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EX PARTE

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

Re: ***Technological Transition of the Nation's Communications Infrastructure*, WC Docket No. 12-353; *Petitions for Rulemaking and Clarification Regarding the Commission's Rules Applicable to Retirement of Copper Loops and Copper Subloops*, RM-11358**

Dear Ms. Dortch:

The Commission has already determined that in order to encourage providers of all types to invest in broadband facilities, providers should have flexibility to determine the technologies and platforms they use to serve their customers, as well as the flexibility to decide when it is time to move away from legacy facilities in favor of newer platforms. Specifically, the FCC concluded that ILECs should not be required to retain redundant and outdated copper facilities when they no longer need them to serve their customers. There is no legal basis to support reversing these settled findings. Nor is their legal authority to limit providers' flexibility in deciding the platforms that they use to serve their customers or to force ILECs to bear the burden of keeping in place solely for the benefit of CLECs copper facilities not used for serving their own retail customers. Indeed, reversing course would require the Commission to undermine policies that have fostered massive investment in and deployment of new broadband facilities. In short, the Commission policy – aimed at encouraging investment by all, rather than handicapping some providers for the benefit of others – has worked as intended, encouraging widespread facilities-based investments by providers of all types (e.g., fiber, cable, and wireless) that have expanded the choices for consumers and the availability of next-generation broadband.

For example, providers throughout the industry have invested billions of dollars into the deployment and upgrade of broadband networks – Verizon alone has invested more than $20 million deploying its all-fiber network. Between expanded fiber networks, widespread cable

deployment and upgrade to DOCSIS 3.0, and the explosive growth of 3G and 4G LTE wireless networks, consumers now benefit from greater availability and more choices for broadband services. Petitioners now ask the Commission to reverse these successful policies and force one set of providers to pay for redundant facilities – at a cost of hundreds of millions of dollars annually – they will not be using. Granting their request would impose unnecessary costs that ultimately are borne by consumers and discourage broadband deployment – the very opposite of what the Commission has intended.

First, Mpower and its allied petitioners ("Mpower *et al*." or "Petitioners") claim that a single set of broadband providers – ILECs – should be denied the flexibility to retire old-technology, copper facilities that they don't need to serve their own customers, just so Petitioners can continue to use those outdated facilities at artificially low rates indefinitely.[1] As previously recognized by the FCC and the D.C. Circuit, such an approach would turn on its head the successful Commission policies aimed at encouraging network investment by *all* providers: it would both undermine the incentive for Mpower *et al*. to invest in facilities of their own and simultaneously deny ILECs and their customers the full benefit of their investments in new facilities.

As it seeks to minimize the investment-deterring consequences of its proposals, Mpower *et al*. suggest that the costs of maintaining unneeded and redundant copper facilities, such as where fiber has been deployed, is not significant to ILECs, and that a requirement to do so would not affect their investments in fiber and other next-generation platforms.[2] They are wrong on both counts. As explained in the initial comments, the cost to a carrier of maintaining copper facilities in those areas where fiber has been deployed are more than $200 million per year nationwide, and many of these costs are incurred even if no customers are being served by the copper.[3] These costs are independent of and in addition to costs incurred in connection with serving customers using copper facilities, and include on-going maintenance costs, property taxes, and monitoring costs – all for facilities which are not being used and are unnecessary to serve customers.[4] For example, even if there are no customers using copper facilities, ILECs may still have to pay property taxes on lines that have not been retired; replace deteriorating lines and repair facilities damaged by mechanical or rodent issues, line cuts, and storm or rain damage; rearrange plant to address end user requests, pole replacement or attachment issues, and government projects (e.g., pole and pedestal moves due to road construction); respond to employee, competitor, or government reports of faults or damage; apply nitrogen and maintain air pressure for unused copper cables and respond to air pressure alarms; maintain air dryers and load cables; monitor networks and dispatch for troubles in terminals, splice closures, jumpers, and cut cables; and incur Care Center costs related to external calls for cut and damaged cables. While the amount of costs may vary depending on where and when copper facilities are retired,

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[1] *See* Mpower Communications Corp., *et al*., Reply Comments (Mar. 20, 2013) ("Mpower *et al*. Reply Comments").

[2] *See* Mpower *et al*. Reply Comments at 4, 19-20, 25.

[3] *See* Verizon Comments at 11 (Mar. 5, 2013).

[4] Verizon Comments, Exhibit A: Declaration of Claire Beth Nogay, ¶ 20 ("Nogay Decl.").

petitioners do not and cannot dispute these categories of costs would be incurred even if ILECs are not using the facilities.

Continuing to allow providers flexibility to decide when to retire redundant or unused copper facilities when other facilities have been deployed allows those providers to avoid unnecessary costs and direct resources instead to better uses, including investment in next-generation broadband. ILECs relied on the FCC rules that permit copper retirement in areas where fiber is deployed when making the decision to invest in and deploy fiber and other next generation facilities.[5] The companies factored in not only expected revenues from selling services over these new facilities, but also cost savings of transitioning away from high-maintenance copper facilities as customers migrate to fiber and savings from being able to retire copper where that copper is no longer needed. *Id.* Because the costs of maintaining one set of facilities are lower than the costs of maintaining two, and because the costs of maintaining copper are much greater than the costs of maintaining fiber, allowing providers the flexibility to decide when to retire copper facilities where fiber is deployed gives them added ability to invest in maintaining and upgrading existing broadband networks to expand their capabilities. Thus, this flexibility encourages deployment and growth of these more reliable, next-generation facilities to customers.

Petitioners also claim that, because some CLECs allegedly find it "uneconomic" to deploy fiber or have faced some hurdles in doing so, ILECs should be required to maintain their copper facilities for the benefit of those CLECs indefinitely, even when those facilities are not being used to serve ILEC retail customers.[6] But Mpower *et al*. ignore the significant economic investment that ILECs have made (and continue to make) in light of these policies to build, deploy and expand the capabilities of next generation networks. The Commission should not now make it more difficult to recoup on those investments by requiring ILECs to maintain redundant unnecessary facilities. Moreover, Petitioners' argument ignores other options for petitioners, including negotiating commercial wholesale arrangements from ILECs, cable providers, other entities that have invested in fiber to the premises, or from wireless.

Second, Mpower *et al*. also err in suggesting that the FCC would have the legal authority to limit providers' flexibility in deciding the platforms that they use to serve their customers or to force ILECs to bear the burden of keeping in place solely for the benefit of CLECs copper facilities not used for serving their own retail customers.[7]

Section 706 of the Act, contrary to the arguments of Mpower *et al*., supports the Commission's current policy of allowing the retirement of older facilities that have been replaced by newer broadband platforms. In fact, Section 706 expressly obliges the Commission to "encourage" broadband deployment by using measures that "*remove* barriers to infrastructure

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[5] Nogay Decl. ¶ 34.

[6] *See, e.g.*, Mpower *et al*. Reply Comments at 16-19.

[7] *See id*. at 27-34.

investment"[8] which necessarily means it should not be creating unnecessary new barriers[9] as Petitioners urge.

Mpower *et al*. argue that Section 706(a) requires the Commission to promote broadband deployment through "measures that promote competition" and that allowing cooper retirement "reduces competition" contrary to this provision.[10] But Section 706(a) specifically limits the Commission's authority to "promote competition" to "methods that remove barriers to infrastructure investment." *Id*. As the Commission has repeatedly recognized, requiring ILECs to retain redundant copper facilities would increase barriers to infrastructure investment, contrary to this Section, by undermining the investment incentives for both ILECs and for the providers who, but for the availability of copper at artificially low rates, would have increased incentive to build facilities of their own.[11] In any event, promoting facilities-based broadband investment will increase, not decrease competition by providing more and better options for consumers. For example, fiber and cable platforms provide wireline broadband alternatives that match or exceed the capabilities of copper facilities. 4G LTE wireless networks provide convenient high speed broadband access that consumers can access on-the-go, or away from their homes or offices. But copper is simply not capable of matching the capabilities of fiber and other next generation technologies, which is precisely why providers have invested heavily to deploy them (dwarfing any expenditures other providers have made in copper-based technologies). As noted above, requiring ILECs to retain copper facilities in areas where newer broadband platforms have been deployed will reduce the incentives to invest in next generation facilities and networks in the first instance. Thus, it would be contrary to the language and purpose of Section 706 to promote investment in copper where, as here, doing so would diminish consumers' ability to obtain access to the superior capabilities of newer technologies and the increased competition it provides.

Nor could Section 706(b), which provides the Commission with authority to "accelerate deployment" of advanced telecommunications capability in areas that lack broadband by "removing barriers" to infrastructure investment, support a limitation on ILECs' flexibility to

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[8] 47 U.S.C. § 1302(a). *See also Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260, ¶ 52 (2008); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 19 (2005); *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004) ("section 706**(**a) identifies one of the Act's goals . . . namely, removing barriers to infrastructure investment").

[9] 47 U.S.C. § 706(a); *see Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 278 (2003) ("*Triennial Review Order*"); *id.* ¶¶ 219, 243.

[10] MPower *et al*. Reply Comments at 27-28.

[11] *See, e.g.*, FCC, *Connecting America: The National Broadband Plan*, at 48-49 (2010), http://download.broadband.gov/plan/national-broadband-plan.pdf (requiring ILECs to maintain copper facilities in areas where they have deployed fiber would "reduce the incentive for incumbents to deploy fiber facilities").

retire redundant copper facilities. Even pursuant to Petitioners' argument,[12] such a finding – which the facts here do not support – would necessarily be limited to areas where fiber or other forms of broadband have not been deployed. Where alternative broadband platforms exist, advanced telecommunications capability is available, and Section 706(b) cannot provide a basis for the Commission to prevent copper retirement or take other steps that would deter investment.

Next, contrary to the argument of Mpower *et al*., Section 251(c)(3) provides no basis for the Commission to prevent copper retirement in areas where fiber or other broadband facilities have been deployed. The unbundling obligations of Section 251(c)(3) apply only to the existing network facilities that ILECs use to serve their customers; they do not impose an obligation to use or maintain any particular type of facilities, nor to retain duplicative or outdated facilities that the ILEC no longer needs to serve customers. Thus, while the Commission previously found "impairment" and established an obligation to provide access to existing copper loops on an unbundled basis, that obligation only arises where the ILEC has in place and chooses to keep in service copper facilities to serve its own customers.[13]

Similarly, Mpower *et al*. are wrong when they argue that the *Triennial Review Order* confirms the Commission's authority "to prevent retirement under the existing rules."[14] The *Triennial Review Order* held precisely the opposite: that where ILECs deployed next-generation fiber networks and the legacy copper facilities were no longer needed to serve customers, the ILECs were free to retire those unneeded and costly copper facilities and thus realize the cost savings that help support the case for new network investment, provided only that competitors continue to have a way to provide *narrowband* (64 kbps) services.[15] The only scenario in which the Commission held an opposition to copper retirement would not be "deemed denied" is one in which "competitors will be denied access to the loop facilities required under our rules" – that is, where copper is retired and the ILEC has not made available a narrowband service.[16] Contrary to what Petitioners appear to suggest,[17] none of the Commission's supposed "interpretation[s] of the term network element in the statute" disturb this holding or otherwise suggest that Section 251 can be used to require ILECs to unbundle elements of a network that is no longer needed to serve the ILECs' own customers.

Finally, Section 271 also does not authorize any restrictions on providers' flexibility to retire copper facilities as they move to newer platforms. As with Section 251(c)(3), Section 271 contains no obligation to deploy or maintain any particular facilities nor to retain duplicative facilities that are no longer used to serve customers. Where a provider has retired copper facilities, it is no longer using those facilities for customers, and thus there is nothing to

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[12] *See* Mpower *et al*. Reply Comments at 28-29.

[13] *See, e.g.*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) (noting that unbundling requirements apply only to an ILEC's "existing network").

[14] Mpower *et al*. Reply Comments at 29.

[15] *See Triennial Review Order* ¶ 277.

[16] *Id.* ¶ 282.

[17] *See* Mpower *et al*. Reply Comments at 31.

unbundle. Moreover, the Commission has granted forbearance from applying the loop unbundling requirements of Section 271 with respect to the broadband elements that the Commission, on a national basis, had relieved from unbundling in the *Triennial Review Order*.[18] Although Mpower *et al.* argue that this holding "does not apply to copper loops," that is incorrect. In the *Section 271 Forbearance Order*, the Commission granted "all BOCS forbearance from Section 271's independent applications with regard to the broadband elements the Commission, on a national basis, relieved from unbundling under Section 251" in the *Triennial Review Order*."[19] They Commission's policy permitting the retirement of copper, subject only to the requirement to provide access to a narrowband 64 kbps voice-grade channel over fiber, was part and parcel of the Commission's broadband unbundling policies, as the *Triennial Review Order* makes clear. Thus, because the Commission held in the *Triennial Review Order* that ILECs did not have to unbundle copper loops for broadband services where fiber has been deployed, there is no obligation to provide such unbundling under Section 271.

Very truly yours,

Katharine R. Saunders

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[18] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, ¶ 12 (2004) ("*Section 271 Forbearance Order*").

[19] *Id.*