



Ann D. Berkowitz
Project Manager – Federal Affairs

1300 I Street, NW
Suite 400 West
Washington, DC 20005
(202) 515-2539
(202) 336-7922 (fax)

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Ex Parte

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

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; and Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147

Dear Ms. Dortch:

Yesterday, Ivan Seidenberg of Verizon had a telephone conversation with Chairman Powell to discuss Verizon's positions on the record in above proceeding. The attached document was provided to Chairman Powell following the conversation. Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Ann D. Berkowitz".

Attachment

cc: Chairman Powell
C. Libertelli

Chairman Powell:

This is a brief follow up to your discussion today with Ivan Seidenberg.

First, with respect to broadband, I want to re-emphasize the importance of conducting a service-specific impairment analysis, both from a legal and practical standpoint.

From a legal standpoint, the Act makes clear that a carrier may obtain "*access* to network elements on an unbundled basis" only to the extent it is impaired in its ability "to provide the *services* that it seeks to provide." The FCC previously has conducted precisely this type of service-specific analysis. And it has been affirmed on this score by the D.C. Circuit, which has pointedly noted that "it is far from obvious to us that the FCC has the power, without an impairment finding as to [the particular] services, to require that ILECs provide [access to elements] for such services on an unbundled basis."

This does not mean that the FCC has to conduct a separate impairment analysis for every individual service imaginable. But it does require a separate impairment analysis for each distinct product or service market, and the FCC has repeatedly (and correctly) found that broadband is a separate and distinct product market.

Some have suggested that the FCC should do an impairment analysis that focuses on facilities instead. To the extent their objective is keep fiber facilities free from the taint of unbundling and to restore investment incentives, the goal is laudable. But an analysis focused solely on facilities creates both legal and practical complications. And the same result can be reached through a properly conducted service-specific analysis that does not suffer from those complications.

From a legal standpoint, an impairment analysis focused on facilities cannot be squared with the Act. This is so because the Act does not require ILECs to turn over specific facilities for competitors to use for any conceivable purpose. As noted above, it only provides for unbundled "access" to network elements to provide the "services" for which there is impairment. And if the FCC is to provide the certainty necessary to foster investment, it is critical that it get the legal framework right and make a clear cut finding that there is no impairment in the already competitive broadband market.

A facilities-focused analysis presents practical problems as well. A good example is the analysis for hybrid fiber-copper loops. Some have argued that the FCC should conclude that carriers are not impaired with respect to all fiber loops so that those loops do not have to be unbundled. They would apply a different rule to hybrid fiber-copper loops, however. The theory for doing so appears to be that hybrid loops exist today, that carriers should have access to technology that exists today, and that the area where investment still needs to be made is in extending fiber to the curb or to the home.

The assumptions underlying this theory are mistaken. Only about 15 percent of Verizon's working lines are served over loops that contain fiber (though the fiber has capacity to serve a somewhat higher percentage), not all loops that are partly fiber are capable of delivering a broadband service, and, under existing rules, carriers do not have unbundled access to the fiber portion of the loops in order to provide broadband services.

As a result, significant investment still needs to be made even in the case of hybrid loops. And it's important to keep in mind that this is a step in the future evolution of the network as fiber is extended farther toward the home. Imposing an unbundling obligation, and creating a class of carriers dependent on this configuration, would impede that evolution. In addition, the fact remains that competitors are not impaired in the broadband market, regardless of the type of facilities at issue, and a finding that they are impaired over some technologies but not others is not sustainable.

This does not mean that there is no way that carriers can obtain access to ILEC loops. If the loop is entirely copper, which is all carriers obtain unbundled access to today, the FCC can adopt grandfather or transition provisions. If the loop is partly fiber, carriers can get access at negotiated, commercially reasonable rates. But the FCC should not distort the impairment analysis to create a new obligation to provide unbundled access at TELRIC rates, which is antithetical to providing the investment incentives that are key to the continued development of the broadband market.

Second, another critical issue involves recent proposals to change the rules for when carriers can get access to combinations of unbundled loops and transport (or EELs), and their impact on the competitive special access market.

As I outlined in my recent letter on the subject, even a small change in these rules can have dramatic consequences in terms of both the revenues at stake and the effect on facilities investment. In recent days, a number of parties have come forward with proposals to address issues raised by smaller carriers, while attempting to protect the competitive special access business. Likewise, we have suggested ideas of our own to address the specific concerns that we have heard articulated. In the last minute rush of this proceeding, however, it's fair to say that no party or the FCC has been able to really evaluate the ramifications of any of these proposals fully.

This is a particular concern in this instance, because any changes could have the unintended and unanticipated effect of undermining a market segment where the FCC has succeeded in fostering meaningful facilities-based competition. Experience shows that other carriers will try to make something different of these proposals than is intended in order to exploit an arbitrage opportunity between subsidized TELRIC rates and competitive special access rates. In particular, they will try to convert any unbundling obligation into a way to supplant interstate access services bound for IXC's or ISP's POPs. In addition, any rules requiring combinations of elements need to be carefully considered to avoid creating a new class of carriers that are dependent on UNEs and to avoid creating the equivalent of a new high capacity UNE-platform for business customers. As a result, we believe it is vitally important for the FCC to obtain comment on the various proposals (which it could do on an expedited basis) in order to fully understand the ramifications of those proposals.

William P. Barr