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December 20, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie R. Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte*
CC Docket No. 01-117

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Commission's rules, this will provide notice that on December 19, 2001, the attached Comments of Mpower Communications Corp. filed December 18, 2001 in NTIA's proceeding *Deployment of Broadband Networks and Advanced Telecommunications*, Docket No. 011109273-1273-01 were provided to: Chairman Michael Powell, Commissioner Kathleen Abernathy, Commissioner Michael Copps, Commissioner Kevin Martin, Kyle Dixon, Mathew Brill, Jordan Goldstein, Sam Feder, and of the Common Carrier Bureau: Dorothy Attwood, Jeffrey Carlisle, Carol Matthey, Michelle Carey, Brent Olson, Kathy Farroba, and Jessica Rosenworcel. Issues in the above-captioned proceeding are discussed at page 12 of these comments. A copy of the comments is attached.

Sincerely,

Francis D. R. Coleman
Vice President, Regulatory Affairs

- cc: Chairman Michael Powell
- Commissioner Kathleen Abernathy
- Commissioner Michael Copps
- Commissioner Kevin Martin
- Kyle Dixon
- Mathew Brill
- Jordan Goldstein
- Sam Feder
- Dorothy Attwood
- Jeffrey Carlisle
- Carol Matthey
- Michelle Carey
- Brent Olson
- Kathy Farroba
- Jessica Rosenworcel

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National Telecommunications and Information Administration

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Deployment of Broadband Networks
and Advanced Telecommunications

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Docket 011109273-1273-01

EX PARTE OR LATE FILED

COMMENTS OF MPOWER COMMUNICATIONS CORP.
IN RESPONSE TO REQUEST FOR COMMENTS
ON DEPLOYMENT OF BROADBAND NETWORKS

MPOWER COMMUNICATIONS CORP.

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December 18, 2001

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Summary

As communications companies increasingly construct fiber and other very high capacity “pipes” to carry broadband traffic, i) the new technology is changing the way all traffic is transmitted, including voice and ii) as these high capacity wires are laid to individual end-users, it becomes increasingly uneconomic to lay competing facilities. Thus, the “last mile” of facilities must be shared, regardless of whether the facilities are owned by ILECs or cable companies.

Despite the economic necessity of sharing the distribution network, however, wholesale issues, including pricing, are not the most significant obstacles to developing a competitive marketplace for telecommunications. More significant are major segments of uneconomic pricing, specifically: a) subsidized residential rates and b) universal service funding for inefficient and/or high cost areas.

These gaping holes in competitive pricing mechanisms send incorrect signals to Wall Street and the marketplace and as a result, severely limit the ability of competing companies to serve residential and high cost areas, thus, largely denying these segments of the community the benefits of new, competitive products and services.

Nevertheless, ILECs and CLECs continue to haggle over wholesale issues. No segment of the industry has provided the needed leadership to cooperatively derive solutions that will allow the industry to make a transition to a more competitive environment. Mpower believes it is time for the industry to establish a process for evaluating and proposing ways to move in a constructive, professional manner toward competition.

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**Before the
DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration**

Deployment of Broadband Networks)
and Advanced Telecommunications) Docket 011109273-1273-01
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**COMMENTS OF MPOWER COMMUNICATIONS CORP.
IN RESPONSE TO REQUEST FOR COMMENTS
ON DEPLOYMENT OF BROADBAND NETWORKS**

Mpower Communications Corp. ("Mpower"), a competitive provider of broadband and telephony services to business and residential customers, hereby submits its Comments on the issues raised by the National Telecommunications and Information Administration ("NTIA") in its Notice, Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications.

I. Introduction and Context

In these Comments, Mpower will explain its view of the current state of telecommunications regulation and how broadband issues and policies "fit" into the technological, economic and regulatory environment in which we find ourselves.

a. Technological Picture

As technology has developed, fiber "pipes" increasingly carry the world's telecommunications signals. Fiber is currently the medium of choice because of its capacity and because of its performance characteristics. Other media such as wireless – whether terrestrial or satellite – are still in a developmental phase by comparison. With

wireless, for example, there are still cost issues, transmission delay problems and spectrum constraints.

Fiber “pipes,” however, are well developed and are capable of enormous capacity. One strand of fiber can provide more capacity than most end-users will ever need. Consequently, it is generally uneconomic to duplicate the “last mile” to end-users – somewhat like constructing parallel highways. It is very expensive and does not achieve significant incremental value .

It is also important to be aware that increasingly voice and data use the same or very similar technology. As a result, in the future it will not be very useful to distinguish between voice and data and it will not be possible to treat broadband and traditional network architectures differently. These facts mean that broadband as well as traditional networks must be shared to achieve economic efficiency. For competitive companies such as Mpower, which has its own switches but buys or leases transport capacity and loops, this means there must be “end-to-end” unbundled network elements (“UNEs”) regardless of technology in the network or equipment on the loop. If there are technological or other barriers to using “the last mile” of network -- whether copper, fiber or other technology -- it will become impossible to reach our customers. Many competitive local exchange carriers (“CLECs”) are in a similar position. Consequently, without “end-to-end” UNEs, i.e. the ability to reach customers regardless of where they are in the telecommunications network, the goal of widespread competition can never be achieved.

Thus, failure to share networks effectively is a significant obstacle to competition. Also, an unwillingness to share networks can be an obstacle to the deployment of new

technology. This need not be the case, however. Some companies have undertaken massive network restructuring, e.g. SBC's Project Pronto, and have offered to share at what are said to be TELRIC (total element long run incremental cost) rates. Without such sharing, however, the end result will certainly be re-constituted monopolies.

b. The Need to Share Network Should Not be an Obstacle to Deployment of New Network

Although it is economically necessary to share networks, there are mutual benefits to doing so. The incumbent local exchange carriers ("ILECs") from whom most network elements are leased receive numerous benefits from being able to "sell" capacity on their networks. First, they get paid and as will be discussed below, they get paid at rates which are economically appropriate. Second, selling a portion of their network capacity helps to "fill the pipes" and such wholesale business can become a significant source of revenue for ILECs. Third, such wholesale business helps to pay for new investment. Fourth, since investment in fiber purchases enormous capacity, the use by CLECs of some of this capacity is efficient because it makes greater use of the investment at an earlier date.

Although complaints are frequently heard about forward-looking cost models and TELRIC in particular, any weaknesses these models have are not reflected in the area of new investments such as fiber. Almost by definition, the costs of new investments are covered by forward-looking cost models. Since fiber investment is a forward-looking or future oriented investment, its costs are among those most likely to be covered effectively. Further, current statutory definitions provide for the inclusion of a fair profit.

High on the list of specific complaints about forward-looking cost models is that they do not cover all of the past, embedded costs. They should not cover such costs. Monopoly ratepayers have long been covering these costs and duplicate cost recovery is not appropriate.

It seems clear, however, that the main reason ILECs complain about forward-looking or TELRIC-based rates is not because TELRIC does not cover costs appropriately. It is because as competition begins to emerge, the ILECs' most lucrative customers are likely to be sought and won first. This lessens revenues from customers who traditionally have subsidized other, uneconomic ILEC rates. Most glaring are residential rates, which typically have been subsidized by large and middle-sized business rates. For the most part, residential rates have not been "re-balanced" and do not pay their way. The answer is to raise residential rates to cover costs.

Further, it is necessary to undertake this effort before additional "tinkering" with the wholesale rules affecting competition. More "band aids" are relatively ineffective in the face of such major structural flaws. In fact, some ILECs would likely admit that while subsidized residential rates hurt ILEC revenues, they can usually make some profit by selling features and other "add-on" services. CLECs, on the other hand, are typically kept out of the residential market entirely because they cannot compete with the subsidized residential rates.

II. Competitive Requirements

At a high level of generality, competitive carriers have only a few basic requirements for ILEC networks. First, they need open access to incumbent networks. Second, and implied by the first requirement, they need technologically neutral interfaces

to the ILEC network so that they can use equipment which suits their own goals and business plans. Third, they need an adequate means of traversing DLCs (Digital Loop Carriers), which make up an increasing proportion of the ILEC network architecture. If the increasingly numerous DLCs in ILEC networks are not constructed to allow for ready sharing, this can become an overwhelming problem for competition. Fourth, they need to have access to copper in the short run and as a transition mechanism. In order to compete, competitors must have up-to-date technology. Ultimately, they cannot compete against new technology with old technology. If, however, they have begun by using technology suitable to copper, e.g. DSL (digital subscriber loop), they need access to copper for the period of time such copper-based products are viable and for the period of time that it takes the CLEC to make a transition to the use of newer technologies. These periods of time, of course, will likely overlap.

Consistent with these principles, it also makes sense to require open access to cable networks. Since one strand of fiber, or co-axial cable, provides more than adequate capacity for most end-users, it mostly does not make sense to replicate the “last mile,” regardless of whether the “last mile” is served with fiber or co-axial cable. Whoever controls the “last mile” with high capacity facilities likely has a monopoly or duopoly and should share facilities at appropriate wholesale rates.

III. From Mandate to Marketplace/ We Need a Way Forward

a. We Need to Think Big.

The NTIA has focused its request for comments on broadband, per se. This is a big topic and one might think it was more than enough with which to grapple. Because broadband is changing the technology of the whole industry, however, along with the

resulting economic environment, one cannot consider broadband in a vacuum. It is essential to look at all the major pieces of the puzzle.

In addition, the Telecommunications Act of 1996 gave the industry a mandate to make a transition to a competitive marketplace. The “rules” are different in competitive as opposed to monopoly marketplaces. Thus, again, it is essential to take a comprehensive look at the way an industry functions in order to make an appropriate analysis regarding the role of broadband in a new, more competitive marketplace. Two other “pieces” it is essential to include in the analysis are i) Residential Rate Re-Balancing and ii) Universal Service.

i) Residential Rate Re-Balancing

Residential rates are typically subsidized. Historically, these rates have been supported by monopoly profits from large and medium-sized businesses, Yellow Pages, etc. As competition develops, the very first targets of CLECs – and their predecessors – were the largest, most independent and most lucrative businesses. These are the businesses to which it makes sense to build new facilities. These are the businesses most able to capitalize on more economic rates by virtue of their size and buying-power. These are the most profitable businesses to ILEC and CLEC alike and they are frequently the “first to go.” This reduces revenues to the ILEC for support of the residential subsidies. The losses, however, are due primarily to the uneconomic rates. When rates are skewed for both residential users (down) and business users (up), incorrect price signals are sent to the marketplace regarding investment and services for both. Large businesses become particular targets for competitors and residential customers are left

with few, if any, new options. Such subsidies clearly cannot continue in a competitive marketplace.

It is obvious that such subsidies are not good for ILECs. They also are not good for CLECs because CLECs cannot compete effectively against subsidized rates. They are not even good for residential customers because although they may have slightly lower basic rates, it is not economic to compete for their business and they “miss out” on the benefits of competition.

Residential rates need to rise where they do not cover costs. Only when residential rates cover costs, plus a profit, will new, competitive carriers be encouraged to enter the residential marketplace to develop and popularize new products and services. Some products and services such as DSL are not new but were not made available earlier because they did not serve the interests of incumbent, monopoly companies. Perhaps ILECs feared they would undercut high margin business products such as T-1's that helped to subsidize residential rates. In any event, it was only after competitive companies began offering DSL on a UNE (shared network) basis that ILECs began to make DSL available to their own customers. A competitive environment requires correct residential price signals from residential prices which cover costs. Residential rates seldom meet this requirement.

ii) *Universal Service*

Universal service is another legacy practice which leads to incorrect price signals being given. Universal service payments subsidize inefficient and/or high cost regimes. While lower density service territories typically face higher costs per customer, if the

benefits of competition are to emerge, price signals need to be more realistic regardless of the location of the service.

There is every indication that wireless and/or satellite technology can be more efficient than wireline technology for low density areas. For sufficient incentives to exist for wireless carriers to bring the much sought after broadband technology to these areas, however, universal service payments must be confined to hardship or “lifeline” situations. Given average telecommunications bills across the country today, in most instances, a rise in prices should be manageable for most consumers.

Indeed, it appears that many have already replaced limited and/or low quality landline service with more flexible wireless services despite the expense. Further, many small, rural ILECs have already begun to offer multiple types of technology. Others would likely do the same with a combination of much reduced universal service funding and the encouragement of appropriate pricing.

b. Industry Leadership Needed

Ultimately governmental entities will need to approve residential rate re-balancing and universal service fund reform. In general, however, government should be as little involved in the transition to competition as possible. The industry is most knowledgeable about the issues and alternatives it faces. Traditionally, when significant issues have arisen in the states, industry representatives have gathered in workshops and even more informal groups, with or without commission Staff, to discuss and develop proposed rules and procedures for moving forward more efficiently. Even in these turbulent times, this has occurred in limited areas, such as performance measures. For the most part, however, the parties have turned to government for solutions to day-to-day

issues and problems, e.g. Tauzin bill, “hi cap” petition, TELRIC/UNE remand appeals, etc.

Where is the needed industry leadership? Who is advancing the discussion and development of industry-wide solutions? Where are the industry-wide forums? In the crucial area of progress toward competition on a nationwide scale, we seem to be operating in a vacuum when it comes to industry cooperation. Certainly there are many areas where cooperation would benefit the process and the players. It seems past time to get serious about the destiny of our industry.

c. Models Exist for Making a Transition to Competition

There are a number of models, processes and procedures for moving from monopoly to competition. At the retail level, some states already have mostly deregulated small, municipal telecommunications companies. If they want to raise rates, they put a notice and survey in with the bill. If a predetermined percentage of customers object, then the utility is subject to a rate case. Otherwise, the ILEC can raise its rates without one.

At the wholesale level, Mpower has proposed another transition mechanism, which it calls FLEX Contracts.¹ Basically, it has proposed that ILECs be encouraged to develop or negotiate wholesale local service contracts similar to long distance and wireless “package deals,” to include terms desired by CLECs and ILECs regarding such issues as price, quantity, quality, term and types of services to be provided. These contracts would be facilitated by making them available for opt-in, as is, but not subject to “pick and choose.” They would also be subject to complaint actions and federal

¹ *In the Matter of Petition of Mpower Communications Corp. for Establishment of New Flex Contract Mechanism Not Subject to “Pick and Choose,”* CC Docket No. 01-117, filed 5/25/01.

enforcement should they be deemed to discriminate against opt-in by carriers not a party to the agreement or not be in the public interest.

The law provides for use of the “impair test,” little by little over time and it might be possible to negotiate some other, more defined process which is gradual and predictable, for example, sunset rules, perhaps by different markets and products over time but making exceptions for the distribution network of loops, i.e. the “last mile.”

d. Priorities

As discussed above, it is of critical importance to take a holistic approach to the telecommunications system when analyzing how to achieve competition. The worst possible approach at this juncture is to prematurely “de-regulate” broadband. “Broadband,” by whatever definition, refers to the newer high capacity portions of the telecommunications network, which increasingly carry not only data “packets” but voice “packets” as well. Services provided under the broadband umbrella represent the cutting edge of innovation and development in the field. Because this is the area where ILECs are being challenged most successfully, they continue to clamor for a completely free rein while they are still the dominant players and may most easily crush the struggling competitive companies. Quite notably their voices have not been raised to ask for reforms to segments of the current system where ILEC monopolies are virtually unchallenged and which continue to operate in the traditional, anti-competitive manner, i.e. residential subsidies and universal service.

Mpower strongly believes that residential rate subsidies must be dealt with promptly. Certainly they should be dealt with before any further de-regulation of broadband. This is particularly true if consumer advocates are correct in positing that

incumbent, “monopolist” control over both broadband facilities and content will slow rather than accelerate deployment of broadband.

Universal service also impairs competition to a significant segment of the population. This segment is much smaller than that affected by residential rate subsidies, however, so dealing with these issues could have a somewhat lower priority.

The telecommunications services industry is not a zero sum game, however. New companies, new products and new investment can and do create new markets and new revenues. Thus it is especially important to get investment in technology and facilities flowing. Generally, this investment is facilitated by minimizing regulation and the “artificial space” created by regulation, e.g. subsidized residential rates and universal service subsidies. As desirable as it may be to achieve at least partial replication of existing networks, however, this will not occur with private funds without the expectation of a reasonable return. The original networks were deployed by monopolies and paid for by all ratepayers and they must be shared as long as economically and competitively necessary.

For the foreseeable future, therefore, it seems clear that access to the “last mile” must be protected for competition to exist.² In addition, a “lifeline” program for the truly needy must continue, even after universal service subsidies have been eliminated. Most other aspects of the current system presumably should be or will be subject to transition over time as competition increases. Educated guesses suggest that switching and UNE-P

² Even Alfred E. Kahn, who has consistently opposed the position stated here on broadband, recently commented that the one exception to the de-regulation he espouses is “truly essential monopoly facilities.” “Unleash the Broadband Economy,” Wall Street Journal, 12/13/01. “Last mile” facilities clearly will continue to fall into this category for a long time to come. Presently, numerous other parts of the telecommunications network also meet these criteria.

may be the first formerly monopoly facilities to meet the “necessary and impair” standard. Mpower would agree.

Other facilities will likely be declared competitive over time, perhaps on a market basis as with the limitations on current switching requirements. A well-defined process would be helpful, however, and it would be preferable if this process could be agreed upon among the parties. Mpower believes that the transition process must have as one of its principles not just an end product but regulatory predictability and avoidance of regulatory shock. In this way new investment and new technology can be encouraged and all end-users can benefit, business and residential alike.

e. Proposed Process

Mpower believes it would be valuable to the entire industry if a cooperative process could be established for evaluating and proposing ways to move in a constructive, professional manner toward competition. Proposals should be solicited from all segments of the industry and the regulatory community, that is, CLECs, large ILECs, smaller and rural ILECs, industry associations, state organizations, consultants and research organizations. A nationwide and/or industry-wide organization, such as the U.S. Telecom Association, might then hold an industry-wide conference on how to make a transition to a more competitive, less regulated environment.

As noted above, this analysis must take a broad view of the current features of the telecommunications environment, including all major elements, such as residential rates and universal service, as well as the UNE environment. There must be no “sacred cows.” Proposals must have broad scope and also come to grips with practical realities.

Based upon the proposals made and the direction of the conference, a committee could draft a “white paper” outlining a cautious, phased de-regulation mechanism for further industry review, comment and shaping. Ultimately, an industry-sponsored petition could be presented to the Federal Communications Commission (“FCC”), with alternative proposals for various aspects of the process, where necessary or desirable.

IV. Conclusions

To properly evaluate the role and impact of broadband in today’s telecommunications environment, it is crucial to put the issues into a broader technological, economic and regulatory perspective. Such a perspective must take account of the fact that broadband is fundamentally changing the way telecommunications services are delivered and must include evaluations of residential rate re-balancing and universal service.

The new fiber and co-axial cable networks provide enormous capacity and make it uneconomic to duplicate some network architecture, especially the “last mile.” Therefore, networks must be shared in useful ways and at appropriate prices -- telecommunications and cable networks alike.

It should be possible to cooperatively develop a set of processes and procedures for the gradual, planned transition to competition, except for the distribution network, i.e. the “last mile,” and industry leadership is urgently needed to achieve these goals.

Respectfully submitted,

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