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April 21, 2010

VIA ECFS

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

Re: Notice of Ex Parte Presentation: WC Docket Nos. 09-135, 06-172, 07-97, 04-223

Dear Secretary Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this will provide notice that on April 20, 2010, Anthony Hansel of Covad Communications Company ("Covad"), Russell M. Blau and the undersigned of Bingham McCutchen LLP, along with William Haas of PAETEC Holding Corp.¹ and Sara Cole of TDS Metrocom, LLC ("TDS") (both of whom participated in the meetings via teleconference) met with David S. Goldman, Legal Advisor, Office of Chairman Julius Genachowski and, in a second meeting, with Austin Schlick, Julie Veach, and Diane Griffin Holland from the Office of General Counsel; and Donald Stockdale, Albert Lewis, Tim Stelzig, Denise Coca, Margaret Dailey, Henry Greenridge, and Laurance Frierson from the Wireline Competition Bureau.

During these meetings, we presented views set forth in the attached document and emphasized that as a threshold matter, petitions seeking forbearance from offering § 251(c)(3) Unbundled Network element ("UNEs") should be denied because granting such petitions, at least under currently prevailing market conditions, would not promote competition as 47 U.S.C. § 160(a)(3) and (b) require. We also presented views that were consistent with previous filings made by Covad, PAETEC and TDS in the above-referenced proceedings.

During the second meeting, in the context of the market power test that we proposed, we discussed the geographic and product markets that should be analyzed. We also discussed the high-capacity broadband services that can be provided over copper UNE loops if certain electronics, such as those offered by Hatteras Networks, Inc. or

¹ On behalf of its operating subsidiaries, PAETEC Communications, Inc. US LEC, and McLeodUSA Telecommunications Services, Inc. (all doing business as "PAETEC").

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Actelis Networks Inc., are attached to the end of these UNE loops.² We clarified that a 64 kbps voice-grade DS0 UNE facility should be analyzed as distinct from qualified copper (*i.e.*, conditioned 2- and 4-wire) loops because the latter UNE loops can be used to provide various high-speed DSL and Ethernet services over them depending upon the electronics attached to these conditioned copper facilities. In this connection, Covad explained that because companies like Covad have had access to unbundled conditioned copper loops, DSL services became popular and prompted the Bell Operating Companies (“BOCs”) to offer their own DSL products.

Very truly yours,

/s/ Philip J. Macres

Philip J. Macres

Attachment

cc: David S. Goldman (all via E-mail)
Austin Schlick
Julie Veach
Diane Griffin Holland
Donald Stockdale
Albert Lewis
Tim Stelzig
Denise Coca
Margaret Dailey
Henry Greenridge
Laurance Frierson

² See, e.g., Hatteras Networks Home Page, <http://www.hatterasnetworks.com>; Actelis Networks, Home Page, <http://www.actelis.com>; see also Letter from Stephen Goodman, Counsel for Hatteras Networks, Inc., to Marlene H. Dortch, Secretary, FCC, RM-11358 (filed Jan. 28, 2008); Letter from Jeffery K White, President, Hatteras Networks, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51 (filed June 1, 2009).

UNE Forbearance
WC Docket Nos. 09-135, 07-97 & 06-172

Ex parte presentation on behalf of:

PAETEC Holding Corp.;
Covad Communications Company;
TDS Metrocom, LLC

April 20, 2010

UNE Forbearance in Phoenix Would be Contrary to National Broadband Ecosystem Objectives and Recommendations

- UNEs are critical wholesale inputs needed to promote robust competitive broadband deployment
- UNE forbearance would defy broadband ecosystem objectives:
 - Would reduce, rather than maximize, competition, consumer welfare, innovation and investment (NBP at xi)
 - Would discourage, rather than encourage, network upgrades or competitive entry (NBP at xi)
- Demonstrated By Berkman February 2010 Report, ETI February 2010 Paper, QSI January 2010 Analysis (09-223), PAETEC Export Data

UNE Forbearance in Phoenix Would be Contrary to
National Broadband Ecosystem Objectives and
Recommendations
(cont'd)

- UNE forbearance would contradict recommendations for competition in wholesale broadband markets:
 - Contrary to NBP, Rec. 4.7, would prevent a comprehensive review of wholesale competition regulation to develop a coherent and effective framework to ensure widespread availability for inputs for broadband service provided to small businesses and enterprise customers
 - Contrary to NBP, Rec. 4.8, would remove a critical wholesale input on a piecemeal basis before the FCC develops a framework to ensure that special access rates are just and reasonable

The FCC Must Adopt a New Forbearance Standard

- The Omaha forbearance standard harms consumers and competition by subjecting them to a duopoly
 - Duopoly markets are contrary to the public interest
 - The Commission's predictive judgment about wholesale competition has been proven to be mistaken
 - The Omaha framework fails to recognize distinctions between relevant product markets
 - The Omaha test does not identify locations where competitors have facilities available to serve customers
- The forbearance analysis should consider all aspects of market power, not just market share
 - RBOCs improperly assume that the presence of a competitor in any product market means that they face competition for all services that can be offered using UNEs
 - RBOCs request an incomplete and one-dimensional analysis of market conditions

The FCC Should Employ an Analytical Framework Similar to Its Traditional Market Power Analysis

- Analysis must be prospective:
 - The question is not whether the ILEC is dominant today, but whether elimination of UNEs would make the market significantly less competitive in future
 - Focus must be on the retail markets in which UNE-based competitors serve customers; forbearance should be denied if it would make any of these retail markets less competitive
- Market Share is a key component of the analysis
 - The Commission should require the presence of two wireline competitors with extensive facilities to end-user premises before granting forbearance
 - The two-competitor threshold is a reasonable measure to guard against dangers inherent in highly concentrated markets
- The analysis should give more weight to actual than potential competition
 - Section 10 focuses on present day market realities
 - Potential competition is already incorporated in the impairment standard
- The Commission should consider Supply Elasticity
 - Ability to add “significant additional capacity”
 - Ability to overcome entry barriers
- The Commission should consider Demand Elasticity

The FCC Should Examine Competition in Discrete Product and Geographic Markets

- Product markets must be defined based on sound economic criteria
 - Separate analyses of wholesale and retail competition
 - Separate analysis of residential and business markets
 - Products that most consumers do not view as a substitute (e.g., wireless) are not in the same product market, even if a subset of consumers do substitute them
- The Commission should standardize the MSA as the appropriate geographic market for analyzing the statutory forbearance criteria

The Qwest Phoenix Forbearance Petition Fails to Meet the Statutory Forbearance Standard

- Loop and transport unbundling remains necessary to assure that Qwest's rates are reasonable and non-discriminatory
- Forbearance would harm competition because loop and transport unbundling remains necessary to protect consumers
 - Forbearance would harm consumers
 - Forbearance would create a new barrier to entry
 - CLECs are impaired in Phoenix without unbundled access to UNEs because of higher costs and lower margins
- Forbearance would not serve the public interest
 - A duopoly in key market segments would not protect adequately against unjust and unreasonable pricing for retail services
 - UNE Forbearance cannot serve the public interest if it would eliminate competition from a market