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EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket Nos. 01-338; 96-98; 98-147

Dear Ms. Dortch:

In separate telephone conversations yesterday with Matt Brill, Senior Legal Advisor to Commissioner Kathleen Abernathy; Dan Gonzalez, Senior Legal Advisor to Commissioner Kevin Martin; and Lisa Zaina, Senior Legal Advisor to Commissioner Jonathan Adelstein, I discussed the appropriate impairment standard for unbundled dark fiber interoffice transport. In particular, I argued that it would be arbitrary and capricious, inconsistent with the court's opinion in *USTA v. FCC*¹ and bad policy for the Commission to adopt an impairment standard for interoffice transport under which requesting carriers would be deemed unimpaired where they seek to use interoffice transport to provide OCn-based services, but under which lit DS3 interoffice transport would be subject to a span-by-span or metropolitan area-by-metropolitan area impairment standard. As I explained, such an approach would have the effect of eliminating unbundled interoffice dark fiber in all geographic markets, since carriers like Conversent use dark fiber exclusively to establish OCn-based interoffice SONET rings.

This result would be arbitrary and capricious for many reasons, most obviously because it would result in the elimination of unbundled interoffice dark fiber transport without any determination that a requesting carrier is impaired in a particular geographic market. For example, requesting carriers would be deemed unimpaired in the absence of dark fiber interoffice transport even in second and third tier markets in which deployment of interoffice dark fiber transport by non-ILEC suppliers has not occurred to any significant degree (non-ILEC suppliers offer interoffice dark fiber transport in only

¹ *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

one in eight of Conversent's interoffice spans) and in most parts of which non-ILEC deployment would be wasteful.

Such a result would also be contrary to the D.C. Circuit's holding in *USTA v. FCC*. Most fundamentally, the standard described herein would be inconsistent with the court's holding that the Commission may not establish national unbundling rules that bear no connection to the particular circumstances in a given geographic area. This is especially true where there is every reason to believe that market conditions differ substantially from geographic market-to-geographic market. Moreover, under the standard at issue, a requesting carrier would be forced to buy lit unbundled interoffice transport even where the requesting carrier is *not* impaired in the absence of ILEC-supplied electronics and is *only* impaired in the absence of dark fiber. In other words, the standard at issue would force requesting carriers like Conversent to purchase *more* of the ILEC's network than they want to. This result would stand the logic of the *USTA v. FCC* decision on its head and should be roundly rejected.

Finally, such a result would be bad policy, because it would significantly reduce requesting carriers' ability to rely on their own electronics as a means of introducing lower prices (*e.g.*, by introducing next generation electronics sooner than the ILECs) and innovative new service offerings. By forcing requesting carriers to use the ILECs' electronics, the Commission would force requesting carriers to offer only the services that the ILECs' electronics and network configuration would permit. In addition, requiring requesting carriers to use the ILECs' electronics would introduce additional points of failure in a requesting carrier's network because it would require additional multiplexers in each central office. Nothing could be more inconsistent with the Commission's stated policy goals in the Triennial Review of encouraging investment and innovation by competitors and of eliminating unnecessary regulation.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, 47 C.F.R. § 1.1206(b)(2), a copy of this letter is being filed electronically for inclusion in the public record of each of the above-referenced proceedings.

Sincerely,

/s/

Thomas Jones
Counsel to Conversent Communications, LLC

cc: Matt Brill
Dan Gonzalez
Lisa Zaina