongoing Data Initiative, GN Docket Nos 13-5, 12-353, WC Docket Nos. 10-90, 13-97, CG Docket Nos. 10-51, 03-123 (Rel. Jan. 31, 2014).

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- c. Such secrecy, if permitted, would provide AT&T an opportunity to engage in undetected abuse of market power

IV. AT&T's attempt to defend its approach in its reply comments is unpersuasive

- a. AT&T argued that the initial stage of the trial is voluntary for wholesalers, but this is not true as a practical matter:
 - i. CLECs know that they must plan ahead and begin buying packet-based services now in an area in which regulated DS1 and DS3 inputs might well be eliminated. Customers are far more efficiently transitioned at the beginning of a contract, rather than in the middle; most customer contracts are three years or more, so CLECs will want to rely on Ethernet at the beginning of the Experiment
- b. AT&T indicated that it is not necessary or appropriate to address the consequences of the elimination of DS1 or DS3 wholesale inputs until it files Section 214 applications for discontinuance; this misses the point:
 - i. If the FCC has a record of the ability of customers to purchase Ethernet *in lieu* of TDM over the initial stage of the experiment, it will be better able to evaluate whether Ethernet is an adequate alternative during the Section 214 process; such a record can only be fully developed if AT&T makes the rates, terms and conditions on which it offers Ethernet publicly available during the initial stage of the Experiment
 - ii. Non-disclosure provisions in "commercial agreements" for the wholesale purchase of Ethernet will likely prevent wholesale buyers from meaningfully participating in the 214 proceeding, and they will prevent the FCC from developing a full record during the Section 214 process
- c. AT&T's assertion that it is just following the law in its apparent plan to cease offering DS1 and DS3 services in the chosen wire centers is misleading:
 - i. The FCC relied on the availability of regulated DS1 and DS3 special access and UNEs as a key factor in eliminating regulation of packet-mode UNEs and Ethernet special access services
 - ii. At the same time, AT&T continues to have market power over the underlying physical connections to business customers
- d. FCC should not allow AT&T to proceed with its proposed Experiment unless and until AT&T does the following:
 - i. Offers access to wholesale packet-based local transmission services (e.g., Ethernet) on rates, terms, and conditions that are equivalent to those currently offered for DS1 and DS3 special access and UNE services

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- ii. Publicize those rates, terms and conditions
- iii. Establish a hot-cut process for converting DSn local transmission services purchased by wholesale customers to Ethernet
- iv. Explain how it will prevent wholesale customers from incurring penalties under special access purchase arrangements as result of switching from DSn to packet-mode
- v. Provide information regarding the availability of copper loops
- vi. Not assume the outcome of legal disputes -- e.g., assuming that VoIP is an information service