Donna Epps
Vice President
Federal Regulatory Advocacy

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

Phone 202 515-2527
Fax 202 336-7922
donna.m.epps@verizon.com

May 20, 2004

Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *In the Matter of Review of Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Element Platform*, WC Docket No. 03-157

Dear Ms. Dortch:

This letter responds to AT&T's February 25, 2004 ex parte (AT&T Ex Parte) concerning Verizon's petition for forbearance from the UNE-P pricing rules. In that paper, AT&T argued, among other things, that Verizon's request for forbearance from the Commission's access charge rule would result in double recovery of switching costs, and that the request is precluded under section 10(d) of the Act. As we show here, both contentions are without merit.[1/] In response to a question from staff, we also set forth,

---

[1/] In the AT&T Ex Parte, AT&T also raised arguments concerning the portion of Verizon's petition seeking forbearance from the application of TELRIC to UNE-P; Verizon has addressed most of the arguments AT&T has raised (with respect to section 10(d) of the Act, for example, or AT&T's purported profit margin) elsewhere, or intends to do so separately.

below, an estimate of the net revenue impact of granting Verizon's petition. As we show, granting the petition would provide a first step toward relief for Verizon, without causing significant revenue loss for the CLECs.

I. The Proposal Involves No Double Recovery.

AT&T contends that Verizon's forbearance request would result in the incumbent over-recovering or double-recovering switching costs. This is wrong for several reasons.

First, as a general matter, under Verizon's proposal, Verizon would receive only one minute of use (MOU) charge for any minute of use of the switch on a particular call. For any minute where the switch is used for access, Verizon would receive *only* the per-minute access charge from the IXC; the UNE-P CLEC would pay *no* MOU charges for that minute. For any minute where the switch is used for local switching, Verizon would receive *only* the UNE-P charges from the UNE-P CLEC.

Second, Verizon's proposal is consistent with the manner in which UNE-P MOU rates are calculated. The per-minute UNE switching and shared transport costs in Verizon's studies (and the resulting UNE rates) are determined by spreading all traffic-sensitive switching costs over *all* minutes of use on the switch — including interstate and intrastate access minutes. As a result, the UNE switching rate is lower than it would be if access minutes were excluded in the first instance, and the costs were spread across only local minutes. And Verizon's forbearance request would not result in any increase in the CLECs' MOU UNE switching charge; indeed, the *overall* UNE-P costs paid by CLECs would decline since they would no longer pay MOU UNE charges for minutes relating to access.

Third, the fact that access rates may be set at a level different from TELRIC UNE rates does not mean that the incumbent would be "over-recovering" for minutes on the switch, as AT&T seems to contend. AT&T Ex Parte, Attach. at 2. Exchange access charges are set by regulators, are designed to help recover the costs of the underlying network, and already have been deemed to be just and reasonable. Moreover, the *CALLS Order* removed implicit subsidies from interstate access rates.[2/] Indeed, AT&T participated in the arms-length negotiations that resulted in the access charges approved by the *CALLS Order.*

In any event, AT&T's suggestion that an incumbent should be limited in the *access* revenues it receives from IXCs because its *UNE* rates are set at a different level ignores the fact that in other contexts, different customers pay different rates depending on how the switch is used. For example, the incumbent serves retail customers over the same switch on which it serves CLECs, and it may, especially where it is serving business customers, collect substantially more per-minute revenue from retail customers than it does from the CLEC UNE-P minutes on that same switch. Similarly, the incumbent receives a different and higher recovery from carriers using switching minutes for resale than it does from UNE-P CLECs. There is no basis to argue that the incumbent's retail and/or resale switching rates must be limited to the per-minute rates it charges UNE-P CLECs, and the analysis is no different with respect to access revenues

---

[2/] *See* Sixth Report and Order, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low Volume Long Distance Users, Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962, 12964 ¶¶ 3, 29-31 (2000) ("*CALLS Order*") (subsidy removed from federal access charges) rev'd in part *sub nom.*, *Tex. Office of P.U.C. v. FCC*, 265 F.3d 313 (5th Cir. 2001).

and UNE-P rates.[3] As the FCC itself noted in its brief in *Competitive Telecommunications Assoc. v. FCC,* 117 F.3d 1068, 1073 (8th Cir. 1997), the access charges an IXC pays relate to "interstate interexchange usage of a facility that is also used for other purposes"[4] — namely, for the provision of local service to end-users by either the incumbent or the CLEC. The "purpose" for which the switch is being used determines the appropriate framework for setting the switching price. In addition, when regulators set UNE rates, they do not take into account the prices set under other regulatory frameworks.

Fourth, there is no merit to AT&T's assertion that Verizon would overrecover the fixed cost of the switch if it were to collect per minute access charges on UNE-P lines where the CLEC continues to pay the flat-rated UNE port rate. AT&T seems to suggest that some or all of the fixed costs that are recovered in the UNE port rate are recovered in the per-minute access charges. *See* AT&T Ex Parte, Attach. at 4. But this is not the case. The FCC specifically removed all non-traffic sensitive costs from per-minute interstate access rates.[5] Thus, the per minute interstate access revenues Verizon would receive

---

[3] AT&T's suggestion that a "psuedo jurisdictional separations methodology" would be required to ensure that UNE rates and access and other rates do not duplicatively recover costs, AT&T Ex Parte, Attach. at 2, makes no sense for the same reason. No "pseudo separations" methodology is required to reflect the fact that the incumbent *already* receives access and UNE revenues for the use of the same switch. As explained above, Verizon recovers only one MOU charge for each minute. And if anything, Verizon's proposal would correctly have the CLEC pay *only* for local switching minutes: all intrastate access and interstate access minutes would be paid for by the IXC via access charges, and would be booked according to the appropriate jurisdiction, as they are today.

[4] Brief for Respondents' *Competitive Telecommunications Assoc. v. FCC*, No. 96-3604, at 16 (8th Cir. Dec. 23, 1996).

[5] *See* First Report and Order, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User*

from the IXC under its proposal would compensate Verizon *only* for the traffic sensitive costs of the switch.[6]

Similarly, there would be no double recovery with respect to Verizon's collection of intrastate access charges from IXCs. As set forth in the attached declaration of Patrick Garzillo, only one of the jurisdictions where Verizon is an incumbent includes non-traffic sensitive costs in Verizon's intrastate MOU switched access rate.[7] *See* Garzillo Decl. ¶ 6. As AT&T itself acknowledges, "[i]ntrastate access fees generally mirror the interstate structure." AT&T Ex Parte, Attach. at 4. Indeed, some states, like New York,

---

Common Line Charges, 12 FCC Rcd 15982, 16037, 16039 ¶¶ 125-127, 129, 134 (1997) ("*First Calls Order*") aff'd *sub nom.*, *Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998).

[6] As AT&T itself concedes, under the federal access charge regime, the fixed costs of the switch are recovered primarily in the EUCL (also known as the SLC), which is an end-user access charge, and in the transport access rate that the IXC pays, which includes the port charge. *See* AT&T Ex Parte, Attach. at 4. Verizon's forbearance request does *not* extend to these charges: Under Verizon's proposal, the CLEC could continue to collect the EUCL/SLC charge from its customer if it chooses to do so. Similarly, Verizon's petition does not extend to CCL charges or the equivalent. In two states where Verizon is an incumbent — Texas and California — interstate access rates still include a CCL charge, which is a MOU charge associated with the cost of the *loop*; some states may have similar charges. *See id.* at 5. Verizon does not propose to collect the CCL from IXCs when it collects access charges in connection with UNE-P customers, because it is simply seeking the right to collect the per minute access charges related to *switching* (and shared transport) costs. We note that AT&T's estimate of per line access revenues, included in its September 24, 2003 ex prate, "UNE-P vs. 271 LD Entry," appears to include *all* access revenues, not just the per minute charges collected from IXCs. *See id.*, "UNE-P associated revenue" chart. Those figures therefore have no relevance to the net revenue impact analysis we have included below.

[7] The one exception is Idaho, which appears to recover non-traffic sensitive costs in switched access rates. Garzillo Decl. ¶ 6. For the purposes of simplifying this proceeding, Verizon proposes that the Commission condition its grant of forbearance with respect to the collection of access charges in Idaho on Verizon's submission (and any necessary regulatory approval) of a proposal to remove the non-traffic sensitive costs of the switch from its switched MOU intrastate access rate.

specifically reduced switched access rates in order to mirror the restructuring and reduction of interstate access rates. Garzillo Decl. ¶ 6. *Second*, the cost studies Verizon now files to support switched access rates exclude non-traffic sensitive costs from the calculation of the switched MOU cost of providing access. *Id.* ¶ 7. Thus, notwithstanding AT&T's assertion to the contrary, there is no evidence that state switched access rates are based on or designed to recover non-traffic sensitive port costs. Of course, the intrastate switched access rates may be higher than the costs reflected in Verizon's switched access studies, but this is because the states have designed intrastate access rates (as well as the rates for other intrastate service offerings such as vertical features) to subsidize services such as E911 and Lifeline and the provision of other services at below-cost rates. *Id.* ¶ 8. There is no reason that that state policy choice should not continue to apply where Verizon collects access charges from IXCs in connection with a UNE-P customer's long distance call, nor any evidence that if it does, Verizon would somehow overrecover its non-traffic sensitive port costs.

Finally, permitting Verizon to charge the per-minute access charges for UNE-P customers also would not result in double recovery of traffic sensitive costs. The fixed UNE switching port rate set by a state commission reflects the commission's estimate of the fixed cost of the switch. The CLECs have advocated that substantial portions of (and even all) switching costs should be considered *non-traffic sensitive* and recovered in the fixed rate;[8/] the CLECs cannot argue after the fact that the port rate recovers costs that are

---

[8/] *See* Memorandum Opinion and Order, *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*, 18 FCC Rcd 17722, 17903 ¶¶ 461-

really *traffic sensitive.* State commissions generally put any costs they recognize as being traffic-sensitive in the UNE MOU switching rate, which, under Verizon's proposal, will not be charged for a minute of use for which access is paid.[9/] Since Verizon would charge the CLEC only the fixed switching port rate, Verizon would not double-recover its traffic sensitive costs.

II. Section 10(d) Does Not Limit the Commission's Authority to Forbear from the Access Charge Rule.

In its ex parte, AT&T also reiterates its claim that section 10(d) bars Verizon's petition. AT&T Ex Parte, Attach. at 1. This is not the case. Section 10(d) limits the Commission's expansive forbearance authority only with respect to the "*requirements* of

---

62 (2003) (stating AT&T and WorldCom's position that most switching rates are not usage sensitive and should be recovered through the port rate); Declaration of Terry L. Murray In Support of Opening Comments of Joint Commentors [AT&T and MCI], *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish A Framework for Network Architecture Development of Dominant Carrier Networks*, R. 93-04-003, I. 93-04-002, at 76-85 (CA P.U.C., filed November 3, 2003) (claiming that no switching costs are usage sensitive and proposing to recover all switching costs through a flat monthly port rate); Joint Direct Testimony of Joseph Gillan and Richard Chandler on Behalf of AT&T Communications of the Pacific Northwest, Inc., and WorldCom, Inc., *Review of Unbundled Loop and Switching Rates; the Deaveraged Zone Rate Structure; and Unbundled Network Elements, Transport, and Termination*, Docket No. UT-023003 (WA U.T.C., filed June 26, 2003) (same).

[9/] As the Commission knows, the Wireline Competition Bureau required Verizon to structure UNE switching costs on an entirely flat-rated basis in Virginia. Verizon has not been required to offer a flat-rated switching price structure in any of the other jurisdictions in which it is an incumbent, *see* Garzillo Decl. ¶ 9 , and Verizon has challenged the Bureau's decision before the full Commission. In the interim, while the flat-rated switching price remains in effect, Verizon recognizes that it would be difficult to implement the relief requested here while still ensuring that there was no double recovery. Thus, the Commission's forbearance order should make clear that in Virginia, forbearance is conditioned on Verizon's submission (and any necessary regulatory approval) of a proposal to identify the traffic sensitive costs that should be removed from the UNE-P port charge in connection with the access minutes for which Verizon would receive access charges.

section 251(c) or section 271." 47 U.S.C. § 160(d) (emphasis added). The access charge rule is not a "requirement" of section 251(c) or section 271. Instead, it is simply a creation of the Commission that the Commission is free to change. Further, as discussed above, the rule is not *"required"* to ensure that CLECs pay UNE rates that comply with section 251(c) (and 252(d)); even if the access charge rule were eliminated, CLECs would pay only for the TELRIC-based costs of their use of the switch, while IXCs would pay per minute access charges for *their* use of the incumbent's access service. Finally, since UNE-P itself is not a requirement of the Act, section 251 does not constrain the Commission with respect to UNE-P pricing. In sum, section 10(d) does not bar the instant forbearance request, because it is not triggered at all.[10/]

Although the Commission cited sections 251 and 252[11/] at the time it adopted the rule prohibiting the incumbent from collecting access charges from IXCs when the incumbent provides UNE-P, that rule is not a "requirement" of the Act's UNE pricing requirements. *Local Competition Order* at 15682, 15865 ¶¶ 364, 722.[12/] The

---

[10/] As Verizon has discussed elsewhere, even if section 10(d) were triggered because the rule were deemed a requirement of section 251, section 10(d) would not bar forbearance here. Section 10(d) specifically ceases to apply where the relevant requirements of section 271 and 251(c) are "fully implemented." 47 U.S.C. § 160(d). In approving Verizon's section 271 applications in all of its states, the Commission has found that Verizon "has fully implemented the competitive checklist," which includes all "requirements" of sections 251(c) and 252(d)(1). 47 U.S.C. §§ 271(d)(3)(A)(i), 271(c)(2)(B)(ii).

[11/] Nothing in section 271 is relevant to the access charge rule.

[12/] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

Commission adopted the rule that UNE-P CLECs were entitled to collect access charges based on the fiction that a carrier purchasing a UNE purchased the right "to use [that UNE] to provide access services to customers they win from incumbent LECs. . . ." *Id.* at 15862-63 ¶ 717. But in fact, CLECs do *not* use UNE-P to provide exchange access to IXCs; instead, the incumbent continues to provide exchange access services to IXCs. Thus, the UNE-P access charge rule does not serve any "requirement" of the 1996 Act, but instead unjustly deprives the incumbent that provides the access service of per-minute access charges, while dictating that these same revenues may instead flow to UNE-P-based CLECs — even though they perform *no* service in return for those revenues.

The UNE-P based CLEC does not interact with the IXC, is not responsible for arranging the access connection with the IXC, and, in sum, provides *nothing* to the IXC when the CLEC's customers make long distance calls. Even where the CLEC and the IXC are the same company, it is in its role as IXC that the company uses (and purchases) the incumbent's access service. Indeed, the IXC may well serve customers of the incumbent who are not local service customers of the CLEC. And, even where the CLEC and the IXC are the same company, it is still the incumbent that arranges that access connection and service and actually passes the access traffic off to the IXC arm of the company. The incumbent remains the party that has actually performed the work with respect to the establishment of the access facilities and service. The Commission specifically recognized that "resellers of local exchange services *are not reselling access services*" when IXCs serve the reseller's customers and thus use the incumbent's underlying exchange access services. *Id.* at 15984 ¶ 984 (emphasis added). Instead, as the Commission recognized, while the reseller is using the incumbent's local services

provided over its local facilities, the incumbent "LEC may offer [exchange access] using the same facilities." *Id.* at 15983 ¶ 980. Thus, as the Commission correctly concluded, when incumbents provide resale, "the 1996 Act requires that incumbent LECs continue to receive access charge revenues." *Id.* at 15982 ¶ 980.

The Commission's recognition that it is entirely just and reasonable for the incumbent to collect per-minute access charges where the CLEC takes resale should apply equally where the CLEC takes UNE-P.[13/] The disparate treatment gives UNE-P-based CLECs an unfair cost advantage as compared to facilities-based carriers that actually incur the costs of providing access in exchange for any access revenues they earn — and in particular compared to incumbents that incur the costs of providing access but earn *no* access revenues for the exchange access service they provide on a UNE-P — a result that is inherently *unreasonable.* In fact, there is no justification for depriving the incumbent of compensation for its exchange access services and facilities, when it is the entity that actually provides such services and facilities to the IXC; nor is there any reasonable justification for providing CLECs with an access charge windfall. The Commission's rule diverts revenue intended to compensate for the underlying network infrastructure away from the entity that actually operates and bears the costs of the underlying facilities.[14/]

[13/] The access charges have been set and approved by regulators and thus — notwithstanding CLEC complaints concerning implicit subsidies (*see, e.g.*, Opposition of MCI, filed in WC Docket No. 03-157, Aug. 18, 2003 at 12 — are just and reasonable on their face. In any event, in the case of interstate access charges, the *CALLS Order* has removed the implicit subsidies from access rates. *See CALLS Order* at 12964 ¶ 3.

[14/] *See e.g.*, *First CALLS Order* at 15990-91 ¶¶ 17, 21 (1997) (noting that "[t]he access charge rules provide for the recovery of the incumbent LECs' costs assigned to the

This unjust and unfair access charge regime cannot be *required.* To the contrary, the Commission clearly has the authority to forbear from applying the rule to ensure that the incumbent, which actually provides the access service, recovers the associated access charge.

In any event, the Commission's access charge rule is not "required" in order to ensure just, reasonable, non-discriminatory cost-based *UNE* pricing.[15/] The Commission suggested — erroneously — that the rule *was* required under sections 251 and 252 in order to avoid the possibility that UNE rates — when collected in addition to access charges — would double recover the costs of the underlying facilities. *Local Competition Order* at 15682, 15865 ¶¶ 364, 722. But as explained in detail above, there is no threat of double recovery, and in fact a UNE-P CLEC will pay *less* in UNE rates because it will not have to pay the UNE MOU rates in connection with access minutes. And forbearance from the access charge rule would mean that the IXCs would pay for access minutes of use through the access charges that the Commission already has approved as just and reasonable under section 201 of the Act.

Finally, UNE-P is not a "requirement" of Section 251 (or 271) of the Act, and the Commission accordingly is free to make UNE-P available subject to any pricing rules

---

interstate jurisdiction" for "costs of th[e] common plant" that is "needed to originate and terminate interstate long-distance calls.").

[15/] Section 251(c)(3) provides that rates must comply with "the requirements" of section 252(d)(1). For purposes of this submission, and without waiving the argument to the contrary outlined in Verizon's previous pleadings, we treat section 10(d)'s reference to section 251(c) as encompassing section 252(d)(1) in keeping with the Commission's similar holding (with respect to sections 271 and 272) in Report and Order, *Section 272(i) "Operate Independently" Requirement for Section 272 Affiliates*, WC Docket No. 03-228, FCC 04-54 (rel. Mar. 17, 2004) ("*OI&M Forbearance Order*").

that meet the requirements of sections 201 and 202 of the Act. As the D.C. Circuit recently found in *USTA II*,[16] "neither *AT&T* nor *Verizon* holds that the § 251(c)(3) nondiscrimination requirement *mandates* the combination rules the FCC promulgated under that section; rather, those cases found the nondiscrimination language . . . ambiguous and deferred to the agency's reading of it." *Id.* at 589. Or, as Chairman Powell himself has conceded, UNE-P "wasn't in the statute. It was sort of a creative combination of the Commission."[17]

Because UNE-P itself is the Commission's policy creation — and not a requirement of the Act — the Commission's discretion with respect to the pricing rules that should apply is constrained only by the requirements in sections 201 and 202 of the Act that prices be just, reasonable, and not unreasonably discriminatory. Permitting the incumbent to collect access charges from IXCs in connection with UNE-P plainly complies with the requirements of sections 201 and 202. The Commission has specifically found that interstate access charges are consistent with sections 201 and 202 of the Act.[18] Thus, the Commission may require that, as a condition of providing UNE-

---

[16] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[17] *Powell Defends Stance on Telecom Competition*, Communications Daily (May 22, 2001); *see also Competition Issues in the Telecommunications Industry*, Hearings before the Senate Comm. on Commerce, Science, and Transportation, 108th Cong. at 9 (2003) (written statement of Michael K. Powell, Chairman, FCC); *see also id.* ("UNE-P is not a network element, nor does the statute provide for it as a complete entry vehicle.").

[18] Report and Order on Remand and Further Notice of Proposed Rulemaking, *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,* 18 FCC Rcd 16978, 17389 ¶ 664 (2003) ("*Triennial*

P, the incumbent is entitled to collect access charges when it provides exchange access to IXCs.[19/]

III. The Net Revenue Impact of Verizon's Petition Would Provide Some Relief to Verizon without Causing Harm to the CLECs.

Granting Verizon's forbearance petition would be an important first step toward providing relief to Verizon in the face of ongoing losses caused by the application of TELRIC to UNE-P. Verizon would receive approximately $50 million more annually if the Commission grants the petition. At the same time, the average per-line net difference in revenues to a CLEC would be less than $0.80, although the precise amount varies by jurisdiction.[20/] Thus, the per-line revenue that CLECs would not receive if Verizon's

---

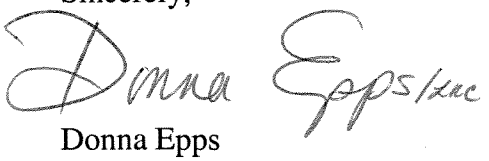
Review Order"), *vac'd in part, United States Telecomm Ass'n v. FCC*, 259 F.3d 554 (D.C. Cir. Mar. 4, 2004)

[19/] While this would result in different pricing rules for the use of UNE-P and for individual UNEs, this is appropriate, because UNE-P is fundamentally different from the leasing of specific UNE facilities that supplement a CLEC's own network. A facilities-based CLEC that leases the UNE-loop, for example, but uses its own switch actually performs its own services and incurs its own facilities-related costs, and it thus is appropriate for that CLEC to recover access charges when it provides the IXC with exchange access services. That is not the case with respect to a UNE-P-based carrier, which essentially obtains the incumbent's finished services and incurs no investment costs of its own.

[20/] These calculations are based on the number of UNE-Ps in service as of March 2004 in the jurisdictions where Verizon provides service as an incumbent. The calculations include Virginia East and Idaho.

request were granted is not so substantial as to disrupt any CLEC's business. Verizon explains how it calculated the net revenue impact in the attached declaration. *See* Garzillo Decl. ¶¶ 10-16.

Sincerely,



Donna Epps

Attachment

cc: Tamara Preiss
Steve Morris
Julie Saulnier
Jeremy Marcus