Qwest
1020 Nineteenth Street NW, Suite 700
Washington, DC 20036
Phone 202.429.3121
Fax 202.293.0561

Cronan O'Connell
Vice President-Federal Regulatory

EX PARTE

February 4, 2003

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W., TW-A325
Washington, DC 20554

RE: CC Docket Nos. 01-338, 96-98 and 98-147, In the Matters of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability

Dear Ms. Dortch:

Yesterday, Cronan O'Connell representing Qwest Communications International Inc. ("Qwest") and Jon Neuchterlein of Wilmer Cutler & Pickering, also representing Qwest, along with Gary Phillips and Christopher Heimann of SBC, met with members of the Federal Communications Commission's ("FCC") Office of General Counsel as follows: John Rogovin, Linda Kinney, Laurence Bourne, Christopher Killion, Paula Silberthau, and Deborah Weiner to discuss Enhanced Extended Links ("EELs"). As addressed in the attached presentation, we discussed the legal background of the EELs and emphasized that the safe harbors for EELs should continue to ensure the valid use of EELs for local exchange services including a requirement that a substantial local use requirement remains necessary and feasible. Qwest also distributed its amended EELs Criteria Proposal, which is also attached hereto.

In accordance with FCC Rule 1.49(f), this *Ex Parte* letter is being filed electronically *via* the Electronic Comment Filing System for inclusion in the public record of the above-referenced dockets pursuant to FCC Rule 1.1206(b)(2).

Sincerely,
/s/ Cronan O'Connell
cc:
John Rogovin (via e-mail at jrogovin@fcc.gov)
Linda Kinney (via e-mail at lkinney@fcc.gov)
Laurence Bourne (via e-mail at lbourne@fcc.gov)
Christopher Killion (via e-mail at ckillion@fcc.gov)
Paula Silberthau (via e-mail at psilbert@fcc.gov)
Deborah Weiner (via e-mail at dweiner@fcc.gov)
Attachments

Qwest/SBC presentation to OGC on EELs

February 3, 2003

Background

- "Special access": a service that IXCs purchase from LECs to route interexchange traffic from a customer location to an IXC POP or other facility *through* a LEC wire center but *around* the LEC switch.
- "Enhanced extended link" ("EEL"): a dedicated loop-transport UNE combination that is the functional equivalent of special access, but is priced at TELRIC.

Background (cont'd).

- Competitive access providers ("CAPs") first brought competition to the special access market in the 1980s.
- By 1992, the FCC concluded that "competition [for high capacity special access/private line services] is already developing relatively rapidly in the urban markets." *Expanded Interconnection Order*, 7 FCC Rcd at 7453 ¶ 177.
- Throughout the 1990s, the Commission responded to this growth of competition by giving ILECs increased flexibility in their special access offerings, culminating in the *Pricing Flexibility Order*.

Background (cont'd)

- In late 1996, perceiving an arbitrage opportunity, IXCs sought to convert their special access circuits to EELs.
  - *CompTel v. FCC* (8th Cir. 1997)
- That request became overtaken by events when, in 1997, the Eighth Circuit invalidated Rule 315(b).
  - Rule 315(b) bars ILECs from physically disconnecting requested combinations of UNEs. Because EELs are "loop-transport *combinations*," the invalidation of Rule 315(b) made it impracticable for CLECs to order them as substitutes for special access services.
- The dispute was revived in 1999, when the Supreme Court issued *Iowa Utilities Board*.
  - Reinstated Rule 315(b), making it cost-effective for carriers to order combinations of whatever UNEs are subject to unbundling.
  - Vacated the Commission's permissive view of the "impairment" standard, which governs what UNEs are subject to unbundling in the first place.

Supplemental Order Clarification (6/2000)

- FCC will "consider the markets in which a competitor 'seeks to offer' services and, at an appropriate level of generality, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." ¶ 15.
- "The exchange access market occupies a different legal category from the market for telephone exchange services; indeed, at the highest level of generality, Congress itself drew an explicit statutory distinction between those two markets." ¶ 13.
- "[W]hether network elements should be made available for the sole *or primary* purpose of providing exchange access services" depends on "whether denying competitors access to that combination would in fact impair their ability to provide *those services*." ¶ 15 (emphasis added).
- Any other rule "could undercut the market position of many facilities-based competitive access providers. Competitive access, which originated in the mid-1980s, is a mature source of competition in telecommunications markets." ¶ 18.

Supplemental Order Clarification (cont'd)

- Establishes three "safe harbors," which contain bright-line criteria for determining when an EEL *is* being used for "a significant amount of local exchange service" and is *not* being used for the "primary purpose of providing exchange access services."
  - These safe harbors were formulated and proposed by a coalition of ILECs and CLECs.
  - In a nutshell, they require a carrier purchasing an EEL to certify (*inter alia*) that it is the sole provider of local service to a particular customer or that the amount of local exchange traffic flowing over the facilities at issue meets certain percentage thresholds.
- Rejects "MCI WorldCom's proposal that we deem a circuit carrying at least ten percent local traffic to be carrying a significant amount of local traffic" on the ground that "the Commission has found the ten percent threshold to represent a *de minimis*, *not a significant, amount of traffic*." ¶ 26 (emphasis added).

CompTel v. FCC (D.C. Cir. 2002)

- Upheld *Supplemental Order Clarification* in its entirety.
- Affirmed Commission's interpretation of section 251(d)(2) as requiring a *service-specific* inquiry into a given carrier's use of UNEs.
  - "By referring to the 'services that [the requesting carrier] seeks to offer,' [the statutory language] seems to invite an inquiry that is specific to particular carriers and services." 309 F.3d at 12-13.
- Noted and affirmed the Commission's own determination that special access services are in fact a "mature source of competition in telecommunications markets." *Id.* at 16; *see also USTA v. FCC*.
- Affirmed existing safe harbors, including the certification requirements:
  - "[I]t is plain that supplying the information is feasible, as the Commission has produced evidence that some carriers are taking advantage of the safe harbors." *Id.* at 17.
- "[I]t is far from obvious to us that the FCC has the power, without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *Id.* at 14.

Legal issues

- There have been three major court decisions addressing the Commission's "impairment" determinations under section 251(d)(2): *Iowa Utils. Bd.*, *USTA*, and *CompTel*.
- In the first two cases, the courts vacated the FCC's unbundling rules as excessively permissive and as inimical to facilities-based competition.
- The *CompTel* court, in contrast, commended the Commission for giving substance to the "impairment" limitation on unbundling obligations in the wake of *Iowa Utils. Bd.*
  - "The FCC is obviously entitled -- indeed required -- to reconsider orders that rest on faulty readings of a statute. That is all it has done here." 309 F.3d at 13.
- It would make no legal sense for the Commission now to *undo* this commended adherence to its statutory obligations.

Legal issues (cont'd).

- Some carriers invite the Commission to do just that, however, by eviscerating the current safe harbor rules. Their proposals:
  - Would eliminate any obligation to certify *either* (1) that the requesting carrier is the sole provider for a given customer *or* (2) that the circuits in question are used largely for local services.
  - Would substitute meaningless alternative criteria -- such as the existence of collocation arrangements or interconnection trunks -- that would effectively permit the use of EELs to provide more than 99% exchange access (voice or data) and less than 1% local exchange service. Examples:
    - Telemarketing call centers
    - Interexchange data services
  - Would thereby replace the Commission's current requirement of "significant" local traffic with a trivial requirement of "any" local traffic -- or even *no* local traffic on a particular facility, even where the CLEC is not the exclusive local provider.

Legal issues (cont'd)

- The CLECs thus invite the Commission to do indirectly what the D.C. Circuit has indicated it may not do directly: "require that ILECs provide EELs for [nonlocal] services," but "without an impairment finding as to nonlocal services." 309 F.3d at 14.
- A substantial local use requirement remains *necessary:*
  - As noted, the Commission has found it inappropriate to permit across-the-board access to EELs upon a showing of 10% local use, let alone a showing of *any* local use, given that the obligation to provide access to the EEL rests entirely on a finding of impairment *as to local exchange services*, not access services..
- A substantial local use requirement remains *feasible*:
  - The D.C. Circuit dismissed the same claims renewed here: that "the safe harbor provisions [a]re too demanding on carriers" and that the certification requirements are "not administratively feasible." 309 F.3d at 17.
  - Indeed, the traditional jurisdictional rule for special access tariffing has *always* required predictions about traffic mix.

Qwest Enhanced Extended Loop Combination ("EELs") Criteria Proposal (2/3/03)

Qwest proposes a streamlined alternative to the current restrictions that promotes the availability of UNEs for facilities-based **local** competition and strikes a competitive balance between ILECs and CLECs.

In the ordering process, the CLEC must be required to provide the following documentation:

1. Self-certify that each individual EEL facility carries at least 51% local traffic or that the CLEC is the exclusive local provider of the end user customer.

2. Documentation that relates the CLEC collocation termination point to the CLEC class 5 switch (a local switch) and the associated Local Interconnection Service ("LIS") trunks. The CLEC must provide the "A" and "Z" location of the LIS trunks and the "26 code" for the LIS trunk group. The "26 code" is the alpha-numeric code designated by Qwest for the LIS trunk group.

3. Document that the individual EEL facility has a local number assignment provided by the CLEC to the end user customer, is tied to the Public Switched Telephone Network, and has porting capability.

4. Document that the individual EEL facility has 911 capabilities such that calls to 911 PSAPs will show the assigned number or hunt group containing the assigned number.

On an ongoing basis, each individual EEL facility must meet the following requirements:

1. 51% of the traffic over the Individual EEL facility must be local traffic or that the CLEC continues to be the exclusive local provider for the end user customer

2. Each individual EEL facility must originate and terminate local voice traffic. The originating and terminating local voice traffic should include the ability to make originating local voice telephone calls without a toll charge and without dialing special digits not normally required for a local call.

3. Each individual EEL facility must terminate into a collocation arrangement.

4. Each individual EEL facility must be connected to a Class 5 switch (a local switch) or equivalent switch registered in the LERG as a Class 5 switch capable of local exchange service with a "CLEC" service provider categorization as reflected in the Telcordia Business Integrated Routing/Rating Database System ("BIRRDS").

5. The service offered to the end user customer must be marketed, advertised and sold as a local exchange service, or a bundle of services including local.

6. Neither end of an individual EEL facility can terminate into an IXC POP or an ISP POP.

7. Each individual EEL facility must be able to be audited according to the appropriate auditing criteria (see attached) as will be amended to the State Generally Accepted Terms ("SGAT") in each state.

Qwest's commingling proposal

For UNE-loops that comply with the local use restrictions as documented above, Qwest supports commingling of DS0 and/or voice grade UNE-loops onto DS1 special access transport for UNE-P facilities that transition to UNE-loops, as well as DS1 UNE-loops onto DS3 special access transport. This proposal meets the needs of the CLECs serving the residential mass market as well as the small and medium sized business market.

EEL Measurements / Audits

- CLECs converting from a UNE-P combination to an EEL will automatically be presumed to meet the “local” standard, with a follow-up certification by the CLEC to be provided no later than six months after the conversion

- As is the case today, Internet access will not satisfy the “local” traffic criteria

- As a condition of the purchase of or conversion to EELs, the CLEC must agree to provide call detail records (“CDRs”) to a third party auditor to be identified by the ILEC for review of compliance with the local use certification.

- The ILEC may initiate an audit by an independent third party to assure compliance with the local use restriction no earlier than 6 months after an EEL is provisioned.

- Every 6 months, the CLEC should be prepared to provide to third party auditor, if requested, one month’s CDRs upon 7 day’s notice. The audit will include verification that the traffic carried over the individual EEL facility meets the EEL criteria.

- The data required for an audit would be the CDR as obtained from the CLEC local voice switch or appropriate gateway.

- Audit criteria will be documented in Qwest SGATs.

- If the CLEC is found to be in violation of the local use restriction, the CLEC will pay: 1) all costs for the auditor and the ILEC personnel involved in the audit, 2) corrected billing back to date the circuit was established, 3) interest on the amount of corrected billing, and 4) loss of commingling rights after three faulted audits for one year