

Dee May
Executive Director
Federal Regulatory



1300 I Street, NW, Suite 400 West
Washington, DC 20005

Phone 202 515-2529
Fax 202 336-7922
dolores.a.may@verizon.com

February 12, 2003

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Portals
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:

The attached letter from Susanne Guyer and Ed Shakin of Verizon was provided to Chairman Powell today. Please place it on the record in the above proceeding. Please let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Dee May".

Attachment

cc: Commissioner Abernathy
Commissioner Adelstein
Commissioner Martin
Commissioner Copps
W. Maher
J. Rogovin
J. Carlisle
B. Tramont
C. Libertelli
M. Brill
D. Gonzalez
J. Goldstein
L. Zaina
M. Carey
R. Tanner
B. Olson
T. Navin



1300 I Street, NW
Suite 400 West
Washington, DC 20005

February 12, 2003

Honorable Michael Powell
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Dear Chairman Powell:

We are writing to respond to two proposals that were made immediately before release of the initial Sunshine Notice last Thursday. While these proposals purport to offer new ways to meet the requirements of the Act, they in fact directly contradict the Court decisions interpreting the provisions of the Act under review in this proceeding. The first, from NARUC, impermissibly proposes to give the states final say over both the removal and the addition of UNEs and, with respect to unbundled switching, would actually expand the availability of this element compared to the rules struck down by the D.C. Circuit in *USTA v. FCC*. The second, from NuVox, Cbeyond and SBC, constructively endorses the safe harbor standards regarding the availability of enhanced extended loops (EELs) in the Supplemental Order Clarification, but then proposes an alternative safe harbor test for "smaller" carriers that does not examine the use of particular facilities and, consequently, would impermissibly ensure in the use of EELs for the provision of non-local service. Both of these proposals move away from true accommodation of competing interests in this proceeding, and neither should be adopted.

NARUC Proposal

The NARUC proposal must be rejected on both procedural and substantive grounds. First, the proposal would require the Commission abrogate its statutory role to determine what elements must be unbundled and instead would assign that role to state regulators. Although NARUC pays lip service to the states being guided by "general overarching principles" articulated by the FCC, it is clear that the states would be free to overcome presumptions of non-impairment and compel unbundling even where the Commission has made a non-impairment finding.

The Act requires the Commission – not the states – to make the determinative finding on impairment and prohibits the states from either usurping that role or preempting the Commission's unbundling determinations. See Letter from Qwest, BellSouth, SBC and Verizon to Chairman Powell (filed Nov. 19, 2002). . The NARUC proposal goes far beyond the extensive role assigned to states under the Act. At a minimum, it is this Commission that must retain exclusive authority to determine whether particular elements meet the Section 251(d)(2) standard. NARUC's suggestion to the contrary cannot be

reconciled with Section 251(d)(2) and the Supreme Court's insistence that the Commission's necessary/impair analysis establish real limits on access to UNEs. *AT&T v. Iowa Util. Bd.*, 525 U.S. 366 (1999). State regulators have themselves recognized this federal role and have agreed that "the FCC must, in the first instance, determine whether competing carriers are 'impaired' in the provision of a telecommunication service." Letter to Chairman Powell from commissioners from Maine, Ohio, Florida and Colorado (dated Feb. 6, 2003).

Second, the substance of the NARUC proposal cannot be reconciled with the D.C. Circuit's explanation of the requirements of section 251(d)(2). The court chastised the Commission for requiring nationwide unbundling even in the face of significant deployment of alternative facilities in many areas. *See USTA v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("UNEs will be available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have the object of Congress's concern.") Moreover, the Court specifically cited circuit switching as an example of where the prior Commission order relied on arguments of cost disparities and scale economies that were true of any new entrant and as a result "there is no particular reason to think that the element is one for which multiple, competitive supply is unsuitable." *Id.* at 427. The record in this proceeding bears out that conclusion, with more than 1300 competitive circuits switches in urban, suburban, and rural areas nationwide, which are being used to provide service to business and residential customers in wire centers accounting for more than 86 percent of the BOCs' access lines. *See* Letter from Susanne Guyer and Michael Glover, Verizon to William Maher (filed Jan. 10, 2003). Yet despite this uncontroverted evidence and the Court admonitions, the NARUC proposal would require even greater access to unbundled switching than exists under the rule the court struck down.¹

Moreover NARUC would base that unbundling requirement on UNE zones that have no consistency and have no relation to the actual use of competitive switches. Because each state used its own criteria to establish these zones, the criteria vary from state to state, and will make a national policy on unbundling unattainable. Some states base their zones on density of lines, while others base their zones on cost, and still others on individualized geography or demographics of a particular state. For example, each island in Hawaii is a separate density zone, and in New York there is a special zone just for Manhattan. Even when states use density as a common basis, they define zones differently. In Rhode Island a zone with 200 lines per square mile is considered rural, while that same density in New Hampshire is classified as suburban. Similarly, a zone with one thousand lines per square mile would be suburban in Massachusetts, Rhode Island and Maine, but that zone is urban in Delaware, Vermont and New Hampshire. Thus the NARUC proposal not only would have the FCC abrogate its obligation under the Act, it would create a scheme that has no rational basis.

Likewise, NARUC would compel continued, universal access to unbundled transport, even though the D.C. Circuit rebuked the Commission for dismissing the relevance of competitive transport alternatives in the top 50 MSAs in establishing just such a rule in the UNE Remand Order. *See USTA v. FCC*, 290 F.3d at 423. (And, as with switching, the availability of alternative transport facilities has virtually exploded since the UNE Remand Order, with over 1800 competitive fiber networks in the top 150 MSAs.)

The NARUC proposal, in short, is unlawful, unwise, and unworthy of serious consideration.

¹ This is so because NARUC would establish a presumption of non-impairment only for business customers subscribing to high-capacity (DS1) services in Zone 1. The current rule, in contrast, does not require access to unbundled switching for business customers with four or more voice grade lines in certain areas.

CLEC/SBC Proposal

In contrast, the joint SBC/CLEC EELs proposal is an effort to address an issue that – at the very least -- needs further review. The proposal appropriately recognizes the state of the law, and specifically endorses the *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000), and the requirement that competing carriers are not impaired in the provision non-local special access services. See *CompTel v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) (“it 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”). And while silent on this point, the proposal appears to suggest that the Commission retain the significant safeguard of prohibiting commingling.² While the proposal may raise issues that can be addressed, it would work a dramatic change to the status quo before carriers can more fully review the impacts, and address deficiencies.

One fundamental deficiency is in the details of the new test. The proposal asks the Commission to abandon any limiting standard on unbundling of EELs for the subset of “smaller” carriers.³ In particular, none of the measures proposed as a test for those smaller carriers meets the most basic requirement of the safe harbor approved by the D. C. Circuit – in fact, none of the alternative measures requires that there be *any* local use – much less substantial local use – for a particular circuit sought to be treated as an EEL. In the name of avoiding a “burden” that is never quantified or substantiated, the proposal ignores tests that its own CLEC authors had previously endorsed, including a requirement of a local number on the circuit to be treated as an EEL, the presence of actual local traffic on the circuit and the right to audit records to confirm such traffic. See Letter from Julia Strow, Cbeyond, to Marlene H. Dortch (filed Jan. 6, 2003).

In its place, the proposal focuses on indicia that a carrier merely qualifies as a CLEC and is collocated. Verizon has already addressed the inadequacy of these requirements. See Letter from William P. Barr, Verizon to Chairman Powell (filed Jan. 30, 2003).⁴ Indeed, even with the carrier size limitation, the proposal would allow immediate use of unbundled elements to substitute for special access circuits resulting in a loss of *hundreds of millions of dollars* in Verizon revenue that would otherwise help support network investment.

In particular, the requirement that a CLEC have a certain number of local interconnection trunks in a LATA is no guarantee that each and every EEL will carry any local traffic, much less a significant amount. While in theory, a logical relationship may exist between the existence of local service interconnection trunks carrying CLEC local traffic and the CLEC’s offering of local services in that LATA, the proposal does not even require that the “qualifying” interconnection trunk have any

² While Verizon has recognized that a limited modification for voice-grade circuits may be appropriate, any other adjustments would have to be evaluated to determine the consequences.

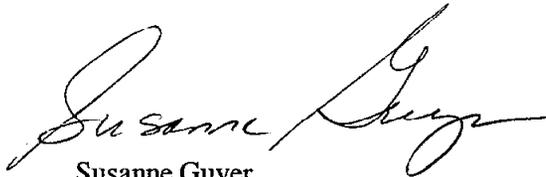
³ The proposal would only screen out the very largest carriers. Verizon estimates that carriers with over four billion dollars in revenues qualify as “small.”

⁴ While Verizon previously explained how a collocation requirement will not slow the use of EELs for non-local special access, this proposal waters down even that requirement by considering it met where ILECs have agreed to reverse collocation. ILECs have sought reverse collocation virtually across-the-board in order to avoid paying inflated rates to the CLECs for access facilities – and CLECs have denied those requests virtually across-the-board. Consequently, CLECs could contend that ILECs have “agreed to” reverse collocation anywhere and everywhere. In no sense, however, would this show that the CLEC is using EELs for a significant amount of local traffic, particularly since reverse collocation would most likely be used by the ILEC to terminate *its* traffic to the CLEC, and not the other way around.

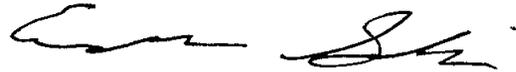
relationship to a particular EEL. And, even if it did require such a connection, a ratio of one DS1 interconnection trunk to 24 EELs cannot be considered "significant." Even at full local utilization, this would only allow for a maximum of 4% local usage (24 channels in the DS1 trunk compared to 576 channels or equivalent capacity in 24 EELs). Indeed, the interconnection trunk requirement is rife with opportunities to game the test. For example, the draft does not distinguish between trunks outbound from the CLEC (which carry local traffic and are obtained by the CLEC) and trunks inbound to the CLEC (which frequently carry internet-bound traffic and are not obtained by the CLEC). Only CLEC-outbound trunks should count to support the presence of local traffic. And, even where two-way trunks are in place, there is no requirement that those trunks be used to carry CLEC-originating local traffic.

The local use safe harbors adopted in the *Supplemental Order Clarification* should be left intact. If the Commission has any remaining concerns about the ability of CLECs to use EELs to extend the reach of their switches for local service in the absence of an unbundled switching requirement, it can address those concerns directly without making wholesale changes to the safe harbors. In particular, the Commission could adopt a narrow exception to the commingling prohibition to permit CLECs to connect analog voice grade loops used to provide competing local telephone service to special access transport. Likewise, it could provide additional clarification regarding the ILECs' auditing rights (which Verizon, for one, has never invoked.) See Letter from William P. Barr, Verizon to Chairman Powell, (filed Jan. 30, 2003). To avoid unintended and unanticipated consequences, the Commission should not, however, adopt radical changes to the existing rules without further review and comment. Instead, as it did previously in adopting the *Supplemental Order Clarification*, it should give time for various parties to analyze proposals and provide input so that the Commission can thoroughly understand how these rules will work on a going-forward basis.

Sincerely,



Susanne Guyer
Senior VP Federal Regulatory Affairs



Ed Shakin
VP & Associate General Counsel