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August 9, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 98-147, 96-98

Dear Ms. Dortch:

This responds to the July 29, 2004 and other submissions by Verizon concerning interim unbundled access to DS-1 loops and transport.¹ Although Verizon has submitted hundreds of pages to the Commission even before the Commission has issued an *NPRM*, the Commission may confidently reject Verizon's contentions for the reasons briefly stated and summarized below.

Special Access Has a Very Limited Role In An Impairment Analysis. Verizon's lengthy presentations erroneously assume that an extensive factual examination of the extent to which some CLECs may be using special access in Verizon territory is relevant to an impairment analysis. In fact, *USTA II* does not require the Commission to embark on any such evaluation. The Court stated that the Commission's impairment analysis must consider the availability of tariffed ILEC special access service but may take into account administrability, and the risk of ILEC abuse. (Slip op. at 31.) This suggests that the Commission may reinstate its finding in the *Triennial Review Order* that special access is not relevant to impairment because of the administrative burdens and impracticability of assuring that BOCs are not engaging in price squeeze or other discriminatory behavior. BOCs have the ability and incentive to discriminate against CLECs. Under current rules, BOCs enjoy pricing flexibility for special access in most

¹ Letter from Dee May, Verizon to Marlene H. Dortch, CC Docket No. 01-338, July 29, 2004; Letter From Suzanne Guyer, Verizon, to Michael K. Powell, CC Docket No. 01-338, June 24, 2004.

metropolitan markets, and (in any case) need not provide any cost justification for their special access rates under the price cap rules. Although the Commission has the legal authority to prevent price squeezes and discriminatory pricing, it lacks both the information and the resources to exercise that authority effectively, especially in a “pricing flexibility” regulatory system where rates may change faster than the Commission can investigate them. It is therefore impracticable at this time for the Commission to assure that BOCs could not engage in price squeeze or discriminatory behavior in connection with special access offerings. Therefore, the Commission in its impairment analysis may determine that special access is not a viable alternative to UNEs.

Verizon’s Unlawful “No Facilities” Policy May Account for CLECs Use of Special Access in Verizon Territory. Notably missing from Verizon’s presentations is any reference to its unlawful “no facilities” policy. Under that policy, which Verizon initiated in 2001, and which the Commission in the *Triennial Review Order* found violated the Act, Verizon has declined to fill orders for DS-1 loop UNEs if routine modifications are necessary to fill the order, even though Verizon will perform those same modifications in connection with orders from its own customers. Where routine modifications are necessary, Verizon has only filled the order as special access. (Even though *USTA II* affirmed the Commission’s rejection of Verizon’s “no facilities” policy, Verizon, since the *Triennial Review Order*, has continued to refuse to make routine modifications unless a CLEC accepts an interconnection agreement amendment that includes new, non-recurring charges for the modifications, in amounts that have never been reviewed or approved by any state commission.) Some CLECs have declined to enter the Verizon territory because of this policy. Other CLECs have purchased special access rather than drop a new, and especially an existing, customer. For example, 85% and 15% of Mpower’s loops are UNE and special access, respectively, but this would be 100% UNE but for Verizon’s unlawful “no facilities” policy. Covad is currently forced to buy some DS-1 loops as special access because Verizon rejects 35% - 40% of its DS-1 orders based on “no facilities.” It would not be surprising, therefore, that Verizon might be able to claim that many CLECs, even those serving small business customers with DS-1s, are using special access since Verizon has had a deliberate, unlawful policy of thwarting its obligation to provide UNEs and of compelling CLECs instead to order special access. In the absence of a detailed and supported explanation by Verizon of the extent to which CLECs use of special access is the result of its illegal “no facilities” policy, its presentations on this point have no probative value whatsoever and should be disregarded.

It is also worth noting that all the BOCs have had to varying degrees a policy of strategic incompetence, including an inability to bill correctly, when it comes to provisioning UNEs that, as a practical matter, has required many CLECs to order special access for some customers. The Commission has an extensive record showing, in particular, BOC UNE provisioning delays.² Substantial problems in BOC special access provisioning does not eliminate impairment with respect to that service. Verizon’s failure to account for the impact of BOCs’ apparently willful policy of delays and other UNE provisioning issues also requires disregarding its showing concerning the extent which CLECs may or may not be using special access.

² *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, CC Docket No. 01-318, 16 FCC Rcd 20641 (2001).

CLECs Used Special Access Loop Transport Combinations Because UNE Combinations Were Not Available. Another obvious reason why some CLECs chose to use special access is that loop transport combinations were not available as legal matter until 1999 with respect to existing combinations and until August 2003 with respect to new combinations. The existing combination rules, after having been stayed by the Eighth Circuit in 1996, were reinstated by the Supreme Court in 1999; and the Commission reinstated the new combination rule in August 2003 in the *Triennial Review Order*. These determinations, however, did not have an immediate practical impact because BOCs delayed implementing them. The Commission has an extensive record in this proceeding, the *UNE Remand Proceeding*, and various pre-filing rocket docket proceedings that detail BOCs' failure to make combinations available. Verizon in particular thwarted CLECs' rights to obtain combinations through its "no facilities" policy. Consequently, some CLECs were forced to use special access services in lieu of UNE combinations. Moreover, BOCs thwarted CLECs efforts to convert special access combinations to UNE status. The EEL "safe harbors" adopted by the Commission in 2000 were unfortunately amenable to manipulation by the BOCs, which was the primary reason the Commission adopted new EEL qualifying standards in the *Triennial Review Order*. Again, assuming its facts are correct, Verizon's statements concerning use of special access have no probative value absent a complete acknowledgement and explanation of its own policies that thwarted use of UNE combinations.

CLECs Used Special Access Because of BOC Prohibitions on "Commingling." Verizon also fails to acknowledge the impact of BOC prohibitions on "commingling" UNEs with tariffed services on CLECs' ability to obtain and use UNEs. This policy prohibited CLECs from connecting UNEs to tariffed services or placing UNE and tariff service traffic on the same facility. This unnecessary policy had no technical or other justification. Its sole purpose was to create a barrier to the use of UNEs. The Commission amassed a substantial record in the *Triennial Review Proceeding* describing the anticompetitive impact on CLECs of this policy and correctly proscribed it. Therefore, assuming that Verizon's contentions concerning special access otherwise had any validity, they are unpersuasive for the additional reason that BOCs' unlawful "commingling" restrictions thwarted CLECs' access to UNEs.

CLECs Have Been "Locked In" to Special Access by Volume and Term Discount Tariffs. CLECs who were forced to purchase special access in lieu of UNEs for the reasons identified above rationally sought to do so at the lowest available price. The BOCs offer their lowest prices to customers who accept term and volume commitments. (Of course, smaller CLECs are not able to qualify for any volume discounts.) Having done so, however, the CLECs became subject to onerous termination penalties if they sought to convert special access services to UNEs or to EELs. Many CLECs therefore have continued to use special access, rather than UNEs, even after the original obstacles to purchasing UNEs (or EELs) were removed. Focal, for example, was only able to convert its special access loop transport combinations to EELs when, in its bankruptcy proceeding, it was able to reject its special access contracts that contained termination penalties. Thus, even if Verizon is correct in claiming that many CLECs use special access instead of UNEs for access to their customers, this does not prove a lack of impairment, but only a lack of ability to convert existing circuits.

CLECs Are Not Comparable to CMRS Providers. The Commission may also ignore Verizon's presentations because CLECs are not similar to CMRS providers by any significant financial measure. The Court's discussion of special access in *USTA II* relied heavily on the fact,

among others, that CMRS providers have been able to operate successfully in the marketplace while relying upon special access services. (Slip op. at 30.) CLECs taken as an industry segment are not comparable to CMRS providers in terms of key financial and operational characteristics. To take the most obvious example, the CMRS industry has been continuously profitable for many years, while the CLEC industry has been in turmoil due to numerous bankruptcies and business failures. This has been compounded by the continual changes and uncertainties in the regulatory framework under which CLECs operate. (Of note, of the 5 national CMRS providers, the BOCs control 2 and are in the process of acquiring a third.) Therefore, it is not appropriate to compare CLECs to CMRS providers in determining impairment because of the use or availability of special access service.

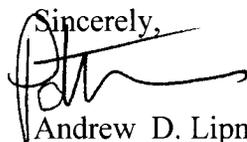
Verizon's Factual Showing Is Unexplained and Unsupported. Assuming it were necessary in any respect to treat Verizon's data submissions as relevant to impairment, which it is not, those submissions are so unexplained and unsupported in critical respects as to be virtually meaningless. As the Association for Local Telecommunications Services has already pointed out, Verizon's data appear to combine CLEC and IXC demand, thereby vastly inflating the supposed use of special access by unidentified "CLECs."³ Verizon has also failed to identify its consultants that collected the information or where they obtained the information presented. In addition, Verizon has not explained key terms such as "CLEC Lit Building." For all we know, this may include CLECs using UNEs or even cable operators providing cable modem service.

In its July 29th *ex parte* Verizon has made some estimates of CLEC special access use excluding its two largest special access customers. In typical fashion, Verizon has offered up dribs and drabs of further information which may or may not be elucidating. In this case, it has not said whether these two special access users are among the seven unnamed CLECs in its other filings. Absent this information, as well as the identity of all these special access users, the reported numbers are still meaningless; they are still likely to include IXC demand among other possible undisclosed infirmities. Also, it remains impossible to determine whether CLEC purchases of special access reflect a lack of impairment, or simply a lack of alternatives. Rather than an endless series of half-baked disclosures, Verizon must as an initial matter submit complete and fully-explained data that will permit substantiation and verification if it is to have any probative value concerning the extent to which CLEC are using special access in its region.

Finally, the Commission should keep in mind the absurdity under the Act and otherwise of considering in an impairment analysis a network element as an alternative to itself. Section 251(d)(2)(B) provides that the Commission, in determining what network elements shall be made available as UNEs, shall consider, at a minimum, whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Under this provision, the Commission must first identify the network element, and then determine whether requesting telecommunications carriers would be impaired without access to it. This determination is made without an examination of price. Then, if the requesting carrier would be impaired without such access, it must be provided at the price set for unbundled network elements under Section 252(d)(1).

³ Letter from John Windhausen, Jr., to Hon. Michael Powell, Docket Nos. 96-98, 98-147, 01-338, July 22, 2004.

Considering a network element at a different price as an alternative to itself would subvert the pricing standard established by Congress. Although *USTA II* required the Commission to consider special access, the Commission should keep in the mind the absurdity, unlawfulness, and subversion of the UNE pricing standard involved in doing so. As the Commission has recognized, special access is no more than a pricing change from UNEs.⁴ Special access should not be given any significant weight as an alternative to UNEs in the impairment analysis.

Sincerely,


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⁴ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98, 15 FCC Rcd 9587, 9603 (2000) (stating that the conversion of special access circuits to UNE status "should not require the special access circuit to be disconnected and re-connected because only the billing information or other administrative information associated with the circuit will change when a conversion is requested.");

cc: Honorable Michael K. Powell
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