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November 21, 2002

William Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: *Ex Parte*
CC Docket Nos. 01-338, 96-98, 98-147

Dear Mr. Maher:

In this letter, XO Communications, Inc. ("XO"), offers for the Commission's consideration specific rule language that would address Verizon's and other ILEC's "no facilities" policy. As explained in this letter, the rule proposed below defines the circumstances in which ILECs may lawfully decline to provide unbundled access to a network element to a CLEC on the grounds that "no facilities" exist XO and others have previously described to the Commission the substantially harmful impact on competition of Verizon's "no facilities" policy.¹ The proposal presented in this letter is only one of several possible approaches that could successfully address ILECs' "no facilities" practices. While XO believes that its approach is both practical and measured, it does not represent the full extent of the Commission's authority in this area. The Commission may decide to endorse other proposals that may also effectively address these troubling practices.² XO believes that the FCC has ample authority to adopt these proposals and supports whatever plan will most quickly lead to the cessation of these anti-competitive practices.

¹ See letter from Mary C. Albert, Vice President Regulatory and Interconnection, Allegiance Telecom, Inc., to Ms. Marlene Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 20, 2002); letter from Patrick J. Donovan, Swidler Berlin Shereff Friedman, LLP, to Ms. Marlene Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, 98-147, 01-318, CCB/CPD File No. 01-06 (filed Sept. 13, 2002).

² See Letter from Jake E. Jennings, NewSouth Communications to Christopher Libertelli, CC Docket No. 01-338, filed November 6, 2002.

XO also takes this opportunity to call to the Commission's attention the fact that XO has recently experienced a sharp increase in the number of instances in which SBC in SWBT territory denies requests for DS-1 loop UNEs based on "no facilities."³ Other CLECs have also experienced this apparent change in SBC policy. Evidently SBC's reason for rejecting UNE orders is based on a new "no facility" policy that is similar apparently to Verizon's policy that CLECs oppose. SBC's initiation of this new policy underscores the need for the Commission at the earliest opportunity to adequately circumscribe ILECs' refusals to provide UNEs based on "no facilities." For all the reasons stated in this letter, and in other submissions on this issue, the Commission may, and should, reject ILECs' efforts based on "no facilities" to thwart their obligation under the Act to provide nondiscriminatory access to unbundled to network elements.

Proposed Rule

XO offers for the Commission's consideration the following proposed rule:

No ILEC may decline a request for a loop or interoffice transport unbundled network element or subelement on the ground that no facilities exist or that 'new construction' would be required at any location or on any route where existing loops, wire centers, and inter-office facilities are either being used to provide network services to end users, or are being offered to end users via tariffs or similar mechanisms, and those services utilize the same network functions as the requested element or subelement.

This rule would prevent ILECs from provisioning DS-1 loops to retail end users while declining to offer identical DS-1 loop UNEs to CLECs on the grounds that the UNE request involves the expansion or modification of network facilities such as the installation of a frame to hold additional line cards, a repeater shelf, apparatus and/or doubler case, a multiplexing rack, or additional multiplexing capacity.

Commission Authority

The Commission has ample authority to establish this rule. In fact, it represents a measured approach that does not call upon the Commission's full authority in this area. Section 251(c)(3) of the Act imposes a duty on ILECs to provide CLECs "nondiscriminatory access to network elements on an unbundled basis...on rates, terms and conditions that are just, reasonable, and nondiscriminatory." Sections 51.307, 51.311 and 51.313 of the Commission's rules similarly require ILECs to offer all requesting carriers nondiscriminatory access to UNEs. These nondiscrimination rules specifically apply to all inherent features of the network element, the quality of the element, and the terms for access to the element, respectively. Under these broad and unqualified nondiscrimination requirements, the Commission could require ILECs to install loops for CLECs whenever they do so for their retail customers. As explained below, XO's proposal is more narrowly tailored than a general wholesale/retail non-discrimination requirement.

³ XO and other CLECs are collecting data showing the recent spike in UNE orders rejected by SBC for lack of facilities and will provide more detailed information to the Commission concerning this situation.

In addition, Section 51.311(b) of the Commission's rules requires that "the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself."⁴ Furthermore, Section 51.313(b) of the Commission's rules requires that "the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself."⁵

The parity requirement of these rules include the tasks involved performing routine network expansions and modifications to electronics and other facilities that ILECs normally perform for their retail customers.⁶ Thus, if an ILEC "upgrades its own network (or would do so upon receiving a request from a [retail] customer), it may be required to make comparable improvements to the facilities that it provides to its competitors to ensure that they continue to receive at least the same quality of service that the [ILEC] provides to its own customers."⁷ The parity requirements of Section 51.311(b) and 51.313(c) already mandate that network modifications be made so that CLECs can access underlying network elements or interconnect at the same level of quality or pursuant to the same terms and conditions, respectively, that an ILEC provides to itself.

Consistent with the 8th Circuit decisions in *Iowa I*⁸ and *Iowa II*,⁹ this obligation does not, however, require that ILECs construct a superior network. In fact, courts recognize that ILECs are required to modify or expand their networks at existing quality levels and that the construction of new facilities does not necessarily mean providing a superior network.¹⁰ Indeed, "new facilities could be necessary just to create equivalent interconnection and access."¹¹

⁴ 47 C.F.R. § 51.311(b); see also *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket No. 96-98, CC Docket No. 95-185, 11 FCC Record 15499, ¶¶ 312-13 (1996) ("*Local Competition Order*") (subsequent history omitted); *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Record 3696, ¶¶ 490-491 (1999) ("*UNE Remand Order*") (subsequent history omitted).

⁵ 47 C.F.R. § 51.313(b); see also *Local Competition Order* ¶¶ 315-16.

⁶ See, e.g., *US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, 31 F.Supp.2d 839, 856 (D. Or. 1998) *rev'd and vacated in part on other grounds sub nom. US West Communications, Inc. v. Hamilton*, 224 F.3d 1049 (9th Cir. 2000); *U.S. West Communications, Inc. v. Jennings*, 46 F.Supp.2d 1004, 1025 (D. Ariz. 1999).

⁷ 31 F.Supp.2d at 856; see also 46 F.Supp.2d at 1025.

⁸ See *Iowa Utilities Board v. FCC*, 120 F.3d 753, 812-13 (8th Cir. July 18, 1997) ("*Iowa I*").

⁹ See *Iowa Utilities Board v. FCC*, 219 F.3d 744, 758 (8th Cir. July 18, 2000) ("*Iowa II*").

¹⁰ See *Iowa I* at 813 n.33; see also *US West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F.Supp.2d 968, 983 (D.Minn. Mar. 30, 1999); 46 F.Supp.2d at 1025; 31 F.Supp.2d at 856; *US West*

To elaborate, although *Iowa I* and *Iowa II* vacated the FCC's superior quality rules, these decisions did not absolve ILECs from their obligation to treat CLECs in a nondiscriminatory manner and at parity, as the Act¹² and FCC rules require,¹³ with respect to routine network modifications and expansions that are needed so that CLECs can interconnect and access UNEs on an equivalent basis. Although *Iowa I* stated that the Act only requires unbundled access to an ILEC's existing network, "not to yet unbuilt superior one,"¹⁴ this statement alone does not stand for the proposition that an ILEC is not required to perform routine network modifications and expansions in order to make an existing network element available as it does for itself and its retail customers.¹⁵

In fact, the decision does not suggest this at all. *Iowa I* holds that ILECs cannot be required to *substantially* alter their networks in order to provide superior quality interconnection or superior quality access to network elements.¹⁶ Furthermore, the *Iowa I* court limited this holding and explained that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include *modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.*"¹⁷ When the court revisited this decision in *Iowa II*, it simply reaffirmed its opinion. In doing so, the *Iowa II* court noted that its ruling was limited in its applicability because "*the Act prevents an ILEC from discriminating between itself and a requesting competitor with respect to the quality of interconnection provided.*"¹⁸

Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., 1998 WL 1806670 *4 (W.D. Wash. 1998); *MCI Telecommunications Corp. v. US West Communications, Inc.*, 1998 WL 34004509 *4 (W.D. Wash. 1998).

¹¹ 55 F.Supp.2d at 983.

¹² 47 U.S.C. § 251(c)(3).

¹³ 47 C.F.R. §§ 51.311(a)&(b) and 51.313(a)&(b); *see also Local Competition Order* ¶¶ 312 (stating that Act's requirement that ILECs "'provide nondiscriminatory access to network elements on an unbundled basis' refers to the physical or logical connection to the element and the element itself.") & 313 (finding that ILECs must provide access and UNEs that are at least equal-in-quality to what the ILECs provide themselves unless it is technically infeasible to do so which the ILEC must demonstrate); *see also UNE Remand Order* ¶¶ 490-491.

¹⁴ *Iowa I*, 120 F.3d at 812-13.

¹⁵ *See, e.g.*, 31 F.Supp.2d at 856; 46 F.Supp.2d at 1025.

¹⁶ *See US WEST Communications, Inc. v. THOMS*, 1999 WL 33456553 *8 (S.D. Iowa Jan. 25, 1999) ("*US West*") (citing *Iowa I*, 120 F.3d at 813 n.33).

¹⁷ *See Iowa I*, 120 F.3d at 813 n.33 (emphasis added) (citing First Report and Order, ¶198); *see also US West*, at *8 (noting that the Eight Circuit endorsed the FCC's statement that the obligations imposed by section 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities "to the extent necessary to accommodate interconnection or access to network elements"); 55 F.Supp.2d at 983 (same); 31 F.Supp.2d at 856 (same); 1998 WL 1806670 *4 (same); 1998 WL 34004509 *4 (same).

¹⁸ *See Iowa II*, 219 F.3d at 758 (emphasis added).

Hence, the crucial limitation established in the *Iowa I* and *Iowa II* decisions requires that an ILEC (in treating CLECs at parity and in a nondiscriminatory manner¹⁹) make those modifications to its facilities that are necessary to accommodate interconnection or access to network elements, but do not require the ILEC “to provide superior interconnection or access by substantially altering its network.”²⁰ As the Court in *US West* found, the proper interpretation of this limitation requires that the term “necessary” be given a meaning consistent with FCC precedent.²¹ Significantly, the FCC deems equipment is “necessary” for interconnection or access to unbundled network elements within the meaning of 251(c)(6) “if an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude the requesting carrier from obtaining interconnection or access to unbundled network elements.”²² Thus, applying this FCC definition of the word necessary within the context of the *Iowa I* and *Iowa II* limitation means that modifications or expansions to equipment is *necessary* because a CLEC cannot obtain interconnection or access to UNEs without them.

This is the exact situation that CLECs face with respect to the no facilities issue, and the *Iowa I* and *Iowa II* limitation directly applies because CLECs cannot access the associated DS1 and DS3 UNEs if ILECs do not make the same basic network modifications and expansions for CLECs that ILECs perform for their retail customers.²³ Because these modifications are basic and routinely offered to ILEC retail customers, such modifications do not involve substantial alteration to an ILEC network and may not be rejected on the grounds that the request involves providing superior interconnection or access. Indeed, a CLEC is not requesting that the ILEC provision network facilities that are superior in quality to that which the ILEC provides to itself or build a new, superior network because the ILEC is already and routinely offering the same

¹⁹ See 47 C.F.R. § 51.311(a)&(b) and 51.313(a)&(b); see also, e.g., 46 F.Supp.2d at 1025; 31 F.Supp.2d at 856.

²⁰ See *US West* at *8.

²¹ See also *US WEST* at *8 (citing Local Competition Order at ¶ 59) (concluding that the state commission’s interpretation of the word “necessary” as it applied to the *Iowa I* limitation was appropriate because it tracked the FCC’s definition of necessary in the context of 251(c)(6)). Subsequent to this court’s decision, the FCC modified its definition of the term necessary in the *Fourth Report and Order* as discussed herein. See *Fourth Report and Order* ¶ 21.

²² See *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capacity*, CC Docket No. 98-147, Fourth Report and Order, FCC 01-204, 16 FCC Rcd 15435, ¶ 21 (rel. Aug. 8, 2001) (“*Fourth Report and Order*”).

²³ See 46 F.Supp.2d at 1025; 31 F.Supp.2d at 856. Notably, the Sixth Circuit’s recent September 30, 2002 opinion in *Michigan Bell Tel Co. v. Strand*, 2002 WL 31155092 *10 (6th Cir. Sept. 30, 2002) is inapposite and does not change this result. In *Michigan Bell*, the court found that Ameritech could price discriminate when there was no retail analogue. *Id.* In particular, the court found that because Ameritech does not provide loop conditioning to its retail customers, there was no retail analogue and thus it was not discriminatory if Ameritech assessed CLECs such construction charges and did not assess its retail customers such charges. *Id.* In contrast to *Michigan Bell* where there was no retail analog, a retail analogue exists when ILECs reject CLEC requests for UNE circuits on the basis that no facilities exist. In fact, when Verizon responds to a CLEC request for high capacity UNEs that no facilities exist, Verizon instructs CLECs to purchase such services out of retail tariffs.

services to their retail customers. In short, these facilities are necessary to create equivalent, not superior, quality of interconnection or access to network elements.

Furthermore, the Commission has recognized that the expansion or modification of facilities could be necessary to create equivalent access. For instance, with respect to rights-of-way access, ILECs must provide CLECs with nondiscriminatory access to poles, ducts, conduits or rights-of-way.²⁴ The FCC has found that “because [ILECs] can expand [their] capacity to suit their needs, ‘[t]he principle of nondiscrimination established by section 224(f)(1) requires that it do likewise for telecommunications carriers....’”²⁵ The Commission declined to craft a rule categorically prescribing when a utility must expand an existing facility as requested versus when it may choose to decline due to infeasibility.²⁶ Nevertheless, it interpreted the Act “to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access.”²⁷

Accordingly, the FCC has authority under the Act and applicable judicial determinations to establish a rule that requires ILECs to make such network modifications or expansions because such changes are necessary to accommodate CLEC interconnection or access to network elements.²⁸ Further, an ILEC’s failure to do so is patent discrimination because such network modifications do not involve providing superior access to network elements in that they are routinely made to accommodate requests for services made by the ILEC’s retail customers.

²⁴ See 47 U.S.C. §§ 251(b)(4) & 224(f)(1).

²⁵ 1998 WL 1806670 *4 (quoting *Local Competition Order* ¶ 1162); 1998 WL 34004509 *4 (same).

²⁶ *Local Competition Order* ¶ 1163; see also 1998 WL 1806670 *4; 1998 WL 34004509 *4.

²⁷ *Local Competition Order* ¶ 1163; see also 1998 WL 1806670 *4; 1998 WL 34004509 *4.

²⁸ Such authority is also supported by other FCC and state decisions. See, e.g., *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218 & 00-249, Memorandum Opinion and Order, DA 02-1731, n.1658 (Chief, Wireline Competition Bureau rel. July 17, 2002) (“*Virginia Arbitration Order*”) (ordering that Verizon must provide the multiplexing equipment because the requesting carrier is entitled to a fully functioning loop); *WorldCom Tech., Inc. v. Ameritech Michigan*, Case No. U-12072, Opinion and Order, 2000 WL 363350 at *3 (Mich. P.S.C. Mar. 3, 2000) (ordering Ameritech to install SONET electronics to provision a request for unbundled transport), *aff’d*, *Michigan Bell Telephone v. WorldCom Tech., Inc.*, 2002 WL 99739 (Mich App. 2002); *U.S. West Comm. Inc.*, Docket Nos. UT-003022 & UT-003040, Commission Order, 2001 WL 1672340 *12 (Wash. U.T.C. July 24, 2001) (holding that the ILEC is still required to provide access to UNEs within its existing network even if it must construct additional capacity within its network to make the UNEs available to competitors).

Only A Limited Rule Is Required At this Time

XO stresses that the proposed rule is tailored to existing ILEC practices and that it is not necessary for the Commission to completely define the scope of circumstances in which ILECs might be obligated to modify the network in order to provide nondiscriminatory access to UNEs. Thus, pursuant to the unqualified nondiscrimination obligations of the Act, the Commission could go further than the rule proposed in this letter. For instance, the Commission could require ILECs to build new loops for CLECs whenever they do so for their own customers. XO believes, however, that it is only necessary for the Commission to establish at this point a rule, or declaration, that addresses the particular marketplace issues that are raised by current ILEC practices. Therefore, the suggested rule states that ILECs may not deny a UNE request based on "no facilities" where already facilities exist over a particular route, rather than imposing a more far reaching obligation that might be possible under the Act.

Although the rule proposed does not address each and every circumstance or issue that could arise concerning ILEC obligations to modify or even construct facilities in order to meet requests for UNEs, it does adequately address current practices of some ILECs that, as explained in the record of this proceeding, are having a significant anti-competitive affect at this time. If circumstances change, or ILECs embark on new problematic policies, CLECs can request that the Commission adopt expanded rules that would exercise more fully the Commission's authority to require nondiscriminatory access to UNEs. The proposed rule is therefore a limited and pragmatic approach to addressing this issue.

In this regard, the Commission should also provide concrete examples regarding how the new rule applies. For instance, the Commission should clarify that an ILEC cannot reject UNE orders due to the lack of a repeater shelf, apparatus and/or doubler case, multiplexing rack, or multiplexing capacity on the basis that new construction is involved or that the CLEC is requesting superior service. The Commission should further explain that these are standard modifications made to an ILEC's network and that because such network modifications are routinely performed in connection with the existing network, the ILEC cannot reject such UNE requests.

Sincerely,



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