BINGHAM

Patrick J. Donovan
Direct Phone: 202.373.6057
Direct Fax: 202.373.6001
patrick.donovan@bingham.com

October 5, 2007

VIA ECFS

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

Re: Re: WC Docket Nos. 06-125, 05-25

Dear Ms. Dortch:

This will provide notice that on October 4, 2007, Frances McComb, Vice President, Regulatory Affairs, Cavalier Telephone, LLC, Stephen W. Crawford, Senior Vice President and General Counsel, Alpheus Communications, LP, Nancy Lubamersky, Vice President-Regulatory Affairs, and Marilyn Ash, Regulatory Counsel, U.S. TelePacific Corp. d/b/a TelePacific Communications, William A. Haas, Deputy General Counsel, McLeodUSA Telecommunications Services, Inc., Joshua M. Bobeck of this firm, and the undersigned met with John Hunter, Office of Commissioner Robert J. McDowell, and Chris Moore, Office of Commissioner Deborah Taylor Tate. We presented the views set forth in the attached documents which was provided at the meetings.

Sincerely yours,

Patrick J. Donovan

Boston
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Walnut Creek
Washington

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

T 202.373.6000
F 202.373.6001
bingham.com

Inadequate Showing of Competition

- BOCs allege, but do not demonstrate, competition in any geographic market.
  - A demonstration of national level competition requires a showing of competition in every local market.
  - *Wireline Broadband Order* dealt with a different service - Internet access service - not common carrier transmission services.
  - *271 Broadband Forbearance Order* limited to markets already assessed in *TRO*.
  - BOCs did not comply with Wireline Bureau request to provide local market data.

BOCs Retain Market Power

- Broadband, IP enabled traffic does not eliminate last-mile bottleneck.
- Only a small percentage of buildings have CLEC fiber (DOJ, GAO, GeoResults).
- FCC retained dominant carrier regulation of Qwest in Omaha even though it found significant retail and enterprise market competition

Dominant Carrier Regulation Still Necessary to protect Competition and Consumers

- Competitors lack reasonably priced alternatives to BOC last mile facilities for provision of Ethernet services
- CLECs incur significant extra costs to provide Ethernet over TDM special access:
  - costly to add another layer of electronics
  - electronics are more expensive than native Ethernet gear
  - multiple TDM circuits needed to match Ethernet capacity

- OCn impairment determination: lack of impairment does not mean lack of market power, expectation that dark fiber would be available barriers to deployment not overcome.
- Impractical to construct OCn at every location.

BOCs May Offer Customized Services Without Forbearance

- Contract tariffs permit customized offerings.
- Dominant carrier regulation for retail services is optional -- AT&T uses non-regulated advanced services affiliate but key inputs it buys (special access) remain subject to dominant carrier regulation.
- *Verizon Fast Packet Order*: Verizon may offer broadband outside of price caps subject to pricing flexibility without a separate affiliate.

Recommendation

- Deny the Petitions for failure to demonstrate competition in any geographic or market segment.
- Consider addressing market failures and path towards deregulation in pending special access and dom/nondom proceedings.

The Marketplace Failure and Need for Special Access Reform

- **The Pricing Flexibility Rules and the CALLS Plan Have Failed to Produce Competitive Special Access Rates**
  - Rates are Not Forward-Looking. The FCC's predictive judgment and market-based approach have failed to produce forward-looking rates reflective of a competitive market
    - Special Access rates are dramatically higher than forward-looking, cost-based rates for comparable UNE services and rates offered by competitors
    - BOCs' excessive special access rates-of-return demonstrate that special access prices are unreasonable
    - Pricing Flexibility has permitted "substantial and sustained" price increases above price cap rates
    - Prices for the BOCs' retail high-capacity service offerings, *e.g.*, Verizon's DSL and FiOS, are significantly lower because competition exists in these markets
  - The Special Access Market is Not Competitive. BOCs continue to possess a bottleneck because almost no viable competitive alternatives to the BOCs' special access services exist.
  - GAO Report Validates CLEC Concerns. Report found that (1) facilities-based competition to end users exist in only a relatively small set of buildings; (2) prices for special access services in MSAs with Phase II pricing flexibility are on average higher than prices elsewhere; and (3) the effects of Phase I and Phase II pricing flexibility contracts on prices serve to impede rather than promote competition.
  - BOCs Impose Unreasonable Non-Price Terms and Conditions. BOCs impose terms designed to limit competition; growth commitments, limits on use of competitors' facilities, limits on use of UNEs, non-cost-based regional commitment plans.
  - BOC Mergers Increase the Need for Reform. Increased concentration facilitates potential for harm; increased economies of scale reduce BOC costs; larger BOC footprints increase the incentive for BOCs to harm competition.
- **Proposed Reforms**
  - Reinitialize Prices. Set prices at forward looking cost.
  - Phase II Pricing Flexibility Should Be Modified to Permit Reductions Only.
  - Reform Price Cap Rules. A productivity based X-factor and additional baskets/categories.
  - Prohibit Unreasonable Terms and Conditions
  - Fresh Look for Existing Special Access Service Contracts. No mandated change to existing contracts.