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BEFORE THE ARIZONA CORPORATION COMMISSION



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MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner

IN THE MATTER OF THE INVESTIGATION)
 INTO QWEST'S CABLE WIRE AND SERVICE) Docket No. T-00000A-02-0280
 TERMINATION POLICIES AND TARIFFS)
 AND THE POLICIES AND TARIFFS OF) AT&T'S RESPONSE TO
 OTHER TELECOMMUNICATIONS CARRIERS) COX ARIZONA
 WITH RESPECT TO ACCESS TO MTE/MDU) TELECOM'S COMMENTS
 TENANTS.) PURSUANT TO 10/10/03
) PROCEDURAL ORDER

AT&T Communications of the Mountain States, Inc. and TCG Phoenix
 (collectively, "AT&T") hereby respond to Cox Arizona Telecom's ("Cox") Comments
 pursuant to 10/10/03 Procedural Order.

I. INTRODUCTION

AT&T has reviewed Cox's latest comments; and, frankly, it is still unable to
 determine if Cox has any legitimate concerns. AT&T understands that Cox wants to
 eliminate Options 2 and 3 from Qwest Corporation's ("Qwest") Cable, Wire and Service
 Termination Policy ("Tariff") and wants a rulemaking to adopt some form of Options 1
 and 4 for all carriers; however, Cox has failed to provide any examples of real-world
 problems associated either with the Tariff, Qwest's compliance with the *UNE Remand*

*Order*¹ in the past or the contents of the new *Triennial Review Order*² to justify its proposals. Cox has simply failed to explain why the *Triennial Review Order* and other orders of the Federal Communications Commission (“FCC”) are inadequate and why Qwest’s Tariff is unreasonable and anticompetitive. AT&T does not wish to deny Cox the opportunity to put on its case; however, the comments Cox has filed so far in the proceeding are devoid of any basis for supporting its proposals. It appears to AT&T that the concerns raised by Cox in its initial comments have been addressed by the FCC.

II. ARGUMENTS

A. Qwest’s Tariff

Qwest’s Tariff provides 4 options to *premise owners* for terminating Qwest facilities on the premise owner’s property. The Tariff does not give the competitive local exchange carrier (“CLEC”) or Qwest the right to select the option for the premise owner. What Cox seeks to do is limit the premise owner’s options under a Qwest tariff and limit by rule the options all telecommunications carriers can make available to premise owners.

It is AT&T’s understanding that Qwest’s tariff is a lawful tariff. Cox has not provided *any* evidence in this proceeding that the Tariff is unlawful or unreasonable. The only objections to the Tariff by Cox that AT&T could locate is that if the demarcation is not located at the property line, Cox has to pay Qwest for use of the subloops, “thus

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) (“*UNE Remand Order*”).

² *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-95; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rule Making, FCC 03-36 (rel. Aug. 21, 2003) (“*Triennial Review Order*” or “*TRO*”).

adding unnecessary cost and administrative difficulties to the competitor's ability to serve the property." Cox's Initial Comments on MTE/MDU Access, at 3. Cox argues it must also pay Qwest's technician to install the necessary cross connects between Qwest and Cox's facilities. *Id.* Cox believes that if the demarcation point is at the MPOE, it will not have to pay for subloops and can do its own cross connects to the tenant's inside wire. *Id.* at 4. By attacking Qwest's Tariff, Cox, in effect, is attempting to eliminate options available to the premise owners under the Tariff and to the CLECs under the Act and FCC orders.

The Commission has the authority to review and change Qwest's Tariff if Cox provides evidence it is unlawful or unreasonable. However, AT&T does not believe the Commission by rule can limit the rights conferred upon CLECs under the federal Act and FCC orders. The Commission should also be cautious about limiting options available to premise owners if those options do not conflict with the federal Act, FCC orders or Arizona law.

B. Federal Law

Pursuant to the Telecommunications Act of 1996, carriers obtain access to interconnection and unbundled network elements from Qwest pursuant to Section 252 of the Act. The FCC has defined Qwest's obligations under the Act. The Commission should not, and legally may not, limit carriers' rights under the federal Act to negotiate access, especially when the FCC has addressed the very issues Cox raises. AT&T does not believe Cox's proposal is the proper course of action to address disagreements related to the federal Act and FCC orders.

In the FCC's *First Report and Order*, the FCC defined the network interface device ("NID") "as a cross-connect device used to connect loop facilities to inside wiring."³ The FCC noted that "[w]hen a competitor deploys its own loops, the competitor must be able to connect its loops to the customers' inside wiring in order to provide competing services especially in multi-tenant buildings."⁴ However, the FCC's initial definition proved inadequate.

The FCC modified the definition of the NID in its *UNE Remand Order*:

We modify that definition to include all features, functions and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism. Specifically, we define the NID to include any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as cross connect device used for that purpose.⁵

In the *UNE Remand Order*, the FCC also modified the definition of the loop to extend from the distribution frame to the loop demarcation point at the customers premises.⁶

The FCC found that "the demarcation point is preferable to the NID in defining termination point of the loop *because, in some cases, the NID does not mark the end of the incumbents' control of the loop facility.*"⁷ The FCC concluded that "[w]here incumbents maintain ownership and control over a portion of the loop beyond the NID,

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶ 392, n. 852.

⁴ *Id.*, ¶ 392

⁵ *UNE Remand Order*, ¶ 233.

⁶ *Id.*, ¶ 167.

⁷ *Id.*, ¶ 168 (emphasis added). The NID is defined as a cross-connect device by the FCC. However, there may be other locations in a MTE where cross-connects may be located. For example, the NID may be located in a closet in a basement of a building where the distribution facilities terminate. There may be additional cross-connects between the NID and the tenant's inside wire (which is deregulated), and which serve as the demarcation point.

the definition of the loop as set forth by the Commission in the *Local Competition First Report and Order* may not provide the competitor with actual access to the subscriber.”⁸

Based on the FCC’s definition, *the demarcation point is where the incumbent LEC’s ownership and control over the loop ends*. This can be at the NID or a cross-connect beyond the NID. Therefore, the demarcation point cannot be established at the property line or any other arbitrary point, unless this is the place where Qwest’s ownership and control of the loop ends. This is a case-by-case analysis.

The FCC has defined subloops “as portions of the loop accessed at the terminals in the incumbents’ outside plant. An accessible terminal is a point where technicians can access the wire or fiber within the cable without removing a splice case to reach wire or fiber within. These would include a technically feasible point near the customer premises, such as a pole or pedestal, the NID..., or the minimum point of entry to the customers premises (MPOE).”⁹ Based on the FCC’s definition of a subloop, a CLEC can gain access at the MPOE, which may or may not be located at the property line, at the NID or at a cross-connect.

The FCC stated in the *UNE Remand Order* that the parties may negotiate for a single point of interconnection (“SPOI”). “If the parties are unable to negotiate a reconfigured single point of interconnection at multi-unit premises, we require the incumbent to construct a single point of interconnection that will be fully accessible and suitable for use by multiple carriers”¹⁰ However, the FCC “emphasize[d] that the

⁸ *Id.*

⁹ *Id.*, ¶ 206.

¹⁰ *Id.*, ¶ 226.

principle in no way diminishes a carrier's right to access the loop at any technically feasible point, including other points at or near the customer premises."¹¹

After the release of the *UNE Remand Order*, the FCC released its *Competitive Networks Report and Order*.¹² In the *Competitive Networks Report and Order* the FCC did essentially four things.

- First, we *forbid telecommunications carriers* from entering into contracts to serve commercial properties that restrict or effectively restrict the property owner's ability to permit entry by other carriers.
- Second, in order to reduce competitive carriers' dependence on the incumbent LECs to gain access to on-premises wiring, while at the same time recognizing the varied need of carriers and building owners, we establish procedures to facilitate moving the demarcation point to minimum point of entry (MPOE) *at the building owner's request*, and we require incumbent LECs to timely disclose the location of existing demarcation points where they are not located at the MPOE.
- Third, we determine that under Section 224 of the Communications Act, utilities, including LECS, must afford telecommunications carriers and cable service providers reasonable and nondiscriminatory access to conduits and rights-of-way located in customer buildings and campuses, to the extent such conduits and right-of-way are owned or controlled by the utility.
- Fourth, we extend to antennas that receive and transmit telecommunications and other fixed wireless signals our existing prohibition of restrictions that impair the installation, maintenance or use of certain video antennas on property within the exclusive use or control of the antenna user, where the user has a direct or indirect ownership of leasehold interest in the property.¹³

In the *Competitive Networks Report and Order*, the FCC discussed moving the

¹¹ *Id.*

¹² *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking in Wt Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-96 and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC 00-366 (rel. Oct. 25, 2000) ("*Competitive Networks Report and Order*").

¹³ *Id.*, ¶ 6 (footnotes omitted and emphasis added).

demarcation point to the MPOE.¹⁴ The FCC recognized that relocation of the demarcation point to the MPOE would limit the availability of the inside wire as part of the loop element and “would result in a decrease in the amount of wiring within a building that is available to competitive LECs as part of the loop, which by definition ends at the demarcation point.”¹⁵ Also, uniformly moving the demarcation point would raise legal issues regarding investments made by incumbent LECs.¹⁶ Accordingly, the FCC declined to mandate a uniform demarcation point at the MPOE.

In light of these concerns, we decline to mandate a uniform demarcation point at the MPOE. The record shows that although moving the demarcation point to the MPOE would reduce cost and facilitate deployment for competitive LECs that rely on their own facilities to reach MTEs, *it would increase costs and hinder deployment for carriers that rely on unbundled local loops.* In the absence of convincing evidence that the benefits to one group of competitors would significantly outweigh the harms to the other, *we find the best course is to continue to leave the choice in the first instance to the building owner.*¹⁷

The FCC also took several actions to clarify the building owners options. “First, we clarify that in all multiunit premises, the incumbent carrier must move the demarcation point to the MPOE *upon the premises owner’s request.*”¹⁸ Second, “[w]e hold that in order to further competition a request by a property owner to relocate the demarcation point to the MPOE must be dealt with in a reasonably timely and fair manner, so as not to unduly delay or hinder competitive LEC access. We therefore direct incumbent LECs to conclude negotiations with requesting building owners in good faith

¹⁴ *Id.*, ¶¶ 50-53. The MPOE is defined as “either the closest point where the wiring crosses a property line or the closest practicable point to where the wiring enters a multi-unit building or buildings. The telephone company’s reasonable and nondiscriminatory standard operating practices shall determine which shall apply.” *Id.*, ¶ 45, n. 104 and App. B (Revised Demarcation Point rules, 47 C.F.R. § 68.3 Demarcation point).

¹⁵ *Competitive Networks Report and Order*, ¶ 51.

¹⁶ *Id.*, ¶ 52.

¹⁷ *Id.*, ¶ 53 (emphasis added).

¹⁸ *Id.*, ¶ 54 (emphasis added).

and within 45 days”¹⁹ The FCC made it clear that “[t]hese rules will apply as well to competitive LECs where they have installed or have had control of the inside wire.”²⁰ If the premises owner asks the LEC to identify the demarcation point, the LEC has 10 business days to do so. If the LEC fails to timely respond, it will be presumed that the demarcation point is located at the MPOE.²¹ The FCC also made it clear “that to the extent incumbent LECs continue to exercise control over on-premises wiring, they must afford access to that wiring as a UNE at forward-looking prices.”²²

The FCC also addressed access to rights-of-way in an MTE. Access to rights-of-way are important because it permits a CLEC to deploy its own facilities in an MTE to the demarcation point.²³ The FCC concluded that under section 224 of the Act, an *incumbent* LEC must grant other telecommunications carriers access to poles, ducts, conduits and right-of-ways it owns or controls, “even though the incumbent LEC has no right under Section 224 with respect to the facilities of other utilities.”²⁴ The FCC also concluded this obligation is “not limited by location or by how the utility’s ownership or control was granted. Thus, to the extent a utility owns or controls poles, ducts, conduits, or rights-of-way within an MTE, the utility may not exercise its control in a manner inconsistent with Section 224 to impede competitive access.”²⁵

The FCC reviewed at length the availability of subloops at or near multiunit customer premises in the *Triennial Review Order*. *TRO*, ¶¶ 343-358. The FCC

¹⁹ *Id.*, ¶ 55.

²⁰ *Id.*, (emphasis added).

²¹ *Id.*, ¶ 56.

²² *Id.*, ¶ 58.

²³ *Id.*, ¶ 77. “To the extent that a new entrant is unable or does not desire the use of existing in-building wiring, it must obtain access to building conduit in order to install its own cables and wires.” *Id.*

²⁴ *Id.*, ¶ 72.

²⁵ *Id.*, ¶ 76.

essentially re-adopted its previous rules with some modifications. 47.C.F.R. § 51.319(b).

The FCC provided a definition of subloops in a multi-tenant environment.

We include within the definition of the subloops for which we require unbundled access, not only the Inside Wire Subloop, but also any other loop-accessible terminal *at, or near*, a multiunit customer premises where, as a result of the incumbent LEC's network architecture, a requesting carrier may need subloop access to utilize the Inside Wire Subloop or NID to reach the end user. These subloop unbundling rules seek to encompass the various other network configurations that may occur at a multiunit premises when the demarcation point, the MPOE, and the NID are not all located at the same point, *e.g.*, in the basement utility room of the particular building to be served.

TRO, ¶ 347, n. 1035 (emphasis in original).

The FCC added a new term "Inside Wire Subloop" and defined it as the " 'inside wire' on the incumbent LEC network side of the demarcation point, *i.e.*, between the MPOE and the demarcation point." *Id.*, ¶ 343, n. 1021. (The FCC noted the term "inside wire" had several understandings and added a definition of Inside Wire Subloop to eliminate confusion. *Id.*)

Due to various interpretations of the FCC's prior rule, the FCC made it clear that no collocation requirement exists with respect to subloops to access MTEs.

The rules we adopt today make clear that *no* collocation requirement exists with respect to subloops used to access the infrastructure in multiunit premises. Incumbent LECs are required to provide subloops to access multiunit premises without collocation. Competitive carriers are able to access these subloops at any technically feasible terminal point at or near the building *in any technically feasible manner*. This will provide facilities-based competitors the greatest flexibility in designing their networks and most efficiently accessing these subloops only at the point necessary.

Id., ¶ 350 (emphasis in original, footnotes omitted).

The FCC also limited the incumbent LEC's obligation to construct a SPOI.

In requiring unbundled subloops at, or near, a multiunit premises for access to the wiring at the premises, including Inside Wire Subloops,

we note that our current requirement relating to the incumbent LEC's obligation to construct a single point of interconnection (SPOI) at multiunit premises locations for access to these subloops requires the incumbent LEC to construct a SPOI even where it has no facilities into the premises... Thus, we grant that portion of BellSouth's petition requesting that we limit the incumbent LEC's obligation to construct a SPOI to only those multiunit premises where the incumbent LEC has distribution facilities to that premises and either owns, controls, or leases the inside wire at the multiunit premises, including the Inside Wire Subloop, if any, at such Premises. We further clarify as requested by BellSouth that the incumbent LEC's obligation to build a SPOI for multiunit premises only arises when a requesting carrier indicates that it intends to place an order for access to an unbundled subloop network element via a SPOI.

The FCC also reviewed its prior decisions regarding the NID. First, the FCC requires the incumbent LECs to provide the NID as a stand-alone NID to permit the CLEC to connect its loop to the inside wire. *Id.*, ¶ 353. Second, when requesting access to an unbundled loop or subloop, the NID is included as a component at no extra charge. *Id.*, n. 1066. In addition, a CLEC that constructs its own NID may disconnect the customer's wiring from the incumbent LEC's NID and connect it to the CLEC's NID, and the incumbent LEC may not impose a charge on the CLEC or require that an incumbent LEC technician be present. *Id.*, ¶¶ 353 & 358; 47.C.F.R. § 51.319(c).

Finally, the FCC stated that an ILEC may not require a CLEC to "collocate" a separate terminal to gain access to inside wire subloop or other inside wire. *Id.*, ¶ 358 (citing to a Cox *Ex Parte* letter dated Dec. 19, 2002).

C. Procedural Order Questions

1. Does the TRO Resolve Cox's Concerns?

The first question in the Procedural Order asks whether the *Triennial Review Order* resolves Cox's concerns that 1) the Tariff be modified to eliminate its potential anticompetitive effects; 2) the Tariff perpetuates problems with access to subloops; 3)

Options 1, 2 and 3 in the Tariff interfere with CLEC access to MTEs; and, 4) the Tariff increases the cost of that access, and that the MPOE should be located in a manner to permit easy access to the MPOE.

The questions assume facts not in evidence. For example, the first question asks whether the *Triennial Review Order* resolves Cox's request that the Tariff be modified to eliminate its potential anticompetitive effects. Cox has not explained why Qwest's Tariff is potentially anticompetitive. Second, there is no evidence that Qwest's Tariff is perpetuating problems with access to subloops. Third, there is no evidence that Options 1, 2 and 3 increase the cost of access. Finally, there is no evidence that Qwest configures the MPOE to deny ready and easy access to the MPOE. Cox has only made vague and unsupportable claims and accusations.

It is impossible to respond to vague and unsupportable claims and accusations. Furthermore, without some idea what Cox's real, specific concerns are, there is no way to determine if they are legitimate or to resolve them.

2. Does Cox's Position Conflict With Any Portion of the TRO?

Cox argues that its position, or its request to eliminate Options 2 and 3, does not conflict with any portion of the *TRO*. Cox's answer is misleading.

AT&T would acknowledge that there is no express language in the *Triennial Review Order* that prohibits elimination of Options 2 and 3. However, there is language that arguably permits Options 2 and 3. Furthermore, Cox has failed to reconcile its proposed solution with the *Triennial Review Order*.

First, the FCC noted that premise owner has the right to select the demarcation point and has the *option* of moving the demarcation point to the MPOE. Moving the

demarcation point to the MPOE at the property line is not required. The FCC also denied a request to adopt rules placing the MPOE at the property line because it could deny CLECs access to subloops within the premises.²⁶

The FCC noted in the *TRO* that premise owners have no obligation to provide CLECs reasonable and nondiscriminatory access to a MTE. *TRO*, ¶ 351, n. 1059. The FCC stated that if the CLECs are prohibited from installing their own wiring, subloops may be the only way to gain access. *Id.*, ¶ 351. Cox would deny other CLECs the very access the FCC has granted.

The FCC made the right decision. Without any convincing evidence that the benefits to one group of CLECs would significantly outweigh harm to other CLECs, the FCC decided not to require that the demarcation point be moved to the MPOE in all cases and left the decision to the premise owner. Cox has not provided *any* evidence to warrant a change in the FCC's decision.

3. Whether it is Necessary to Continue With This Docket in Light of FCC's TRO.

Cox states that if a rulemaking is opened to eliminate Options 2 and 3 on an industry-wide basis, this docket can be closed. Unless Cox provides some real-world evidence that demonstrates Qwest's Tariff is unreasonable, this docket should be closed. Furthermore, there has been no showing by Cox that a rulemaking is necessary.

As explained earlier, the only objections by Cox that AT&T could locate is that if the demarcation is not located at the property line, Cox has to pay Qwest for use of the

²⁶ The FCC noted that "although moving the demarcation point to the MPOE would reduce costs and facilitate deployment for competitive LECs that rely on their own facilities to reach MTEs, it would increase costs and hinder deployment for carriers that rely on unbundled loops." *Competitive Networks Report and Order*, ¶ 53. Because the FCC could not determine the benefits to some CLECs would outweigh the harm to other CLECs, it chose to leave the choice to the building owner. *Id.*

subloops, "thus adding unnecessary cost and administrative difficulties to the competitor's ability to serve the property." Cox Initial Comments on MTE/MDU Access at 3. Cox argues it must also pay Qwest's technician to install the necessary cross connections between Qwest and Cox's facilities. *Id.* Cox believes that if the demarcation point is at the MPOE, it will not have to pay for subloops and can do its own cross connects to the tenants inside wire. *Id.*, at 4. The FCC recently stated that the incumbent LEC could not require collocation to access subloops. *TRO*, § 350. The FCC made it clear that Cox can disconnect the customer's wiring from Qwest's NID and connect it to its own NID without charge and without Qwest's technician being present. *Id.*, ¶¶ 353 & 358.

The FCC allows the premise owner in the first instance to select the demarcation point. *Competitive Networks Report and Order*, ¶ 53. The FCC requires the incumbent LEC to provide access to loops and subloops up to the demarcation point. The CLEC also has the right to access poles, conduits and rights-of-way that the incumbent LEC owns or controls to the demarcation point. *Competitive Networks Report and Order*, ¶¶ 72, 76 – 77.

Granted, Cox has to pay Qwest for the use of subloops. But subloops are priced at total service long-run incremental cost. If the MPOE and demarcation point are moved to the property line and the premise owner owns all wire from the demarcation point to the units, CLECs will be required to negotiate with the premise owner. The premise owner has no obligation to provide access and can charge any amount for such access. Cox may prefer dealing with the premise owner because it has the advantage of being a cable provider with an existing relationship. Other CLECs may wish to have access to

subloops. Regardless, the FCC has stated the premise owner in the first instance should make the decision regarding the location of the demarcation point. This appears to be what Qwest's Tariff does.

4. **If the Commission Should Continue to Pursue the Matter, What Issues Need to be Addressed and How Should They Be Resolved?**

Cox claims a rulemaking should be initiated to determine whether Options 2 and 3 should be allowed. It also claims any new rules adopted would apply to all telecommunications carriers and would "eliminate potential anticompetitive impact in new and substantially reconfigured multiunit premises."²⁷ The rulemaking would use Options 1 and 4 as a basis of any rule.

It is AT&T's understanding this docket was opened to review Qwest's Tariff. A rulemaking is not necessary to determine if the existing Tariff is unreasonable. Since the Tariff applies to premise owners, AT&T has not formulated a position whether Options 2 and 3 are unreasonable. AT&T would point out that Options 2 and 3 do not appear to conflict with any FCC order; and, if Qwest owns or controls the facilities under Options 2 and 3, CLECs would be able to access these facilities on an unbundled basis.

Cox simply has not demonstrated a need for a rulemaking. Furthermore, its proposal conflicts with the rights provided to CLECs by the federal Act and the FCC.

III. CONCLUSION

Cox has failed to provide any evidence that Qwest's Tariff is unreasonable. It has had several chances to do so. AT&T is not suggesting the Commission could not establish a procedural schedule for testimony. In fact, if Cox raised legitimate

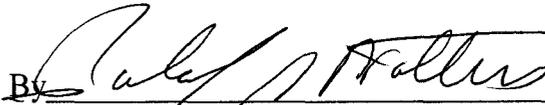
²⁷ It is noteworthy that Cox alleges potential, not actual anticompetitive effects.

complaints, AT&T could very well support it. However, at this time, there is insufficient evidence to make any finding regarding Qwest's Tariff.

AT&T negotiates with Qwest for access to interconnections and unbundled network elements. This is what Cox should do. Cox has not alleged that Qwest has refused to negotiate or meet its obligations contained in the Act or FCC orders. Cox's only real complaint appears to be that it does not want to have to pay Qwest for subloops. It also appears to AT&T that, to avoid having to pay for subloops, Cox wants to eliminate some of the choices the CLECs presently have and require all CLECs to obtain access or configure their networks in the same manner Cox does. The Commission should be very cautious of promulgating rules that may advantage some CLECs and disadvantage others, or promote one form of network architecture over another.

Submitted this 10th day of December, 2003.

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(Docket No. T-00000A-02-0280)

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