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July 13, 2004

Ex Parte

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

Re: AT&T Petition for Rulemaking to Reform Regulation for Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM No.10593

Dear Ms. Dortch:

In the last two weeks, Verizon has submitted extensive evidence describing the state of competition for high-capacity services in the largest MSAs where Verizon provides service as the incumbent local exchange carrier.[1] This evidence, which is enclosed, includes detailed maps graphically depicting the scope of competition as well as white papers, declarations, and other supporting materials and is relevant to this proceeding for the following reasons.

First, the evidence demonstrates that competing providers are not dependent upon incumbent special access services to serve customers in these markets. Contrary to AT&T's claims that "the Bells ... are ... the *only* suppliers of high capacity local links to the vast majority of buildings ...,"[2] these materials demonstrate that competing providers have deployed their own loop and transport facilities to tens of thousands of office buildings in these MSAs. The market realities are that:

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1 *See* Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338, 98-147 and 96-98 at 10, 15 (filed June 24, 2004); Letter from Michael E. Glover, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338, 98-147 and 96-98 at 19, 29 (filed July 2, 2004).

2 *See* AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM 10593, at 2 (filed Oct. 15, 2002) ("*AT&T Petition*").

- demand for high capacity services is highly concentrated with 80 percent of the demand for high capacity services in just eight percent of wire centers;
- competing providers have targeted deployment of their facilities to serve that demand, with an average of 20 competitor networks in the top 50 MSAs in the country;
- at least one competing provider has conceded that it earns the "majority of [its] revenue .. .exclusively through [its] own network facilities ..." and boasts that "[w]hile [RBOCs] have lots of fiber deployed, I don't know that they have more buildings connected than we do in all cases;"
- AT&T itself operates local fiber that connects to at least 6,400 buildings and tells investors that its own network "touches virtually all Fortune 1,000 Companies," and that its core network extends "all the way to the customer premises;" and
- competing providers are using fixed wireless and cable to reach customers, with 40 percent of large businesses, 29 percent of mid-sized businesses, and 23 percent of small businesses using fixed wireless for at least some high-capacity services and 41 percent of large businesses, 32 percent of mid-sized businesses, and 44 percent of small business using cable modem service for some high-capacity services.

As this evidence and the maps attached at tabs A, D and E show, competing providers have deployed their own facilities wherever significant demand for high capacity services exists.

Second, the evidence shows that rather than inhibiting competition as AT&T claims,[3] Verizon special access is facilitating additional competition for high capacity services. To the extent competing providers have chosen to use incumbent special access services to reach customers, they have competed successfully for retail customers of all types and sizes. As the maps attached at tabs A, E, and F show, competing providers are using Verizon special access services not only to extend the reach of their networks in outlying areas where competing facilities have not yet been deployed, but also in areas that have significant deployment of competitive facilities. This means that carriers can successfully compete with CLEC-fiber by purchasing special access services and using them as the basis for some or all of their high capacity services to end-users. These carriers are successfully using special access by purchasing these services at steep volume and term discounts of 35 to 40 percent off base rates and then using these circuits to provide high-capacity services to their own customers. And competing providers are using special access to serve not only large enterprise customers but also small and medium-sized businesses such as antique dealers, book stores, dry cleaners, florists, gas stations, hair dressers, and travel agents to name a few.

Third, other providers not only are able to compete successfully, but actually dominate key market segments. Indeed, competing providers such as AT&T dominate the large enterprise segment of the market, the most valuable segment of the telecom industry and a market that accounts for the vast majority of high-capacity demand. AT&T, MCI, and Sprint account for nearly half of all revenues from larger enterprise customers and are the primary service provider for nearly three-quarters of larger corporate accounts. In contrast, within its region, Verizon accounts for only 9 percent of the $28 billion spent on network-related service by the 400 companies with the highest annual telecommunications expenditures. Accordingly, Royce

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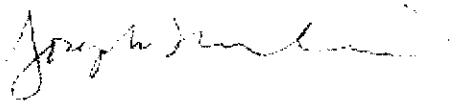
[3] AT&T Petition at 16-18.

Holland explains that "[t]he large corporate enterprise market ... is all but irrelevant to the debate over competition policy because there are no bottleneck facilities."

In short, there is extensive competition to provide high capacity services to business customers of all shapes and sizes, and the fact that competitors are using special access to compete successfully for customers both in areas where competitive facilities have not been widely deployed but more importantly in areas where competitive facilities have been deployed and competition is thriving proves that the rates competitors are paying for special access services are competitive. Under these circumstances, there simply is no justification for repeal of the pricing flexibility relief Verizon has obtained or a return to the rate of return regulation AT&T requests.

Please do not hesitate to contact me with any questions.

Sincerely,



Joseph Mulieri

Enclosures

cc: T. Preiss
S. Morris
D. Shetler

Before the
Federal Communications Commission
Washington, D.C. 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 Act	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	CC Docket No. 98-147

EX PARTE

Competing Providers Are Successfully Providing High-Capacity Services To Customers Without Using Unbundled Elements

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Competing Providers Are Successfully Providing High-Capacity Services To Customers Without Using Unbundled Elements

During the course of the Triennial Review proceeding, Verizon and others submitted voluminous evidence demonstrating that competing providers were successfully providing high-capacity services using a combination of their own or other alternative facilities and special access services purchased from incumbent LECs.

- With respect to the availability of competitive facilities, the evidence showed that competing providers had deployed an average of more than 15 networks in each of the top 50 MSAs.

- Verizon submitted voluminous evidence demonstrating that competitors were using special access circuits purchased from Verizon to provide high-capacity services to customers of all shapes and sizes.

Today, there is even more evidence of competition in the provision of high-capacity services than there was at the time of the Triennial Review, both as a general matter, and with respect to the particular markets served by Verizon.

- The following outline and accompanying maps demonstrate that, in each of the Top 20 MSAs in Verizon's serving area where high capacity demand is most heavily concentrated, competing providers are using a combination of competitive facilities and special access services purchased from Verizon to provide high-capacity services throughout these MSAs.

- This evidence shows that, in each of these 20 MSAs, competing providers have deployed extensive fiber networks that connect to hundreds of buildings, with the heaviest concentration in the areas and buildings where there is the most significant demand for high-capacity services.

- The evidence also demonstrates that competing providers are using special access services to extend the reach of their fiber networks to serve areas where there is high-capacity demand throughout each of these 20 MSAs, and to serve customers ranging from florists, gas stations, hair dressers and travel agents to large enterprises.

- This evidence is summarized in the maps in Attachment 5.

Background

In the *Triennial Review Order*, the Commission imposed unbundling obligations for virtually all high-capacity facilities, including high-capacity loops, dedicated transport, and dark fiber. In doing so, the Commission made four key determinations:

- First, the *Order* defined the relevant geographic market as each individual point-to-point route. *See, e.g., TRO* ¶¶ 327, 386, 390.

- Second, the *Order* established "triggers" for removing unbundling obligations where there are multiple providers on a given route, and delegated to the states the responsibility of determining where the triggers are met (and where carriers therefore are not impaired). *See, e.g., id.* ¶ 329; ¶ 400.

- Third, the *Order* recognized that there are other instances where, even though the triggers are not satisfied, competition is still possible (and carriers therefore are not impaired), and it delegated to the states the responsibility of determining where that is the case. *See, e.g., id.* ¶ 335, 410.

- Fourth, the *Order* refused to consider evidence that competing providers are successfully providing high-capacity services using special access services purchased from incumbent LECs. *See, e.g., id.* ¶ 102, 103.

In *USTA II*, the D.C. Circuit vacated the rules requiring unbundling of high-capacity facilities, which it defined as any "transmission facilities dedicated to a single customer or carrier," including both transport and high-capacity loops. 359 F.3d at 573. The Court reached four key conclusions that are relevant to high-capacity facilities:

- First, the Court required "a sensible definition of the markets in which deployment" occurs, and held that the Commission must consider "facilities deployment along similar routes when assessing impairment." *Id.* at 574-75.

- Second, the Court held that the critical inquiry is whether competing providers are *capable* of competing without UNEs – that is, whether "competition is possible," not whether one or more competitors are already competing in that market. 359 F.3d at 575; *see also id.* at 571 (issue is "whether a market is suitable for competitive supply").

- Third, the Court held that the Commission's decision to delegate the impairment determination to state commissions was invalid, and therefore vacated *all* "portions of the order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements." *Id.* at 568

- Fourth, the Court held that the Commission "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired," and expressly vacated the Commission's contrary conclusion, because "[w]here competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling." *Id.* at 576, 577; *accord id.* at 592, 593.

High-Capacity Services Are Uniquely Suited To Competitive Supply

The provision of high-capacity services is characterized by a number of demand- and supply-side characteristics that make these services uniquely suited to competitive supply.

A. Demand for high-capacity services is highly concentrated geographically.

- *80 percent* of the demand for Verizon's high-capacity special access services is concentrated in fewer than *8 percent* of its wire centers (532 of 6,900). *See* Attachment 1.

- More than *three-quarters* of the 532 wire centers are located in the top 20 MSAs addressed here.

- Within highly concentrated wire centers, demand is further concentrated in large office buildings and business parks.

B. High-capacity services are used by customers that generate relatively high traffic volumes and corresponding revenues; it is therefore an attractive customer segment that has been heavily targeted by competing providers when they enter a new market area.

- Attachment 2 shows that, because demand is concentrated most heavily in larger MSAs, the number of separate CLEC networks in an MSA increases in proportion to the size of the MSA.

- Attachment 3 shows that competitive fiber networks target buildings where demand is concentrated.

C. Once a competitor decides to enter a particular market area, it can provide high-capacity service *throughout* that market area, by using a combination of its own facilities or facilities obtained from an alternative provider, and special access services obtained from an incumbent LEC.

- Attachment 5 contains maps illustrating this point for the 20 Verizon MSAs in which special access demand is most heavily concentrated.

- The summary maps – collectively labeled Maps A – plot the specific locations where competing providers are providing high-capacity services to customers using either special access or alternative fiber facilities. These maps show that competitors are providing high-capacity services throughout these MSAs using both modes of entry.

- When Verizon competes out of region, it takes a similar approach. Verizon currently provides high capacity services to 500 large business customers in six out-of-region states using a combination of its own facilities, non-ILEC fiber facilities obtained through commercial arrangements, and ILEC special access.

Competitors Are Capable of and Are Using Alternative High-Capacity *Transport* Facilities

Competing providers have deployed fiber facilities throughout major metropolitan areas and business parks focusing on the areas where demand for high-capacity services is concentrated, and are capable of and are using those facilities to provide transport services.

A. Competing providers have deployed fiber networks in markets throughout the country wherever significant demand for high-capacity services exists.

- Competing providers have now deployed at least one network in at least 98 of the top 100 MSAs, and there are now an average of roughly 20 such networks in each of the top 50 MSAs.

- According to CLECs themselves, these fiber networks consist of more than 180,000 routes miles of fiber.

- To cite just a couple examples, AT&T operates 20,600 route miles of local fiber and Time Warner Telecom operates 11,345 route miles of local fiber.

B. The same is true for the markets served by Verizon in which high-capacity demand is concentrated, as shown by two sources of data:

- *First*, Verizon performed physical inspections of selected central offices with high demand levels for high-capacity services to identify those in which competing providers have obtained fiber-based collocation.

  -- The physical inspections revealed that there is competitive fiber in more than three quarters of the offices that are among the offices that account for 80 percent of Verizon's demand for high-capacity special access services (and likely more since not all these offices were inspected).

- *Second*, Verizon obtained third-party data on known competitive fiber routes from a leading independent provider of information related to telecommunications geography.

  -- CLECs and ILECs alike use this data for marketing purposes and/or to determine the availability of telecommunications services, including high-capacity services, in a given market.

- Maps B show, for each of Verizon's top 20 MSAs with the highest concentration of demand, the central offices that this data revealed are served by competitive fiber and the known competitive fiber routes.

  -- These maps show the strong correlation between the presence of competitive fiber and the offices in which demand is concentrated.

- Maps C show, for each of the top 20 MSAs, the transport routes between offices where physical inspections of the offices themselves and/or fiber route data in the territory served by theses offices revealed that competitive fiber is present.

  -- Fiber-based collocation is a reliable indicator of the central offices between which competitive transport can be provided, because when competitive fiber leaves a Verizon central office, it almost always connects to the collocating CLEC's own fiber network, or the network of another competing provider.

  -- Competing carriers are capable of providing connections between these central offices either directly or *indirectly* – for example, by using their own network or another carrier's network as an intermediary point – and therefore are capable of connecting to any other central office that also connects to those competitive networks. *Cf. Pricing Flexibility Order* ¶ 81.

- Maps D and E reflect the known fiber routes in the metropolitan and downtown portions of Verizon's top 20 MSAs.

  -- The known fiber routes provide further confirmation that there is a high correlation between competitive fiber deployment and the areas where demand is concentrated.

  -- While the information on known fiber routes is reliable, it is incomplete and does not include all competitively deployed fiber.

Competitors Are Capable of and Are Using Alternative High-Capacity *Loop* Facilities

The extensive fiber networks that competing providers have deployed also are capable of and are being used to provide high-capacity loops to buildings in which there is concentrated demand for high-capacity services.

A. Competing providers have deployed fiber facilities throughout the country to reach buildings and office parks where high-capacity demand is concentrated.

- According to CLECs themselves, these fiber networks connect to tens of thousands of office buildings.

- To cite just a couple examples, AT&T operates local fiber that connects to at least 6,400 buildings, and Time Warner Telecom operates local fiber that connects to at least 3,854 buildings.

- Time Warner Telecom says that "[w]hile [RBOCs] have lots of fiber deployed, I don't know that they have more buildings connected than we do in all cases. In certain markets they may; in others they may not."

B. Just as competing providers have connected their fiber to buildings where demand is concentrated across the country, the same is true for the markets served by Verizon. Verizon has again obtained two sources of data that prove this.

- *First*, Verizon obtained third-party data identifying the office buildings that competing providers are serving with fiber facilities.

  -- Maps A and D identify the buildings that competing providers are serving with fiber facilities in each of Verizon's top 20 MSAs.

  -- Maps E include more detailed maps of downtown areas that show that there are hundreds of individual buildings connected to CLEC fiber networks, with the heaviest concentration in the areas where there is the most significant demand for high-capacity services.

    · Both sets of maps show that competing providers are using fiber to connect directly to office buildings throughout the markets in which they have deployed fiber.

    · The locations of the "lit" buildings are based on data from two sources that are generally relied on in the industry: a broker of high-capacity services for telecommunications service providers and for end-user customers that maintains an extensive database of the availability of competitive services, and an industry consultant to telecommunications equipment vendors and service providers.

- *Second*, Verizon obtained data that estimate the typical aggregate demand for high-capacity services in buildings served by competitive fiber; these data confirm that competitors have chosen to target buildings where demand is concentrated.

  -- Attachment 3 is a chart demonstrating that competing providers have deployed fiber to the majority of buildings with high telecommunications expenditures, including:

     · 65 percent of buildings with greater than $6 million in aggregate annual telecommunications expenditures;

     · 57 percent of buildings with $4-$6 million in aggregate annual telecommunications expenditures; and

     · 50 percent of buildings with $2-$4 million in aggregate annual telecommunications expenditures.

  -- This analysis is based on data from a leading provider of sales and marketing information regarding the size, nature, and address of the businesses in the 20 MSAs that Verizon evaluated. Using an industry model, Verizon was able to estimate and correlate telecommunications demand with each individual building address.

C. Data on competing fiber also does not provide the whole picture because there is additional competition for high-capacity loops from fixed wireless and cable.

1. Fixed Wireless

- Analysts report that 40% of large business (5,000+ employees), 29% of mid-sized businesses (500-5,000 employees), and 23% of small businesses (5-99 employees) use fixed wireless for at least some high-capacity services (In-Stat/MDR, Dec. 2003).

- Competing providers are using fixed wireless to extend their existing fiber networks. For example:

  -- On May 4, 2004, WilTel announced that it would use fixed wireless from Teligent to expand its networks in Tier 2 and 3 markets to give customers "direct, on-net access to WilTel's robust services."

  -- "XO is rolling out its fixed wireless services directly and through other carriers that would resell it to end users. A handful of smaller carriers have resold it, says [Mark] Salter [the company's vice president of broadband wireless]."

2. Cable

- Each of the nation's major cable operators is now actively pursuing business customers that use high capacity services. For example:

  -- Time Warner is "[d]elivering cost effective, high capacity access solutions to several Fortune 500 customers."

  -- Cox Business Services has recently "launched . . . a new integrated marketing campaign to inform and drive demand among Enterprise and Fortune 500 companies."

- According to analysts, 41% of large businesses, 32% of mid-sized businesses, and 44% of small businesses use cable modem service in their main offices for at least some high-capacity services (In-Stat/MDR, Dec. 2003).

Competitors Are Capable Of And Are Using *Special Access* To Compete Successfully

Competing providers are extending the reach of their fiber networks by using special access services. Competing providers are using special access to serve customers of all shapes and sizes, and in all geographic locations, which demonstrates that special access is a viable alternative for competing providers everywhere.

A. More than 80 percent of Verizon's total special access revenues are generated from sales to other carriers, which then use the special access circuits to provide service to their own customers.

- Competing providers are using special access services in three main respects:
  - -- to extend the reach of their own fiber networks or those of other alternative providers they may be using;
  - -- to compete entirely through a resale model, by reselling special access services directly to end users; or
  - -- to transport switched traffic that is consolidated from many smaller customers.
- Some carriers use special access services exclusively (rather than UNEs) to reach their customers, or have stated that special access is all they need from ILECs.
  - -- For example, Time Warner Telecom recently stated that it "does not rely upon UNEs," because it earns the "majority of our revenue . . . exclusively through our own network facilities," and "[i]nstances where we need services from ILECs to connect our remote customers to our vast fiber network, we purchase those under special access tariffs or under agreements with the ILECs."

B. Competing providers are using special access services purchased from Verizon to serve customers of all types and sizes, and in all geographic areas where there is high capacity demand, which demonstrates that special access is a viable alternative for competing providers everywhere.

- Maps F show the locations where a sample set of representative carriers are using Verizon special access to serve customers in each of Verizon's top 20 MSAs.

  Maps E provide a more detailed view of this data, and also overlay this data with the locations of the buildings that competing providers are serving with fiber.
  - -- These maps show that CLECs are using Verizon special access to serve customers in areas of high concentration, where competitive facilities

already exist, as well as in areas where demand is less concentrated and competitive facilities have not yet been deployed.

-- These maps are based on data that Verizon compiled by reviewing the billing records of a sample of carriers that include the two largest and three to seven smaller competing carriers that purchase high-capacity special access services from Verizon. Verizon identified the type of service these carriers obtained, the location at which it was being used, and the identity of the customer that was being served.

- Attachment 4 is a list of the types of customers that the sample CLECs are serving using special access services purchased from Verizon.

  -- The list shows that competing providers are using special access to serve not only large enterprises, but also small businesses such as antique dealers, book stores, dry cleaners, florists, gas stations, hair dressers, and travel agents to name a few.

  -- These data demonstrate that special access is a viable competitive alternative for all kinds of customers with demand for high-capacity services.

- Competitors are using special access much more extensively than UNEs to serve their customers.

  -- Of the high-capacity circuits that competing carriers purchase from Verizon:

     · nearly 93 percent of the DS-1 loops and more than 98 percent of the DS-3 loops are purchased as special access service;

     · only 7 percent of the DS-1 loops and less than 2 percent of the DS-3 loops are purchased as UNEs.

- Competing providers purchase these special access services at significant discounts for use to serve their own customers.

  -- Verizon offers significant volume and term discounts – 5 to 40 percent – off of base rates (depending on the term of the agreement and the type of service).

  -- Competing providers purchase special access services from Verizon at an average discount of approximately 35 to 40 percent off the base rates.

There Are Several Classes of High-Capacity Customers, Services, and Facilities For Which Competition Is Particularly Intense

In addition to the fact that there is extensive competition in the provision of high-capacity loops and transport generally, there also are several classes of high-capacity customers, services, and facilities for which competition is particularly intense, and for which there can be no finding of impairment.

A. Background

- In *USTA II*, the D.C. Circuit reaffirmed its previous holding that the impairment inquiry must take a "nuanced" approach that analyzes whether competition is impaired in "specific markets or market categories." 359 F.3d at 574 (citing *USTA I*, 290 F.3d at 426).

- Accordingly, the Commission may not impose an unbundling obligation for a particular category of customers or services without first making an impairment finding with respect to that category.

  -- The D.C. Circuit has twice affirmed the Commission's own conclusion that the standards in the Act are appropriately applied by "disaggregating the *impairment* issue, and in ordering unbundling only with respect to the *service* for which it found impairment." *Id.* at 592 (initial emphasis in original); *see also id.* ("service-by-service impairment analysis permissible") (citing *Comptel*, 309 F.3d at 12-13).

  -- The court has reversed the Commission where it has "failed to conduct the requisite impairment analysis," for specific categories of services or customers. *Id.* at 575 (reversing unbundling requirements for use by providers of wireless service).

  -- And the court has squarely held that "competitors cannot generally be said to be impaired" in a particular market category or categories "where robust competition in the relevant market belies any suggestion that the lack of unbundling makes entry uneconomic." *Id.* at 592; *accord id.* at 576.

- There are at least five specific categories of services or customers where robust competition demonstrates that competition is not impaired without access to UNEs.

B. Large enterprise customers

- Analysts typically define "large enterprise" customers as Fortune 1000 companies and large public institutions. This is the most valuable segment of the telecom industry, representing $50 billion in annual revenues.

- Large enterprise customers typically purchase most of their telecommunications services on a nationwide or global basis from one or two primary service providers, and local telephone companies have not been major players in this market segment.

  -- The Bell companies have only recently begun to compete seriously for the nationwide and global business of large enterprise customers.

  -- The interLATA restriction historically precluded the Bell companies from providing interLATA services, which is a critical component of the package of services that large enterprise customers demand.

- Competing providers continue to lead in the head-to-head competition for larger enterprise customers.

  -- AT&T, MCI, and Sprint account for nearly half of all revenues from larger enterprise customers (Lehman Brothers, 11/03) and are the "primary" service provider for nearly three-quarters of large corporate accounts. (Merrill Lynch, 2/03)

  -- Within its region, Verizon accounts for only 9% of the $28 billion spent on network-related service by the 400 companies with the highest annual telecommunications expenditures, according to WEFA, an economic consulting firm.

  -- Royce Holland: "The large corporate enterprise market . . . is all but irrelevant in the debate over competition policy because there are no bottleneck facilities." (TR Daily 12/04/03)

- Competing providers dominate the head-to-head competition for high-speed packet-switched services that make up much of the demand of enterprise customers, and do not need high capacity loop or transport UNEs to provide these services in particular.

  -- High-speed Frame Relay and ATM services are currently the biggest single telecom expenditure for large business customers. (Schwab Soundview 01/04)

  -- Competing carriers provide high-capacity packet-switched services, such as Frame Relay and ATM, by combining their own packet switching capabilities with high-capacity transmission facilities that either they supply themselves, obtain from an alternative supplier, or purchase as special access service from an incumbent LEC.

-- AT&T, MCI, and Sprint control approximately 75 percent of Frame Relay and ATM revenues; XO and Qwest are number 4 and 5, respectively. (Schwab Soundview 01/04)

-- AT&T, MCI, SAVVIS, Level 3, and Sprint are the five largest providers of IP-VPN services; the only two Bell companies in the Top 10 are Qwest and SBC, with a combined share of 3.4 percent. (In-Stat/MDR 01/04)

C. Wireless and Long Distance

- Competition in wireless and long distance has thrived, even though providers of these services have not relied on UNEs.

- Carriers are not impaired in their ability to provide wireless services without access to UNEs.

  -- The D.C. Circuit overturned the Commission's decision regarding UNEs for wireless carriers for failing to undertake the requisite service-by-service analysis. 359 F.3d at 575-577.

  -- The court found that wireless carriers had not been impaired without access to UNEs in light of the fact that there was a "rapidly expanding and prosperous market for wireless services." 359 F.3d at 576.

  -- The court held that this evidence "clearly show[s] that wireless carriers' reliance on special access has not posed a barrier that makes entry uneconomic," and that there was accordingly no basis to find impairment.

  -- Since the Triennial Review proceeding, the number of wireless subscribers has grown from 129M to 157M; wireless traffic has grown from 20 percent to 30 percent of all voice traffic.

  -- Wireless has grown increasingly competitive with wireline, both for lines and minutes: the percentage of users giving up their landline phone has grown from 3-5 percent to 7-8 percent; the number of wireless minutes has grown steadily while wireline minutes have declined; and wireless now accounts for approximately 40 percent of all long distance traffic.

- Carriers also are not impaired in their ability to provide long distance services without access to UNEs.

  -- As the D.C. Circuit recognized, competing carriers have long provided long distance service successfully without access to EELs, *e.g.*, 359 F.3d at 590, and there accordingly is "no evidence suggesting that [CLECs] are impaired with respect to the provision of long distance services," *id.* at 590, 592.

-- On the contrary, the court emphasized that, in the context of long distance services in particular, "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant market belies any suggestion that the lack of unbundling makes entry uneconomic." 359 F.3d at 592.

-- The D.C. Circuit therefore noted that, on remand, it expected the Commission to "turn to the issue of impairment" specifically "with reference to long distance service," and anticipated that it "may well find none." 359 F.3d at 592.

-- Competitors continue to compete successfully in the long distance market without relying on UNEs, and there is no plausible argument that other carriers are entitled to UNEs for use to provide long distance services.

D. Enhanced Extended Links (EELs)

- Because EELs are simply a combination of high-capacity loops and transport, EELs are not subject to unbundling for the same reasons as for high-capacity loops and transport generally.

  -- Where there are alternative high-capacity loop and transport facilities available, competing providers can use these facilities as a substitute for EELs.

  -- Competing carriers also are capable of and are using special access as a substitute for EELs, and the Commission must consider this alternative in its impairment analysis.

- Competing carriers cannot demonstrate impairment without access to high-capacity EELs because they have provided high-capacity services successfully without access to UNEs.

  -- The D.C. Circuit reiterated that, with respect to EELs, just as with respect to specific services and markets, the "presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . *precludes* a finding that the CLECs are 'impaired'" 359 F.3d at 593 (emphasis added).

  -- The court found that where CLECs were competing successfully using special access services purchased from the ILECs, the Act "precludes" a finding that they would be impaired if they could not "convert" those circuits to UNEs. *Id.*

  -- The court also recognized that it would create "anomalies" if CLECs that already were competing successfully using special access were "barred

from access to EELs as unbundled elements," while other carriers entering the market would not be barred, and the court therefore emphasized that "if history showed that lack of access to EELs had not impaired CLECs in the past, that would be evidence that similarly situated firms would be equally unimpaired going forward." *Id.*

- Competing carriers' own conduct demonstrates that they are capable of providing (and are in fact providing) high-capacity services without access to EELs as UNEs.

  -- As demonstrated above, competing carriers are extensively using special access to provide high-capacity services, and this includes loop-transport combinations that they purchase in the form of special access.

     · Of the high-capacity circuits that competing carriers purchase from Verizon, nearly 93 percent of the DS-1 loops and more than 98 percent of the DS-3 loops are purchased as special access service, while only 7 percent of the DS-1 loops and less than 2 percent of the DS-3 loops are purchased as UNEs.

     · With respect to EELs specifically, approximately 95 percent of DS-1 loop and transport combinations are purchased as special access rather than EELs. And more than 99 percent of the EELs Verizon sells are made up of these DS1 combinations.

  -- Even those carriers who have purchased or converted to EELs first served customers for extended periods of time using special access.

     · One of Verizon's largest purchasers of special access services served customers for an average of nearly 2 years, and in some cases as much as 7.5 years, before converting its special access circuits to UNEs.

  -- A number of carriers that use special access services extensively have not converted any special access circuits to UNEs or have converted only a small fraction.

     · This same carrier has converted only a small fraction (1/30) of its special access circuits to EELs; another of Verizon's largest purchasers of special access services has not converted any of its circuits to EELs, nor have several other CLECs that use special access extensively.

  -- The fact that special access may be priced higher than UNEs is irrelevant, because "the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements

at the lowest price that government may lawfully mandate." 359 F.3d at 576.

E. Entrance Facilities

- The Commission has recognized that entrance facilities are particularly well suited to competitive supply and are already competitive.

  -- These facilities "often represent[] the point of greatest aggregation of traffic in a competing carrier's network, and such carriers are more likely to self-deploy these facilities because of the cost savings such aggregation permits." *TRO* ¶ 367.

  -- These facilities are "the most competitive type of transport", and competitive deployment of these links is "pervasive." *TRO* ¶ 367 n.1122.

- CLECs have been steadily replacing entrance facilities they have obtained from Verizon with their own competitive transport.

  -- Competing providers migrated at least 20,000 entrance-facility circuits from their POPs to collocation arrangements just last year and this trend continues.

- To the extent that competing providers continue to obtain entrance facilities from Verizon, they typically purchase special access rather than UNEs.

  -- Of the high-capacity entrance-facility circuits that carriers purchase from Verizon, approximately 96 percent are special access, while only 4 percent are UNEs.