

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7645
WWW.SWIDLAW.COM

ANDREW D. LIPMAN
DIRECT DIAL (202) 424-7833
ADLIPMAN@SWIDLAW.COM

NEW YORK OFFICE
405 LEXINGTON AVENUE
NEW YORK, NY 10174

December 8, 2004

Via Hand Delivery

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Unbundled Network Elements, CC Docket 01-338 and WC Docket 04-313

Dear Chairman Powell:

I am writing on behalf of the private equity firms identified on the signature page of this letter, as the Commission prepares to vote on new Unbundled Network Element rules, to emphasize how important it is that these rules preserve an opportunity for facilities-based CLECs to use DS-1 loop and transport facilities for access to small and medium-sized businesses.

DS-1 loops, as well as extended loops ("EELs") using DS-1 transport, serve a very different segment of the market than higher-capacity DS-3 and dark fiber UNEs. The RBOCs have tended to blur the distinction between DS-1 and other so-called "high capacity" UNEs, but DS-1 loops are used primarily to serve small businesses, which (as we have previously noted) make up the largest segment of business customers. By contrast, DS-3 facilities are used to serve only much larger businesses, typically those with over 50 employees at a single location. Because the markets served by these facilities are so different, any findings of non-impairment that the Commission may reach for DS-3 or dark fiber facilities would *not* logically imply a lack of impairment for DS-1.¹ In particular, DS-1 customers have much lower line densities than large enterprises, so carriers seeking to serve the small business market almost never have an alternative to ILEC-supplied facilities.

The relatively rare exception would be in a case where a small business is located in the same multi-tenant office building as larger enterprises that do use higher-capacity facilities. In these cases, competitive carriers may have deployed their own facilities to serve the larger businesses, and may be able to provide DS-1 capacity to serve some of the smaller tenants "on the side." We agree that

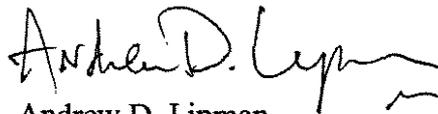
¹ We do not wish to suggest that a finding of non-impairment for DS-3 and dark fiber is necessarily justified; there are many circumstances in which competitive carriers face insuperable barriers to competitive provisioning of these facilities as well. However, any such finding would have to be based on market conditions that are very different from those pertaining to DS-1 UNEs.

where these competitive wholesale facilities actually exist, and are actually available for use at the DS-1 level, carriers would not be impaired without access to DS-1 loops. We stress, however, that these situations are the exception, not the rule.

Accordingly, we urge you to adopt a nationwide finding of impairment for DS-1 facilities, both loop and transport. The only supportable exception to this finding would be for service locations served by competitive wholesale carriers who are both willing and operationally ready to provide DS-1 level loops to third parties. We agree with those CLECs who have suggested that non-impairment can be conclusively presumed where there are *two* or more such wholesale providers offering service. Where there is only one wholesale provider, it would not be safe to presume non-impairment, because there may be unusual circumstances that limit the ability of third parties to access the building, and further investigation of the facts would be needed before a conclusion of non-impairment could be justified.

As you know, our companies have made substantial investments in the telecommunications sector. Our portfolio companies include investments in competitive carriers, including that serve numerous markets throughout the United States over a mix of their own network facilities and loop/transport UNEs leased from ILECs. DS-1 UNEs are particularly critical to the ability of this industry sector to provide efficient, innovative services to the smaller businesses that form the bedrock of this Nation's economy, and we sincerely urge you to protect competitive access to these facilities in your forthcoming rules.

Very truly yours,



Andrew D. Lipman

Attorney for the following private equity firms:

Bain Capital, LLC
Centennial Ventures
Columbia Capital
Ironside Ventures
M/C Venture Partners
McCullen Capital
Meritage Private Equity Funds
Spectrum Equity Partners
Stolberg Equity Partners
Wind Point Partners

cc: Commissioner Kathleen Abernathy
Commissioner Jonathan Adelstein
Commissioner Michael Copps
Commissioner Kevin Martin
Jeffrey Carlisle