

Dee May
Vice President
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

July 29, 2004

Ex Parte

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

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

Dear Ms. Dortch:

Please place the attached on the record in the above proceedings.

Please let me know if you have any questions.

Sincerely,

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

Attachment

cc: Christopher Libertelli
Matthew Brill
Scott Bergmann
Jessica Rosenworcel
Daniel Gonzalez
John Rogovin
John Stanley
Michelle Carey
Thomas Navin
Jeffrey Carlisle
William Maher

CLECS ARE NOT IMPAIRED WITHOUT HIGH CAPACITY LOOPS AND TRANSPORT

This paper responds to recent letters from CLECs and their financial backers that, like a July 9 letter from CompTel, argue that the Commission should reinstate an unbundling requirement for high-capacity loops and transport as part of any interim rules the Commission may adopt.¹

Although they complain loudly that CLECs would be harmed if the Commission does not reimpose such an unbundling requirement, they offer no concrete evidence in support of their claims. Notably missing from their letters is any refutation of Verizon's evidence that CLECs are competing — and, therefore, can compete — to serve small- and medium-sized businesses of all shapes and sizes *without* UNE loops and transport, including UNE DS-1 loops. Indeed, they do not — because they cannot — deny that such competition exists today. And although they assert that they “cannot overstate the harm” if the Commission does not reinstate the vacated UNE rules, ALTS at 1, they unquestionably do so by ignoring CLECs' widespread use of their own facilities, other competitive facilities, and the use of special access services purchased from Verizon.²

¹ See Letter from John Windhausen, Jr., ALTS, to Michael Powell, FCC, CC Docket Nos. 01-338 *et al.* (July 22, 2004); Letter from Peter H.O. Claudy, M/C Venture Partners; James Fleming, Columbia Capital; James N. Peary, Jr., Madison Dearborn Partners, LLC; Rand G. Lewis, Centennial Ventures; and James H. Greene, Jr., Kohlberg Kravitz Roberts & Co., to Michael Powell, FCC, CC Docket Nos. 01-338 *et al.* (July 22, 2004); *see also* Letter from Julia O. Strow, Cbeyond; Susan Jin Davis, Covad Communications Co.; Gavin McCarty, GlobalCom, Inc.; Greg Scott, Integra Telecom, Inc.; Richard Heatter, Mpower Communications Corp.; Penny Bewick, New Edge Networks, Inc.; and Mark Jenn, TDS Metrocom, LLC to Chairman Michael K. Powell, FCC, CC Docket Nos. 01-338 *et al.* (July 21, 2004) (“Joint CLEC July 21 Ex Parte”).

² T-Mobile, however, agrees that the “FCC should focus on actual deployment of competitive facilities.” Letter from Gil M. Strobel, Lawler, Metzger & Milkman, LLC, to Marlene H. Dortch, FCC, CC Docket No. 01-338, Attachment at 5 (July 21, 2004) at 5.

As Verizon has shown, when CLECs do use facilities obtained from Verizon to provide high-capacity service to their own customers, they do so primarily by purchasing special access, not UNEs. Some, such as Time Warner, do “not rely upon UNEs” at all. Others use UNEs very minimally. As US LEC explains, it is “successfully executing its business plan and, importantly ... [is] well positioned to address the uncertainty around UNE services,” because “over 90% of [its] customer T-1s are not UNE based.”

“Revenue Grows By \$13.3 Million And EBITDA Grows By \$3.3 Million Year Over Year”, US LEC Press Release (July 29, 2004). Overall, 93 percent of the DS-1 loops, 95 percent of the DS-1 loops purchased in combination with transport, and 98 percent of the DS-3 loops that carriers obtain from Verizon are purchased as special access. Where carriers use special access services to provide their own high-capacity services, they purchase those services at deep volume and term discounts, averaging 35-40 percent off of the list prices.

This is true not only of CLECs as a whole, but also of smaller CLECs. *Excluding* the two largest purchasers of special access in Verizon’s territory, *90 percent* of the DS-1 loops, *92 percent* of the DS-1 loops purchased in combination with transport, and *96 percent* of the DS-3 loops that CLECs purchase from Verizon are purchased as special access, not UNEs. That is, even when smaller CLECs utilize Verizon facilities to provide high-capacity services, they use UNEs rarely — less than 10 percent of the time — and only marginally more often than the largest carriers. In fact, several of the smaller CLECs that have been the most vocal in favor of reimposing unbundling obligation for high-capacity loops *do not purchase any* high-capacity UNE loops from Verizon, but instead *exclusively* purchase special access loops.

ALTS and the CLECs' financial backers, like CompTel before them, completely ignore all of this and claim, without any basis in fact, that reimposing unbundling requirements for high-capacity loops and transport is necessary to protect consumers and CLECs. Their claims, however, cannot be squared with the facts.

As an initial matter, ALTS argues (at 2-3) that the rule requiring unbundling of high-capacity loops was not vacated and that the Commission's impairment determinations remain valid.³ But the D.C. Circuit provided multiple grounds for vacating the Commission's virtually identical unbundling requirements for high-capacity loops and transport, and ALTS offers no reason for concluding that the court left one set of rules in place while vacating the other. First, as Verizon has shown, the D.C. Circuit used "transport" as a generic term, which it defined to include high-capacity "transmission facilities dedicated to a single customer or carrier" — that is, loops and transport. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 573 (D.C. Cir. 2004) ("*USTA II*"). Although ALTS suggests (at 3) that the D.C. Circuit "quot[ed] directly from the FCC's definition of interoffice transport," the court did not, in fact, quote the *Triennial Review Order*⁴ or cite any paragraph as a basis for its definition. The court, moreover, did not define "transport," as used in the opinion, as limited to facilities "use[d] for transmission among incumbent LEC central offices and tandem offices,"

³ See also Letter from Chris A. Davis, McLeod USA, to Michael Powell, FCC, CC Docket Nos. 01-338 *et al.* (July 20, 2004) (claiming that "[t]he D.C. Circuit Court of Appeals did not address high capacity loops in its order"); Joint CLEC July 21 Ex Parte at 3 (asserting that the court "did not vacate loop rules or the Commission's impairment finding supporting loop unbundling").

⁴ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003), ("*Triennial Review Order*"), *vacated in part and remanded, USTA II*, 359 F.3d 554, *petitions for cert. pending, AT&T Corp. v. United States Telecom Ass'n*, Nos. 04-12, 04-15, & 04-18 (U.S. filed June 30, 2004).

which is a key distinction between transport (which connects switches to other switches) and loops (which connect switches to end-user customers). *Triennial Review Order* ¶ 361.

Second, although ALTS asserts (at 3) that the D.C. Circuit invalidated only “the delegation to states of authority to implement the self-provisioning trigger,” the court, in fact, vacated all “portions of the Order that delegate to state commissions the authority to determine whether CLECs *are impaired* without access to network elements,” whether under the self-provisioning trigger, the wholesale trigger, or the multi-factor analysis. *USTA II*, 359 F.3d at 564, 568 (emphasis added). And ALTS does not dispute that the Commission *did* “delegate to the states the authority to . . . determine customer locations where competitive carriers are not impaired without access to incumbent LEC unbundled DS1s,” based on the “availability of wholesale competitive alternatives.” *Triennial Review Order* ¶ 327. The Commission’s Competition Policy Division recently agreed that, as a result of *USTA II*, “state commissions no longer retain the authority delegated to them by the Commission to make impairment decisions.” *Order, Request for Stay of Order for the July 2, 2004 Deadline for State Commission Determinations of Impairment Pursuant to the Triennial Review Order*, DA 04-2045, CC Docket No. 01-338, ¶ 1 (CPD rel. July 8, 2004) (dismissing as moot petition to stay deadline for completion of state commission impairment proceedings).

Third, ALTS ignores the D.C. Circuit’s two independent grounds for vacating the Commission’s provisional impairment findings, which apply to both high-capacity loops and transport: the Commission’s decisions to ignore both “the availability of tariffed ILEC special access services” and “facilities deployment along similar routes.” *USTA II*,

359 F.3d at 575, 577. Therefore, contrary to ALTS's claims, there is no valid UNE rule today as to either high capacity loops or transport.

ALTS also asserts (at 4) that the failure to reinstate unbundling requirements for DS-1 loops and DS-1 EELs will harm small- and medium-sized business customers. But their claims are based on the erroneous premise that CLECs rely primarily — if not exclusively — on *unbundled* DS-1 loops and transport rather than special access or alternative facilities to serve these customers. For example, ALTS cites (at 4) a Small Business Administration determination that 22 percent of small businesses obtain service from a CLEC, but that survey does not state, nor does ALTS claim, that those businesses are served solely (or even predominantly) using UNEs. ALTS also relies (at 4) on a “study” by two former WorldCom executives that CompTel filed. As Verizon has shown, that study assumes away not only the fact that CLECs are serving small- and medium-sized businesses using their own facilities, competitive facilities, and special access, but also that CLECs using special access obtain substantial discounts from basic rates. ALTS addresses none of this.

Finally, ALTS (at 4-5) and the CLECs' financiers (at 3-4) contend that CLECs will be harmed unless the Commission reinstates unbundling requirements for high-capacity loops and transport. But even if some CLECs have adopted UNE-based business plans — and neither ALTS nor the financiers offer evidence that this is the case for many, or even any, CLECs — frustration of their business plan would provide no basis for an impairment finding. As Verizon has shown, other (if not most) CLECs are successfully competing *without* unbundled high-capacity loops and transport, demonstrating that competition is possible and there can be no impairment. Thus, the

financiers' claim (at 3) that the absence of UNEs would "immediately render[] most markets unprofitable for CLECs" cannot be squared with the fact that CLECs are successfully competing without UNEs in markets throughout Verizon's region. Nor is there any merit to ALTS's claim (at 5) that only "the nation's largest interexchange carriers" "overwhelmingly use special access" instead of UNEs to provide high-capacity services. As shown above, when smaller CLECs provide high-capacity services by using Verizon's network (rather than their own or alternative facilities), they purchase special access, not UNEs, more than 90 percent of the time, no different from the largest carriers.

For all of these reasons, ALTS's claims and those of the CLECs' financial backers do not support reinstating an unbundling requirement for high-capacity loops or transport as part of any interim or permanent rules the Commission may adopt.