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EX PARTE

FILED VIA ECFS

August 21, 2007

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

Re: *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, GN Docket No. 07-45*

Dear Ms. Dortch:

Qwest Corporation (“Qwest”) hereby responds to the June 15, 2007 letter filed by Bingham McCutchen LLP, representing BridgeCom International, Inc., *et al* (“BridgeCom”). In that letter, BridgeCom, *et al.*, urged the Federal Communications Commission (“Commission”) to determine that “a new program governing ILEC retirement of copper loops as envisioned in the Petition will help achieve the nation’s goals of provisioning of advanced telecommunications capability to all Americans.” As described in the attached, which was originally filed in RM-11358, Qwest opposes mandating incumbent local exchange carriers to provide unbundled access to retired copper loops.

In accordance with FCC rule 1.49(f), this *ex parte* letter is being filed electronically *via* the Electronic Comment Filing System for inclusion in the public record of the above-referenced docket pursuant to FCC Rule 1.1206(b)(1).

Ms. Marlene H. Dortch
August 21, 2007

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If you have any questions regarding this correspondence, please contact the undersigned using the contact information reflected in the letterhead.

Sincerely,

/s/ Melissa E. Newman

Attachment

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of)	
)	
Policies and Rules Governing)	
Retirement of Copper Loops by)	RM-11358
Incumbent Local Exchange Carriers)	
)	
Petition of XO Communications, LLC,)	
Covad Communications Group, Inc.,)	
NuVox Communications and Eschelon)	
Telecom, Inc. for a Rulemaking to Amend)	
Certain Part 51 Rules Applicable to)	
Incumbent LEC Retirement of Copper)	
Loops and Copper Subloops)	
)	
Petition of BridgeCom International, Inc., <i>et al.</i> ,)	
Petition for Rulemaking and Clarification)	

OPPOSITION OF QWEST CORPORATION

Qwest Corporation (“Qwest”) submits its opposition to the January 18, 2007 Petition for Rulemaking filed by XO Communications, LLC, *et al.*, and the January 18, 2007 Petition for Rulemaking and Clarification filed by BridgeCom International, Inc., *et al.*¹ (“BridgeCom Petition”) (jointly XO and BridgeCom are “petitioners”). Petitioners ask the Federal Communications Commission (“Commission”) to make it more difficult for incumbent local exchange carriers (“LECs”) to retire copper loops after overbuilding its own copper facilities with fiber. Petitioners want the Commission to make rules requiring incumbents to get affirmative regulatory approval before retiring copper. BridgeCom suggests that the Commission require incumbents to sell their copper facilities to competitive LECs. Petitioners want to preserve competitive LECs’ ability to request unbundled access to copper loops in order

¹ See Public Notice, DA 07-209, RM-11358, rel. Jan. 30, 2007.

that competitors can provide a suite of voice, video and information services. The Commission has, in essence, already decided that competitive LECs are not impaired without access to retired copper. Rather, the Commission has decided that allowing incumbent LECs to retire copper provides incentives for both incumbent and competitive LECs to invest in next-generation networks. Moreover, as described below, there are significant problems associated with compensating incumbent LECs for retired copper.

BACKGROUND

In the *Triennial Review Order* (“TRO”) the Commission rejected arguments in favor of requiring affirmative regulatory approval prior to the retirement of copper loop facilities.² The Commission’s copper retirement rules arose as part of the Commission’s plan to stimulate investment in next-generation networks, particularly fiber-to-the-home (“FTTH”). These rules arose in a landscape where FTTH was being installed mainly in “greenfield” situations, and competitive LECs accounted for 77% of FTTH installations.³ Petitioners revisit the issue, without acknowledging that the incentives put in place by the *TRO*, and other orders, have succeeded in increasing broadband deployment. When the Commission issued the *TRO*, FTTH was deployed to approximately 26,000 homes, and competitive LECs and municipalities had

² *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17146-48 ¶¶ 281-84 (2003) (“*TRO*”), corrected by *Errata*, 18 FCC Rcd 19020, (2003), *aff’d in part, remanded in part, vacated in part, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA IF*”), *cert. denied sub nom. National Ass’n Regulatory Util. Comm’rs v. United States Telecom Ass’n*, 125 S. Ct. 313, 316, 345 (2004).

³ *Id.*

deployed 90% of that FTTH.⁴ Now the two largest incumbents, AT&T and Verizon, are making significant investments in overbuilding their existing networks with fiber.

By way of background, the Commission decided that requesting carriers are not impaired without access to a FTTH loop whether that loop is a new loop or a replacement for pre-existing copper. Both the incumbent and the competitor face the same costs in deploying fiber, and both face the higher potential rewards from the full suite of services made possible by fiber.⁵ The current loop retirement rules arise from the Commission's insight that in making broadband investment decisions incumbent LECs will be deterred by requirements that they must keep and maintain in working order their copper plant, and must continue to provide that plant for use by competitive LECs at Total Element Long Run Incremental Cost ("TELRIC") rates. That is, the freedom to retire copper plant is itself an incentive to deploy fiber. Moreover, competitive LECs will be spurred to invest in next-generation networks by the knowledge that the incumbent LECs' next-generation networks will not be available on an unbundled basis.⁶ The Commission expected consumers to benefit from the race to build next-generation networks,⁷ and they have.

In overbuild scenarios competitive LECs and incumbent LECs are not similarly situated in one respect. Incumbent LECs could replace and ultimately deny access to the already-existing copper loops that competitive LECs were using to serve their customers.⁸ Thus, the Commission decided that the incumbent LEC must either keep the existing copper loop connected to a particular customer after deploying FTTH, or if the incumbent retires the copper loop, it must

⁴ *Id.* at 17117 ¶ 227.

⁵ *Id.* at 17142 ¶ 273.

⁶ *Id.* at 17141-42 ¶ 272.

⁷ *Id.*

⁸ *Id.* at 17144-45 ¶ 277.

provide unbundled access to a 64kbps transmission path over its FTTH loop.⁹ The Commission was careful to note that it did not require the incumbent to incur relief and rehabilitation costs for a loop unless the competitive LEC requested access to it and the loop was placed back into service.¹⁰

The Commission declined to require regulatory approval prior to copper loop retirement. Rather, it chose to rely on existing requirements that carriers provide public notice of network changes. It did permit parties to file objection to copper loop retirements. Such objections are deemed denied unless acted upon within 60 days. The goal of this notification process is to ensure that incumbents and competitors work together to maintain the competitor's access to loop facilities.¹¹

ARGUMENT

Petitioners' proposed rules would remove incentives to deploy fiber. XO petitioners would require the incumbent LEC to seek express Commission permission before retiring copper loop. Similarly, Bridgcom petitioners would ask the Commission to prohibit retirement unless certain circumstances are met. Petitioners would like the Commission to mandate that incumbent LECs leave copper loops in place, allowing CLECs to use the copper facilities to offer "voice, video, and information services"¹² while paying TELRIC rates. These Petitions find support in neither the law, nor public policy.

The statute does not support petitioners' goal of using retired copper loops as the third wire into the home to be used in the delivery of "voice, video, and information services" without

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 17146-47 ¶ 281.

¹² BridgeCom Petition at 1.

an impairment finding.¹³ In order to show impairment petitioners have to demonstrate that lack of access to an incumbent LEC network element, *i.e.*, retired copper, poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic for a reasonably efficient competitor.¹⁴ They would have difficulty making such a finding given the extensive intermodal competition that already exists from cable, satellite, and wireless. Moreover, the Commission essentially found in the *TRO* that legacy copper loops generally do not meet the Section 251(c)(3) unbundling standard where the incumbent LEC is deploying FTTH. Petitioners are asking for reconsideration of that decision without making an impairment showing.

Even if the statute allowed petitioners to use unbundled network elements (“UNEs”) to provide voice, video and information services without an impairment finding, policy arguments do not support their Petitions. First, the Commission has already considered petitioners’ arguments and determined that the benefits of providing unbundled access to competitors, are outweighed by the need to provide appropriate incentives for both incumbents and competitors to install fiber. Petitioners do not dispute the Commission’s finding that competitive LECs wishing to offer broadband service are free to deploy their own next-generation facilities, and face the same cost-benefit analysis as do incumbents.¹⁵ Further, petitioners ignore two significant problems associated with compensating incumbent LECs for copper plant left in place. First, the petitioners ignore the costs required to maintain unused plant in place in the absence of retail or wholesale customers. There is no reason why incumbent LECs should shoulder the costs

¹³ 47 U.S.C. § 251(c)(3).

¹⁴ See *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Red 2533, 2545-46 ¶ 22 (2005) (subsequent history omitted).

¹⁵ *TRO*, 18 FCC Red at 17141-42 ¶ 272.

associated with maintaining redundant infrastructure. Second, the petitioners assume that the competitive LECs should be able to lease loops at the state-determined UNE loop rate.

However, these rates presume that the incumbent LEC is also providing service in the area via copper loops, and would itself serve the customer at issue via the same loop if the customer were not taking service from a competitive LEC. These assumptions are not true in the overbuild context. The loop-related costs that would otherwise be spread among numerous customers will no longer be defrayed in that manner. While BridgeCom's proposed forced sale of copper plant,¹⁶ would avoid the problems associated with maintaining unused copper plant, it would do nothing to correct the fiber deployment disincentives to incumbent LECs. This is because a forced sale is unlikely to yield a market-based price since the incumbent must by law sell a facility to a particular buyer.

CONCLUSION

The Commission does not have the statutory authority to mandate that incumbents provided unbundled access to retired copper loops for the provision of video and information services without an impairment finding. In addition, making it difficult for incumbent LECs to

¹⁶ BridgeCom Petition at 14.

retire copper loops would provide a disincentive for incumbents or competitors to investment in fiber. Accordingly, the Commission should deny the Petitions.

Respectfully submitted,

QWEST CORPORATION

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Its Attorneys

March 1, 2007

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **OPPOSITION OF QWEST CORPORATION** to be 1) filed with the FCC via its Electronic Comment Filing System in RM-11358; 2) served via email on Ms. Janice Myles, Wireline Competition Bureau, Competition Policy Division, Federal Communications Commission at janice.myles@fcc.gov; and 3) served via email on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Richard Grozier

March 1, 2007