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December 15, 2003

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

Re: FCC Forum on Voice over Internet Protocol (VoIP)

Dear Ms. Dortch:

On behalf of a coalition of the below-named VoIP service providers ("Coalition"), we submit the attached comments to the Commission's VoIP Forum. We also are submitting the Comments electronically to voipforum@fcc.gov.

We realize that the Coalition's comments exceed the 1,000 word maximum noted on the Commission's VoIP website, but given that the comments are submitted on behalf of multiple parties, we request that the Commission accept the comments for the record.

The following companies are participating in these comments: BullDog Teleworks, Callipso, CommunicationsXchange, deltathree, Everest Broadband Networks, Go-Comm, M5 Networks, NorVergence, PingTone Communications, PointOne, Red Gap Communications and US Sonet/Lightspeed Telecom.

If you have any questions about this submission, please contact me at (202) 955-6680 or HubbardA@dsmo.com.

Sincerely yours,

Allan C. Hubbard

ACH/ncw
Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
FCC Forum on Voice over Internet Protocol (VoIP)	)

COMMENTS

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COMMENTS

These comments are being filed by a coalition of smaller, entrepreneurial VoIP service providers (the "Coalition") for consideration in the record of the Commission's December 1, 2003 VoIP forum.[1] The comments are intended as an articulation of a broad set of guiding principles and objectives for the Commission as it begins its consideration of the regulatory status of VoIP.

I. INTRODUCTION AND SUMMARY

Generally speaking, the members of the Coalition agree with the consensus views expressed at the forum. That is to say, there should be a unified, federal VoIP regulatory regime and the Commission should act to prevent the states from imposing multiple and inconsistent regulatory regimes of their own; the Commission should regulate, if at all, as lightly as possible by encouraging private industry and market-driven solutions to areas of concern (e.g., E911 and access for the disabled); and the

[1] The following companies are participating in these comments: BullDog Teleworks of New York, NY, Callipso of Simi Valley, CA, CommunicationsXchange of Tampa, FL, deltathree of New York, NY, Everest Broadband Networks of Fort Lee, NJ, Go-Comm of Dallas, TX, M5 Networks of New York, NY, NorVergence of Newark, NJ, PingTone Communications of Herndon, VA, PointOne of Austin, TX, Red Gap Communications of Dallas, TX and US Sonet/Lightspeed of Salem, IL.

Commission should maintain its current policies of not applying access charges to, or assessing universal service fees directly against, VoIP traffic until the Commission completes its comprehensive reevaluations of intercarrier compensation and the universal service contribution methodology.

There are, however, two additional issues—both involving the role of incumbent local exchange carriers ("ILECs") in VoIP—that were not mentioned at the forum, but which the Commission must address. First, while a regulatory "light touch" is the right course with respect to new entrant VoIP service providers, the Commission should not assume that ILEC VoIP services should be afforded the same treatment. New entrants lack market power and have a tiny fraction of market share compared to their powerful, entrenched competitors. The ILECs, by contrast, are dominant providers of local exchange services, have market power, and retain control of critical bottleneck facilities. Given that new entrants have driven—and will continue to drive—the innovation in VoIP service offerings, the Commission should not assume that all of the benefits of VoIP will be realized if the ILECs are allowed to re-monopolize the field. The Commission should thus consider whether a bifurcated regulatory approach is necessary to ensure that the ILECs' market power is sufficiently constrained to allow for the development of true competition. In a related vein, the Commission should also consider whether action is necessary to prevent other broadband providers, such as cable companies, from taking steps to deny access to VoIP providers.

Second, regardless of how the Commission ultimately decides to regulate the ILECs' provision of VoIP services, it must distinguish the regulation of ILEC VoIP end user service offerings from the ILECs' obligations to provide access to their bottleneck local loop and transport facilities over which the service is provisioned. As discussed

below, many if not most, of the members of the Coalition depend on access to bottleneck ILEC facilities to reach their customers. Unless the Commission acts to protect new entrant access to those facilities, start-up VoIP service providers will be unable to successfully compete with the entrenched ILECs—especially given that the ILECs have announced their own forays into VoIP as a means of freeing themselves from regulation of their retail service offerings. In particular, the Commission must act to stop the ILECs from unilaterally interpreting, and then engaging in self-help with respect to, the Commission's VoIP policies. Several of the members of the Coalition have either been denied service, or, worse, have had existing service terminated because of disputes over their proper regulatory status, particularly—though not exclusively—with respect to access charges. A particular practice that must be stopped is ILEC demands for the payment of access charges on VoIP traffic made to the competitive local exchange carriers ("CLECs") who provide local access to VoIP providers. CLECs often have no practical way of resisting those demands—which often are undocumented—and instead are forced to capitulate and curtail or terminate service to VoIP providers. The end result is that VoIP providers are effectively denied access to the public network, and thus to their customers.

The Coalition observes at the outset that VoIP is an umbrella term that embraces any number of distinct service platforms and architectures. As one of the panelists said during the forum, VoIP is not just a new way of sending information between telephone handsets; it is a fundamental expansion of the manner in which people communicate and the tools they use to do so. While the Coalition will, as the Commission has to date, use the term VoIP as a matter of convenience, one of the questions that the Commission must address is how to define VoIP in a meaningful manner. As many panelists

expressed at the forum, there are many types of VoIP and it may not be possible to apply a single over-arching definition to all of the various service architectures. Furthermore, the Commission will need to think carefully about how to incorporate all of the relevant architectures while excluding those architectures for which the lower level of regulatory scrutiny contemplated by the Commission is inappropriate. The definition must also take into account that VoIP is but one of many applications that are carried over convergent, IP-enabled networks.

II. THE COALITION IS COMPRISED OF ENTREPRENEURIAL VOIP SERVICE PROVIDERS

The Coalition is comprised of twelve companies that provide service to their customers using VoIP. All of the participants in these comments are new entrants focused on bringing innovative new VoIP technologies and services to the market. Unlike other coalitions of companies participating in the VoIP debate, none of the members of the Coalition are incumbent local or long distance providers or traditional equipment manufacturers.

While the companies comprising the Coalition represent a variety of business models, and employ several different variations of VoIP, one thing that many of the providers have in common is that they focus on service to small and medium-sized enterprises. As discussed in more detail below, the enterprise VoIP sector is in many ways distinct from the consumer sector. To date, and at the December 1st forum in particular, the Commission's attention has largely been focused on the consumer sector. In formulating its policies with respect to VoIP, the Commission must be cognizant of the distinguishing features of the enterprise VoIP service provider sector. The Commission should be sensitive to not regulating with such a broad brush that it

frustrates the continued development of innovative new services—and, indeed, entirely new methods of communicating—that integrate a VoIP-enabled voice component with other enterprise productivity applications.

III. THE COMMISSION SHOULD ESTABLISH A NATIONAL VOIP POLICY

No matter how the Commission ultimately defines VoIP, it is critical that the Commission act to ensure that VoIP is subject to a unified national policy. As the Commission is well aware, the past several months have seen a dramatic increase in the regulatory activity relating to VoIP at the state level. Several states have taken, or are considering taking, steps to regulate, to one degree or another, VoIP providers. The specter of VoIP providers being exposed to 50 different regulatory regimes while the industry is still in its infancy could significantly slow the pace of development and deployment. Being subject to state regulation would not only act as a direct drag on service providers and equipment manufacturers, it would also have the indirect, but potentially even more troubling, effect of stifling investment in the VoIP sector. Accordingly, the Commission should declare VoIP an interstate service subject to its exclusive jurisdiction. Given that VoIP is an umbrella term encompassing numerous architectures, in an order to avoid confusion and to eliminate the possibility of any ILEC mischief, the Commission should consider adopting a definition or definitions of VoIP services that clearly fall within its interstate jurisdiction.

At the same time, given the dominant position of the ILECs, the Commission should be cautious. The Commission may need to preempt in a manner consistent with preserving traditional state regulatory oversight over local exchange services and equivalent ILEC offerings.

IV. THE COMMISSION SHOULD REGULATE NEW ENTRANT VOIP SERVICE PROVIDERS WITH AS LIGHT A HAND AS POSSIBLE

A. A Hands-Off Approach To Regulating New Entrants Will Help Ensure The Continued Successful Development Of S Still-Nascent Industry

As several of the panelists at the Commission's VoIP forum observed, the policy that the Commission has observed to date of not subjecting VoIP to regulation has been a stunning success. By freeing VoIP new entrant service providers from having to comply with multiple regulatory regimes, the Commission has fostered an atmosphere of innovation. New entrants like the participants in these comments have developed and are bringing to consumers and businesses alike a vast array of entirely new methods of communicating. The continuation of the Commission's current non-regulatory approach is necessary to ensure the development of what is still a nascent industry and the continued success of innovative new entrant service providers. The Commission should thus begin its evaluation of the proper regulatory regime for VoIP from the premise that it should subject VoIP to regulation only if and where necessary. As discussed below, one thing that follows from such an approach is that it may be appropriate to adopt a bifurcated regulatory scheme that affirmatively encourages new entrants while imposing a higher degree of regulation on dominant providers employing VoIP technologies.

While the Commission's hands-off policy has been successful to date, uncertainty as to how long that policy will be kept in effect has to some extent clouded the business plans of, and investment opportunities available to, VoIP providers. To create regulatory certainly, and thus to ensure a stable business and investment environment, the Commission should consider adopting a set period of time during which it will maintain its current hands-off approach.

B. In Addressing The Policy Issues Identified At The Forum, The Commission Should Not Assume That Regulation Is Necessary

That said, the Coalition recognizes that, as each of the Commissioners and nearly every panelist pointed out, there are several important policy issues that the Commission must address with respect to VoIP, including E911, CALEA compliance, and access for the disabled. However, even with respect to those key policy areas, while regulation could be appropriate in some instances, that should not be the default assumption. The Commission should only regulate where necessary, which is to say where it is unlikely that the market, left to operate unfettered, will effectively address the concern. As the Commission heard at the forum, the VoIP industry is hard at work at developing innovative solutions to ensure E911 capability over packet networks. Consumers and enterprise customers are likely to impose market pressure for satisfactory E911 solutions. Indeed, as was widely reported in the press last week, Time Warner Cable has announced a national roll-out of VoIP services offered over its cable plant, and has said that the service will be E911 compatible. Likewise, with respect to CALEA compliance and access for the disabled, there are various industry initiatives underway and the Commission should allow those initiatives time to succeed before preemptively regulating.

C. The Commission Should Continue Its Policy of Not Applying Access Charges to VoIP Traffic Until It Completes Its Intercarrier Compensation Proceeding

Not only are there some cases where regulating now may be unnecessary, there are some cases where regulation at this juncture would be clearly detrimental. Access charges are one such instance. In its 1998 *Universal Service Report*, the Commission essentially decided to refrain from applying the telecommunications regulatory regime

to the subset of VoIP services that met its tentative definition of "phone-to-phone IP telephony" services until it had a more complete record on which to rule.[2] The Commission then went on to note that the ultimate categorization of VoIP (i.e. phone-to-phone IP telephony) was significant because a future finding that the services were telecommunications would open the possibility of imposing access charges.[3] Even then, the Commission was clear that the imposition of access charges would not be automatic; three additional conditions would need to be met: (1) a finding that "the providers of [VoIP] services obtain the same circuit-switched access obtained by other interexchange carriers;" (2) a further finding that VoIP providers "therefore impose the same burdens on the local exchange as do other interexchange carriers;" and (3) a determination that it would be "reasonable that they pay similar access charges."[4] The Commission concluded its discussion by saying that it would face "difficult and contested issues relating to the assessment of access charges," and concluded that it would "examine these issues more closely based on the more complete record developed in future proceedings."[5] The only fair reading of this discussion is that the Commission intended that access charges not apply to VoIP until it had the opportunity to reconsider the issue in a future proceeding.

Relying on the *Universal Service Report*, members of the Coalition have built business plans, obtained investment, and created access architectures based on the

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2 *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 90 (Apr. 10, 1998).

3 *Id.* ¶ 91.

4 *Id.*

5 *Id.*

assumption that access charges do not apply to their VoIP service offerings. It is critical that the Commission continue to adhere to that policy until it completes its pending intercarrier compensation proceeding. In that proceeding, the Commission is considering wholesale changes to, and possibly even the elimination of, the access charge regime. It would make no sense to disturb the Commission-engendered expectations of VoIP providers, their customers, and their investors to apply a regulatory scheme that the Commission is considering eliminating.

Not only should the Commission maintain its current policy with respect to access charges, the Commission should explicitly and forcefully rearticulate that policy to eliminate any possibility of abuse by the ILECs. Notwithstanding the clear articulation of the policy of non-application in the *Universal Service Report*, the ILECs continue to maintain that access charges apply to VoIP services, at least in certain instances. The ILECs have taken it upon themselves to police the traffic passed to them by VoIP providers (either directly or through an intervening carrier) and to make unilateral determinations as to whether the traffic is subject to access charges. Where the ILEC "determines" that access charges should apply, the ILEC will often either terminate service or threaten to terminate service to the VoIP provider or the intervening carrier. Several members of the Coalition have experienced this ILEC self-help first hand. In one instance, the CLEC providing PRI circuits to a member of the Coalition was forced to suspend service under threats by the ILEC that the ILEC would take steps to collect access charges on the traffic.

It would be hard to overstate the anticompetitive effects of even threatened service terminations. When, for example, an ILEC threatens a CLEC serving a VoIP provider with termination for failure to pay access charges on VoIP traffic, the CLEC

has two options: it can either stop serving its VoIP service provider customer and lose the associated revenue, or it must carry on its books the potential liability associated with the asserted claim for access charges. The result is a narrowing or, in some markets, the elimination of, the competitive alternatives to which VoIP providers can turn for service.

To eliminate any further mischief by the ILECs, the Commission should immediately issue a statement or a ruling that makes unequivocally clear that, until such time as the Commission revisits the issue, access charges do not apply to VoIP.

D. VoIP Providers Pay Into The Universal Service Fund Through Their Underlying Telecommunications Carriers, And The Commission Should Not Impose A Direct Universal Service Contribution Obligation On VoIP Providers Until The System Is Rationalized

Universal Service Fund ("USF") support is another area where the Commission's best course is to maintain the status quo. Currently, many VoIP providers, including the Coalition's participants, contribute significant amounts to the USF via pass-throughs from their underlying telecommunications providers. Thus, contrary to the impression given by some commenters, VoIP providers are already significant, albeit indirect, contributors to the USF. Even if the Commission determines that, from a policy perspective, VoIP service providers should contribute to the USF directly, now is the wrong time to impose that obligation. The Commission has undertaken a comprehensive rethinking of its contribution methodology in an effort to rationalize a system that nearly everyone agrees is no longer working. Until the Commission completes that undertaking, it makes no sense to subject new services to the regime, especially since VoIP providers already contribute indirectly to the USF.

V. THERE ARE TWO IMPORTANT CAVEATS TO THE PRINCIPLE THAT THE COMMISSION SHOULD REGULATE LIGHTLY

A. While The Commission Should Subject New Entrants To As Little Regulation As Possible, It Does Not Follow That The ILECs Should Be Regulated To The Same Degree

To date, the debate about whether and how the provision of VoIP services should be regulated has been focused on new entrant service providers and has not taken the ILECs into account. This has been the case largely because new entrants have put themselves at the forefront of the debate by being the first to market with successful new products and services. However, the ILECs have now all announced significant VoIP initiatives, including plans to use VoIP to move their base of local exchange customers out of regulation.

The Commission should not assume that ILEC VoIP offerings should be subject to only the same regulations as new entrant offerings. The ILECs are dominant in the local marketplace and retain control over essential PSTN bottleneck facilities. Unlike new entrant service offerings, the ILECs' announced initiatives largely appear to be efforts to avoid regulation and lower some costs. The ILECs' announced VoIP initiatives, which will use VoIP to remove their local operations from regulation, could have disastrous effects on the state of competition and the continued ability of new entrants to bring innovative, next-generation services to market. Accordingly, the Commission should start from the premise that the ILECs need to remain regulated and should only remove regulation where it is clear that there is both economic benefit and that competition will not suffer.

There is nothing inconsistent with subjecting ILEC and new entrant VoIP service offerings to varying levels of regulation. The ILECs have market power and therefore regulation is required to constrain them; new entrants do not.

B. Regulation Of VoIP Services Providers Is Distinct From Ensuring Their Access To Bottleneck ILEC Facilities

Regardless of the degree of regulation to which various classes of VoIP service providers are subject, the Commission must keep in place—and in some instances reinvigorate—policies necessary to ensure that service providers continue to have access to ILEC bottleneck facilities. In order to provide service to their customers, most Coalition participants depend on facilities they purchase—and which they can only purchase—from their local ILEC, often including various types of broadband loops to their customers' premises. New entrant VoIP providers are thus at the mercy of the ILECs—the same ILECs who are now moving aggressively to compete in the VoIP arena. For example, in one instance an ILEC suspended service to a Coalition member over a dedicated circuit carrying VoIP traffic in an IP-centrex environment after an ILEC unilaterally concluded that the arrangement constituted unauthorized long distance resale by the VoIP provider. While service was suspended for only one day, the result of suspension was that the VoIP provider lost customers and soured its relationship with others.

As with access charges, the ILECs frequently take it upon themselves to unilaterally set the terms and conditions upon which they will provide VoIP providers with access to their networks. For example, one member of the Coalition that provides voice, data, and video to residential customers over its own overbuilt fiber-to-the-home

plant was recently refused service by an ILEC unless and until it became a certificated local telecommunications provider.

The Commission must act affirmatively to put an end to this form of ILEC self-help. This is particularly important in the enterprise VoIP service provider context. In consumer business models, the customer typically provides the broadband connection by ordering either DSL or cable-modem Internet access. By contrast, in the VoIP enterprise service provider model, in many instances the service provider is responsible for providing the facilities to the customers' premises—facilities which must be acquired from the ILEC. If the service provider cannot secure those facilities, it cannot serve the customer.

VI. CONCLUSION

The Coalition requests that the Commission take these comments into consideration as it proceeds to address the question of whether and/or how to regulate VoIP.

Dated: December 15, 2003

Respectfully submitted,

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