

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Review of the 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. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	

**OPPOSITION OF QWEST COMMUNICATIONS INTERNATIONAL INC.**

Qwest Communications International Inc. (“Qwest”) hereby submits its Opposition to the petitions for reconsideration of the *Triennial Review Order*<sup>1</sup> submitted by AT&T Wireless Services, Inc. (“AT&T Wireless”), the Cellular Telecommunications & Internet Association (“CTIA”), Earthlink, Inc. (“Earthlink”), Nextel Communications, Inc. (“Nextel”) and T-Mobile USA, Inc. (“T-Mobile”).<sup>2</sup>

In their petitions, the commercial mobile radio service (“CMRS”) petitioners continue their quest to obtain advantage over their wireline competitors by converting special access circuits to unbundled network element (“UNE”) rates. In the *Triennial Review Order*, the

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<sup>1</sup> *In the Matter 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*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36 (rel. Aug. 21, 2003) (“*Triennial Review Order*” or “*Order*”), *appeals pending sub nom. United States Telecom Association v. FCC*, Nos. 00-1012; Nos. 00-1012, et al., consolidated with Nos. 03-1310, et al., on Oct. 29, 2003.

<sup>2</sup> Petitions for Reconsideration were filed Oct. 2, 2003.

Federal Communications Commission (“Commission”) erroneously concluded that CMRS providers are eligible to purchase UNEs, subject to certain restrictions. The Commission also found, however, that “inter-network transmission facilities,” including facilities from a CMRS base station to an incumbent local exchange carrier (“ILEC”) central office, are not subject to unbundling requirements. It is this latter finding that the CMRS petitioners seek to undo -- but only for CMRS providers -- based on the new theory that the connection from the base station to the ILEC central office is a “loop.”

The result sought by the CMRS petitioners would directly contravene the Commission’s “technology-neutral approach,” by allowing CMRS providers alone to obtain “inter-network transmission facilities” at unbundled rates. Furthermore, the CMRS providers’ theory that the connection from the base station to the ILEC central office is a loop has no basis in fact. As a result, these petitions should be denied. The Commission should also reject Earthlink’s request to reinstate line sharing, as it fails to provide any legitimate grounds for its request.

I. CMRS PROVIDERS ARE NOT ENTITLED TO UNE PRICING FOR THE TRANSMISSION FACILITIES BETWEEN THEIR BASE STATIONS AND ILEC CENTRAL OFFICES

In their petitions, the CMRS providers present a new legal theory regarding their entitlement to obtain the special access facilities between CMRS base stations and ILEC central offices at TELRIC rates. Having lost their argument that these transmission facilities qualify as *unbundled dedicated transport*,<sup>3</sup> the CMRS providers now claim that these facilities constitute *an unbundled loop*.

Remarkably, the CMRS petitioners suggest that this additional relief is critical to their ability to compete. In fact, CMRS providers have done just fine without access to UNEs. The

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<sup>3</sup> *Triennial Review Order* ¶ 368.

CMRS providers readily admit the great success they have had in attracting customers, including customers once served by the ILECs.<sup>4</sup> CMRS providers have up until now used tariffed special access services to connect their base stations to their mobile switching centers (“MSCs”), and route traffic within the ILEC network, without any impairment to provide their wireless services. Given this success, it is clear that CMRS providers would not be “impaired” without access to UNEs, and therefore should not be eligible to obtain UNEs at all. In any case, CMRS providers certainly are not entitled to obtain unbundled access to the “inter-network transmission facilities” between CMRS base stations and ILEC central offices.

Shortly before the initiation of the *Triennial Review* proceeding, AT&T Wireless and T-Mobile (formerly VoiceStream Corporation) filed a petition for declaratory ruling, asking the Commission to “affirm that CMRS providers may convert interoffice transmission facilities purchased from incumbent LEC special access or private line tariffs to unbundled dedicated interoffice transport, including transport to and from CMRS base stations.”<sup>5</sup> To support this argument, AT&T Wireless and T-Mobile contend that the link *between a cell phone and a base station* is a loop,<sup>6</sup> and the base station is a switch.<sup>7</sup> Applying this logic, the petitioners assert that the connection between the base station and the ILEC central office constitutes dedicated

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<sup>4</sup> For example, CTIA notes that 95 percent of the United States population lives in counties with access to three or more different mobile telephone providers, and 83 percent are in counties with five or more such mobile providers. CTIA Petition at 2. According to T-Mobile, “a growing number of CMRS customers are ‘cutting the cord’ and replacing their landline phones entirely with wireless phones, while others are using wireless phones instead of purchasing second or third lines from the incumbent LECs.” T-Mobile Petition at 5-6 (footnotes omitted).

<sup>5</sup> See Petition for Declaratory Ruling, CC Docket No. 96-98, at 1 (Nov. 19, 2001) (ATTWS/VoiceStream Petition).

<sup>6</sup> *Id.* at 14 (“Th[e] ‘last mile’ connection between the mobile phone and base station may be thought of as the wireless loop.”).

<sup>7</sup> *Id.* at 21 (“Base stations fall within [the] definition of a switch); *id.* at 22 (“Commission precedent dictates that CMRS base stations are switches.”).

transport subject to UNE rates.<sup>8</sup> The CMRS petitioners reiterated these arguments in the comments they filed in the *Triennial Review* proceeding.<sup>9</sup> In the *Triennial Review Order*, the Commission disposed of the ATTWS/VoiceStream Petition,<sup>10</sup> and specifically concluded that “CMRS carriers are ineligible for dedicated transport from their base station to the incumbent LEC network.”<sup>11</sup>

Faced with this ruling, AT&T Wireless and T-Mobile now characterize the special access facilities between the base station and ILEC central office as a *loop*, rather than interoffice transport, claiming that the base station constitutes a “loop demarcation point at an end-user customer premises.”<sup>12</sup> These carriers never argued for the Commission to define this link as a loop. Indeed, T-Mobile acknowledges that this issue was not raised before the Commission, except in passing.<sup>13</sup> Given their sudden and substantive shift in position, the Commission should be highly skeptical of the petitioners’ arguments.

Moreover, the Commission’s rules simply cannot be stretched as far as the CMRS petitioners would have them go. In the *Triennial Review Order*, the Commission defined a local loop as a “transmission facility between a distribution frame (or its equivalent) in an incumbent

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<sup>8</sup> *Id.* at 19.

<sup>9</sup> Comments of AT&T Wireless Services, Inc., CC Docket No. 01-338, at 28 (Apr. 5, 2002) (“AT&T Wireless Triennial Review Comments”) (“[T]he Commission should declare that transport links to base stations qualify as dedicated transport because base stations are switches, or perform functions equivalent to end office switches.”); Comments of VoiceStream Wireless Corporation, CC Docket No. 01-338, at 10-11 (Apr. 5, 2003).

<sup>10</sup> The Commission found that the ATTWS/VoiceStream Petition was moot given the Commission’s revised definition of dedicated transport. *Triennial Review Order* ¶ 368 n.1124.

<sup>11</sup> *Id.* ¶ 368.

<sup>12</sup> *See* T-Mobile at 13.

<sup>13</sup> *See id.* at 9 n.27.

LEC central office and the loop demarcation point at an end-user customer premises.”<sup>14</sup> That definition is not satisfied here. In no way does a base station constitute a “loop demarcation point at an end-user customer premises.” In a wireline loop, the demarcation point signifies the point at which the end user’s (or building owner’s) facilities begin. The base station serves no such purpose. The CMRS provider maintains control of the service on either side of the base station -- all the way from the MSC to its customers’ cell phones. While the CMRS providers are now arguing that the base station functions like a PBX, in reality it is analogous to a digital loop carrier in a wireline network, which is not considered an end-user premises or a demarcation point. As a result, the special access facility from a base station to the ILEC central office does not qualify as a “loop,” and CMRS providers are not entitled to this connection at TELRIC rates.<sup>15</sup>

This outcome is completely consistent with the Commission’s intent “that no requesting carrier shall have access to unbundled inter-network transmission facilities under section 251(c)(3).”<sup>16</sup> This rule applies “to all competitors alike, including intermodal competitors.”<sup>17</sup> As the Commission found, this “technology-neutral approach” suits the development of intermodal competition.<sup>18</sup>

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<sup>14</sup> 47 C.F.R. § 51.319(a). This rule is consistent with the Commission’s previous definition of the local loop.

<sup>15</sup> If one argued that the facilities from the cell phone user to the MSC is a loop, then the connection from the base station to the ILEC end office would constitute a subloop analogous to a portion of a feeder subloop. *See* AT&T Wireless Petition at 8-9. This analysis would not help the CMRS providers’ arguments, however, because the feeder portion of a loop is not available on an unbundled basis: “We require incumbent LECs to provide unbundled access to their copper subloops, *i.e.*, the distribution plant consisting of the copper transmission facility between a remote terminal and the customer’s premises.” *Triennial Review Order* ¶ 253.

<sup>16</sup> *Id.* ¶ 368.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* ¶ 369.

As a final matter, it would be inequitable to allow CMRS providers to convert these special access circuits to UNE loops. At least in the case of Qwest, the circuits at issue were often constructed to specification on behalf of the CMRS providers and generally to locations other than ILEC central offices. Qwest agreed to undertake this construction only because the CMRS providers promised to compensate Qwest the tariffed price for these circuits. Qwest would not have constructed, nor would it have been obligated under the Commission's rules to construct,<sup>19</sup> the circuits at the non-compensatory rates demanded by the CMRS providers. Even under the stringent network modification rules adopted in the *Triennial Review Order*, Qwest would not be required to construct these customized circuits as UNEs.<sup>20</sup> The CMRS providers should not be permitted to circumvent these rules by ordering the circuits as special access facilities and then converting them to UNEs.<sup>21</sup>

## II. THE COMMISSION CORRECTLY ELIMINATED LINE SHARING AS A UNE IN THE *TRIENNIAL REVIEW ORDER*

In its petition, Earthlink simply ignores the basis for the D.C. Circuit's remand of the *Line Sharing Order* -- the failure to consider the impact of intermodal competition. Indeed, Earthlink urges the Commission to commit the same error again. In the *Line Sharing Order*, the Commission concluded that competitors would be impaired without unbundled access to the high frequency portion of copper loops.<sup>22</sup> In reaching this conclusion, the Commission limited its

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<sup>19</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3843 ¶ 324 (1999).

<sup>20</sup> *Triennial Review Order* ¶ 632.

<sup>21</sup> For the same reason, the Commission should deny Nextel's extraordinary request for "fresh look" relief. Nextel at 15-17.

<sup>22</sup> *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147, Fourth

impairment analysis to carriers seeking to provide xDSL [digital subscriber line] service without voice service. The Commission found that, for such carriers, the alternatives to line sharing -- which included self-provisioning loops, obtaining a second loop to serve customers, purchasing the entire first loop and using it to provide voice service in addition to xDSL service, and obtaining the high-frequency portion of the loop from third parties -- were either “significantly more costly [than line sharing] or not available ubiquitously, or both.”<sup>23</sup>

The D.C. Circuit rejected the Commission’s impairment analysis, agreeing with the petitioners that the Commission “completely failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite).”<sup>24</sup> The court pointed to a number of Commission reports discussing the intensity of facilities-based competition, particularly from cable providers, and concluded that cable operators and CLECs clearly are able to compete and, in fact, hold a market advantage over ILECs in providing advanced services.<sup>25</sup> That state of competition gave the Commission “no reason to think [that requiring line sharing] will bring on a significant enhancement of competition.”<sup>26</sup> That being the case, the court found that the Commission was not justified in imposing a line sharing requirement.<sup>27</sup>

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Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912, 20926 ¶ 26-7 (1999) (“*Line Sharing Order*”).

<sup>23</sup> *Id.* at 20931 ¶ 36.

<sup>24</sup> *United States Telecom Ass’n. v. FCC*, 290 F.3d 418, 428 (D.C. Cir. 2002).

<sup>25</sup> *Id.* at 428-29 (citing *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398, 2404 ¶ 12 (1999); Third Report, 17 FCC Rcd. 2844, 2864 ¶ 44, 2865 ¶ 48 (2002)).

<sup>26</sup> *USTA*, 290 F.3d at 429.

<sup>27</sup> *Id.*

In the *Triennial Review Order*, the Commission heeded the D.C. Circuit's command and found that requesting carriers would not be impaired in the absence of line sharing. In addition to considering the impact of intermodal competition, the Commission also recognized the availability of alternatives to line sharing in the form of stand-alone copper loops and line splitting.

As the Commission concluded, “[c]ontinued access to the incumbent LEC’s conditioned, stand-alone copper loops and subloops enables a requesting carrier to offer and recover its costs from all of the services that the loop supports, including xDSL service.”<sup>28</sup> This approach is wholly consistent with the impairment standard adopted by the Commission, which compares the potential revenues and costs that an efficient competitor faces in entering a market.<sup>29</sup> The Commission specifically declined to base a finding of impairment to preserve the types of narrow business plans that Earthlink supports: “Providing UNEs to carriers with more limited business strategies would also disregard the availability of scale and scope economies gained by providing multiple services to large groups of customers.”<sup>30</sup> Earthlink’s argument that it is less costly for CLECs to provide DSL via line sharing -- particularly when they pay a zero recurring rate for the HFPL [high frequency portion of loop] -- also is not dispositive. *USTA* requires the Commission to consider the costs of unbundling, as well as purported benefits. Unbundling “imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.”<sup>31</sup>

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<sup>28</sup> *Triennial Review Order* ¶ 255.

<sup>29</sup> *Id.* ¶ 84 (“[W]e ask whether all potential revenues from entering a market exceed the costs of entry, taking into consideration any countervailing advantages.”).

<sup>30</sup> *Id.* ¶ 115.

<sup>31</sup> *USTA*, 290 F.3d at 427.

Line splitting has also proven to be a viable alternative to line sharing. In the *Line Sharing Order*, the Commission found no evidence that requesting carriers could obtain the high frequency portion of the loop from other competitive local exchange carriers (“CLECs”). Conditions have changed. Covad, for example, has line splitting arrangements with multiple major carriers, including AT&T, MCI, and Z-Tel.<sup>32</sup> In short, the *Triennial Review Order* provided a well-reasoned basis for the Commission’s decision to eliminate line sharing, which was faithful to the clear direction that it received from the D.C. Circuit in *USTA*. As a result, the Commission should deny Earthlink’s petition for reconsideration.<sup>33</sup>

### III. CONCLUSION

For the foregoing reasons, the Commission should deny the petitions for reconsideration submitted by AT&T Wireless, CTIA, Earthlink, Nextel, and T-Mobile.

Respectfully submitted,

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<sup>32</sup> See *Covad Communications Group Announces Third Quarter 2003 Results*, Business Wire (Oct. 22, 2003).

<sup>33</sup> The Commission should also deny Earthlink’s vague request to extend the transition period for line sharing. In the *Triennial Review Order*, the Commission granted CLECs exceedingly generous transition periods for both existing and new customers, given that the line sharing UNE was never based on a legitimate finding of impairment. These transition periods should provide end users and carriers sufficient time to plan in accordance with the Commission’s decision regarding line sharing.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **OPPOSITION OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System, 2) served via e-mail on the FCC's duplicating contractor Qualex International, Inc. and, 3) served via First Class United States mail, postage prepaid on the parties listed of the attached service list.

/s/ Richard Grozier  
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