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EX PARTE

Electronic Filing via ECFS

December 7, 2004

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313; *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338

Dear Ms. Dortch:

On Monday, December 6, 2004, Steve Davis, Andrew Crain, Robert McKenna and Craig Brown by phone, Melissa Newman and Cronan O'Connell in person, all of Qwest Communications International Inc. ("Qwest") and Kathryn Zachem of Wilkinson Barker Knauer, also representing Qwest, met with Austin Schlick, Linda Kinney, John Stanley and Jeffrey Dygert of the Office of General Counsel, and Jeremy Miller and Russell Hanser of the Wireline Competition Bureau to discuss the Qwest proposed market share test.

As Qwest has addressed on the record in these proceedings, competition in Qwest's territory is apparent throughout the region not only in large markets, but also in many of Qwest's medium to small markets. Therefore, Qwest stated that the Federal Communications Commission's ("Commission") impairment test(s) needs to be flexible enough to recognize competition in markets that may not be easily identified through an impairment test based solely on density reflecting fiber collocations or the number of incumbent local exchange carrier ("ILEC") business access lines. To that point, Qwest proposes a market share test (*see* attached) that recognizes facilities-based competition by intermodal providers which would result in subsequent full unbundling relief to an ILEC.

In accordance with Commission rule 47 C.F.R. § 1.49(f), this *ex parte* letter is being filed electronically *via* the Commission's Electronic Comment Filing System for inclusion in the public record of the above-referenced dockets pursuant to Commission rule 47 C.F.R. § 1.1206(b)(2).

Sincerely,

/s/ Cronan O'Connell

Attachment

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December 3, 2004

MEMORANDUM

Re: WC Docket No. 04-313, *In the Matter of Unbundled Access to Network Elements*
CC Docket No. 01-338, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*

The Federal Communications Commission Must Adopt a "Competitive Market" Test as a Safety Net When Extensive Competition Develops in a Market in which Application of the FCC's Theoretical "Impairment Test" Would Nevertheless Still Require Unbundling of Network Elements.

Under the statutory "impairment test," the Federal Communications Commission ("FCC") cannot order that a network element be unbundled unless it is demonstrated that competition in a relevant market will be impaired without access to that unbundled element at Total Element Long Run Incremental Cost ("TELRIC") prices. As a general principle, this requires the FCC to analyze whether the particular market is "suitable for competition" without access to the element. The FCC may not base its impairment decision solely on the existence of actual competition within a market. Accordingly, any impairment decision will of necessity be based on proxies for actual competition and contain at least some elements of predictive judgment. Regardless, there are markets today where the FCC's proposed impairment analysis demonstrates that the market is not suitable for competition but have already been marked by significant and substantial competition in a manner that the impairment test did not accurately predict. In other words, any impairment test that the FCC devises will, in some markets, substantially understate the extent of actual competition. Even though the FCC may not, under the Act, limit its impairment analysis to existing competition, it must adopt a backstop to prevent the anomaly of rules that conclude that competition cannot exist in a market where it already exists.

This probability is neither speculative nor remote. Under the impairment rules that have existed in the past (those that have been vacated by the Courts in past proceedings), significant facilities-based competition has developed in areas where it would not have been predicted by the earlier impairment tests. For example, in Omaha, Nebraska, the 74th Metropolitan Statistical

Area ("MSA") in the United States, facilities-based competitors (primarily, but not exclusively, the local cable franchisee) currently control more than 50% of the residential and business market.[1] In another rural community with less than 15,000 residents, Qwest's market share has been reduced to less than 5%.[2] There are other communities where Qwest's market share has been substantially eroded, despite the fact the communities are not within what is commonly viewed as the primary location for the development of competition—larger cities and major urban areas.

While Qwest has filed a petition for forbearance from dominant carrier regulation in the Omaha MSA based on the fact that it is no longer the dominant carrier in that market, this process is cumbersome and uncertain. The continued application of the unbundling rules to markets where Qwest has lost its dominant market position cannot be countenanced or continued.[3] The FCC's impairment test is statutory in nature, and, even if acceptable in theory, must take account of those instances where competition has developed in areas where the application of the FCC's test predicted that competition would not develop. As a result, the FCC must develop a backstop or safety net that would eliminate the mandatory unbundling requirements in areas where facilities-based competition has developed despite a prediction by the impairment test that it would not do so. The continuance of mandatory unbundling in competitive markets would seriously disrupt true competition, and it is incumbent on the FCC to move quickly to avoid the development or continuation of such a situation.

This backstop mechanism should operate in a manner that is relatively self-effectuating. Incumbent local exchange carriers ("ILECs") desiring to take advantage of the process should not be required to file a forbearance petition for communities marked by significant levels of existing facilities-based competition. An ILEC's obligation to provide unbundled network elements in these markets would be removed automatically upon a straightforward showing that that ILEC has lost a certain percentage of its market share, or that a specified percentage of the addressable market could readily be reached by the facilities of competitive suppliers. Otherwise, the FCC will risk a proliferation of situations (such as exists in Omaha) where a hypothetical impairment finding requires unbundling despite significant market share loss by the ILEC.

In order for this test to be effective, it must be sufficiently simple to be self executing, or practically so. As the Omaha forbearance proceeding has well illustrated, it is important for the FCC to define expeditious and meaningful processes to recognize competition when it actually

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[1] *See* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223 (filed June 21, 2004). A copy of this Petition is attached hereto.

[2] *See* Qwest Reply Comments, WC Docket No. 04-313, Declaration of David L. Teitzel and Barry Orrel, Attachment 2 (filed October 21, 2004).

[3] As is to be expected, the Qwest petition has been vigorously opposed by those who stand to benefit from the current regulatory system. For example, the incumbent cable provider and dominant local exchange provider, Cox Communications, Inc., has filed extensive comments opposing giving Qwest any regulatory relief at all, as have other competitors, including AT&T Corp., Sprint and MCI.

exists, and to eliminate mandatory unbundling in such markets. The continuance of mandatory unbundling in competitive markets would seriously disrupt true competition, and it is incumbent upon the FCC to move quickly to avoid the development or continuation of such a situation. One solution to this problem has already been suggested by ACS of Anchorage, which has proposed a test by which an ILEC would be relieved of its unbundling obligations if, within an ILEC's local exchange serving area, the ILEC has lost 30% of its market share to a competitive local exchange carrier ("CLEC"), the CLEC is able to reach 60% of the customers in the market over its own loop facilities, and the CLEC is actually providing local exchange service over its own facilities.[4] This test provides a good beginning for analysis, although it is unrealistic in most markets outside of Alaska.

Qwest suggests that the best approach is to first look independently at actual ILEC customer loss. When the market share of non-ILEC facilities-based (*i.e.*, those supplying their own loops) carriers exceeds 30%, this fact alone is sufficient to demonstrate that competitors are not impaired without access to unbundled ILEC network elements.

In addition to the showing based on actual facilities-based competition, another strong indicator of actual competition (and thus of the absence of impairment) is the widespread existence of competitor facilities in a market. This is true even if the competitor has not yet achieved a substantial market position in terms of customer base. Qwest proposes that the ILEC be relieved of its unbundling obligation in any market where competitive facilities physically pass 40% of the customers (residential and business) within a given market.

Under either test, it would be up to the petitioning ILEC to choose and define the relevant geographic market in which to seek relief. Normally relief in these circumstances will include all unbundling requirements.[5] The geographic market could normally not be smaller than a wire center.

In the case of actual competition having already resulted in market share loss, all that would be required would be for the ILEC to file a petition with the FCC defining the market and demonstrating the market share percentage that the ILEC had fallen below the 70% margin specified. Objections to this petition would lie based solely on demonstration that the submitted market share data was erroneous or that the geographic market was chosen in a manner that did not reflect the actual marketplace. We suggest that the FCC adopt a rule that specifies that, in the absence of an affirmative FCC finding that the petition did not warrant grant based on these factors within 90 days of filing, the petition be deemed granted by operation of law on the 91st day after its filing.

In the case of potential competition based on facilities through which a significant percentage of the market can be served, the petitioning ILEC would be required to make a filing

[4] Comments of ACS of Anchorage, Inc., WC Docket No. 04-313, at 14 (filed Oct. 4, 2004).

[5] Once competition within a market has reached a certain level, we submit that all ILEC facilities should be presumed to be subject to competition because the ILEC has no monopoly power which could justify further unbundling of any services or facilities.

defining the geographic and product markets, and demonstrating that competitive facilities passed 40% of the premises within that market. Oppositions to this type of petition would be limited to demonstrating that the geographic market was chosen in a manner that did not reflect the actual marketplace, or that the statement of the percentage of competitive facilities passing premises within that market was not accurate. Because this analysis may be more sophisticated and fact-based, we recommend that the FCC adopt rules that provide for the automatic grant of such a petition unless denied within 180 days after its filing