

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

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

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
TEL. (212) 973-0111
FAX (212) 891-9598

December 8, 2004

VIA ELECTRONIC FILING (ECFS)

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

Re: *Ex Parte*, WC Docket No. 04-313, CC Docket Nos. 01-338

Dear Ms. Dortch:

For the reasons stated below, the Commission should not adopt Qwest's proposal for a "backstop" or "safety net" that would remove any obligation of incumbents to provide unbundled access to network elements based on loss of market share to competitors.¹ Qwest proposes that unbundling obligations be removed when the market share of non-ILEC facilities-based carriers exceeds 30%.

Qwest contends that its proposed backstop is necessary because impairment tests based on fiber-based collocators or wire center density would erroneously require unbundling even in markets where CLECs are not impaired as evidenced by Qwest's loss of market share. The undersigned companies do not endorse every possible use of wire center density or fiber-based collocator tests. Nonetheless, Qwest has failed to adequately explain why wire center density or fiber-based collocators are not related to potential or actual intermodal competition. Qwest asserts, but does not attempt to show, that these tests would also not identify where potential intermodal competition is likely or possible or already exists. In fact, assuming the validity of these tests with respect to competitors that use ILEC facilities, it is likely that these tests also identify the geographic and product markets where there is a potential for intermodal competition. Accordingly, Qwest has failed to justify the fundamental underpinning of its suggested test. Absent a tight showing that in fact wire center density and fiber-based collocation are not related to the existence of intermodal competition it would be arbitrary and capricious for the Commission to adopt any such backstop at this time.

Another way of looking at it is that Qwest's proposed test is premature because Qwest has not shown on the record at this point how the impairment tests that the Commission will

¹ Letter from Cronan O'Connell, Qwest to Marlene H. Dortch, December 7, 2004.

adopt in this proceeding will relate to the existence of intermodal competition in Qwest's or other incumbent territory. Assuming it wanted to consider the matter further outside of other proceedings initiated by Qwest, the Commission should gain experience with the impairment findings and tests that it will adopt in this proceeding before taking any additional steps.

Qwest's proposal is also incurably flawed because it does not adequately define "facilities-based" competitors or competitors using their own loops. Even intermodal competitors frequently use incumbent facilities to some extent. Even if its proposal did not have other flaws, it would make no sense to relieve incumbents of unbundling obligations based on any extent to loss of market share to competitors using ILEC facilities. Qwest fails to explain whether competitors using special access to any extent would be included in counting market share loss. Qwest also fails to explain how the market share test could be administered. If Qwest loses 30 percent of market share and is able to withdraw UNEs, then presumably some CLECs would exit the market causing Qwest's market share to rise above 70 percent, presumably triggering reinstatement of the unbundling obligation. Qwest's proposal is hopelessly muddled in this regard and, therefore, incapable of adoption.

Qwest's proposal should also be rejected because it would permit ILECs to gerrymander areas eligible for unbundling relief. Under Qwest's proposal, ILECs could apparently choose virtually any area, even apparently individual buildings or blocks in order to create an area meeting its self-selected threshold. Thus, Qwest suggests that "normally" the requested relief would not be less than a wire center. The ILEC would also be permitted to define the relevant product markets. Obviously, this would be a recipe for permitting ILECs to game the system. Qwest's proposal should be rejected for this reason alone.

Qwest's proposal would also create substantial administrative burdens for the Commission and industry. Because there would be essentially little or no restraint on ILECs' ability to define the geographic and product market scope of their own relief, its proposal, far from being self-effectuating, would create precisely the type of protracted litigation that the Commission is seeking to avoid.

Qwest also requests that unbundling obligations be removed where competitive facilities physically pass 40% of customers within a given "market." This proposal should be rejected because it ignores the numerous factors relevant to impairment that require the Commission to adopt a route and address specific impairment approach for transport and loops. These factors have been enumerated in detail by CLECs in this proceeding.² In a nutshell, the fact that a competitor's facilities "pass" customers does not indicate that it is practical to any extent for the CLEC to extend facilities to the customer. This proposal is also hopelessly vague in that "pass" is subject to numerous possible interpretations. This proposal should also be rejected because, as explained above, ILECs could game the system by defining geographic and product markets and because it would lead to substantial litigation before the Commission.

The Commission should also not adopt the Qwest eleventh hour proposal because it has not been adequately addressed on the record. Qwest has already filed a petition for forbearance

² See, e.g. Comments of ATX Communications et al filed October 4, 2004.

raising all of the issues implicated by its request in this docket that is the subject of this letter.³ Qwest's forbearance petition provides an adequate basis for addressing any need for unbundling relief based on loss of market share.

Sincerely,



Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
Philip J. Macres

Counsel for
Alpheus Communications, LP.
ATX Communications, Inc.
Freedom Ring Communications, L.L.C. d/b/a
BayRing Communications
CTC Communications Corp.
Focal Communications Corporation
Globalcom, Inc.
McLeod USA, Inc.
Mpower Communications Corp.
Ntelos, Inc.
OneEighty Communications, Inc.
RCN Telecom Services, Inc.
TDS Metrocom, LLC

cc: Honorable Michael K. Powell
 Honorable Kathleen Q. Abernathy
 Honorable Michael J. Copps
 Honorable Kevin J. Martin
 Honorable Jonathan S. Adelstein
 Christopher Libertelli
 Matthew Brill
 Jessica Rosenworcel
 Daniel Gonzalez
 Scott Bergmann
 Jeffrey Carlisle
 Michelle Carey
 Thomas Navin

 Jeremy Miller
 Russell Hanser
 Pamela Arluk
 Carol Simpson
 Tim Stelzig
 Ian Dillner
 Marcus Maher
 Gail Cohen
 John Stanley
 Christopher Killion
 Cathy Zima
 Erin Boone

³ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Sec 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223 (filed June 21, 2004).