October 31, 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


Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(2)(iii), 47 C.F.R. § 1.1206(b)(2)(iii), and Section 1.4(e)(1), 47 C.F.R. § 1.4(e)(1), of the Commission’s rules, the undersigned submit this notice of ex parte presentation in the above-referenced proceedings. On October 25, 2012, the Honorable Chip Pickering
of Capitol Resources LLC, representing The Broadband Coalition, Julia Strow, Co-founder and Consultant to Cbeyond, Inc., Karen Reidy, Vice President of Regulatory Affairs for COMPTEL, Chris Murray, Senior Vice President of Public Policy for EarthLink, Inc., Roger Fleming of Northfork Strategies, LLC, representing Integra Telecom, Inc., Charles McKee, Vice President of Government Affairs, Federal & State Regulatory, for Sprint Nextel Corp., Don Shepheard, Vice President of Federal Regulatory for tw telecom inc., Patrick Thompson, Director of Legislative 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”), and Matt Wood, Policy Director for Free Press, and John Bergmayer, Senior Staff Attorney for Public Knowledge (collectively, “the public interest organization participants”) met with Nick Degani, Legal Advisor to Commissioner Pai. 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.

Congressman Pickering first explained that telecommunications policy in the U.S. has consistently favored competition over monopolies and duopolies. This has been true from the breakup of the Bell System, to the 1994 auction of PCS spectrum to replace a duopoly cellular service market with a market in which up to seven licensees competed in an MTA, to the passage of the 1996 Act. This policy has been extremely successful and yielded tremendous consumer welfare benefits. Those same benefits will result if the Commission’s longstanding competition objectives are maintained in the emerging packet-mode environment.

The competitive provider participants next 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

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customers. Competitors are also deploying packet-mode services to make cloud services cost-effective for small and medium-sized businesses.

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

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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).


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).
ensure they can obtain access to last-mile facilities and interconnection on reasonable rates, terms and conditions.6

The competitive provider participants 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

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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
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 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.

Second, the competitive provider participants 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. 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 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

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9 Id. at 2-3.
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.

The competitive provider participants 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, the public interest organization participants agreed with the need to maintain technology-neutral competition policies – not in spite of, but indeed because of the ongoing transition to new technologies. They 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, the public interest organization participants 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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