

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

August 20, 2004

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 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 letter from Michael Glover of Verizon to Chairman Michael Powell, dated August 20, 2004, 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: Scott Bergmann
Matt Brill
Michelle Carey
Jeff Carlisle
Daniel Gonzalez
Chris Libertelli
Tom Navin
Jessica Rosenworcel
John Stanley

Michael Glover
Senior Vice President and
Deputy General Counsel



1515 N. Court House Road
Suite 500
Arlington, VA 22201-2909

703 351-3860
703 351-3676 fax

August 20, 2004

EX PARTE

Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Powell:

This letter briefly follows up on a question raised in our meeting last week about how the availability of special access should be factored into the Commission's impairment analysis for high capacity facilities.

As an initial matter, all parties appear to recognize that there is no longer any question *whether* the Commission is obligated to consider the availability of special access — and, moreover, CLECs' use of special access to compete successfully — as part of its determination of whether competitors are impaired without access to a particular network element. The D.C. Circuit addressed that directly in *USTA II*. In the *Triennial Review Order*, the Commission had held that the availability and use of special access was “irrelevant to the impairment analysis.” *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 576-77 (D.C. Cir. 2004). The D.C. Circuit squarely rejected the Commission's determination, and held that that “the Commission's impairment analysis *must consider the availability* of tariffed ILEC special access services when determining whether would-be entrants are impaired.” *Id.* at 577 (emphasis added); *id.* (Commission cannot “omit consideration of such [ILEC-provided] alternatives in its impairment analysis”). For this reason, the court expressly “vacate[d]” the paragraphs of the *Triennial Review Order* in which the Commission set forth its reasons for ignoring special access. *Id.* (“We therefore ... vacate ¶¶ 102-03 of the Order”); *id.* at 594 (“We vacate the Commission's decision not to take into account availability of tariffed special access services when conducting the impairment analysis.”).

Therefore, the question now is *how* the Commission is to factor the availability and use of special access into its impairment analysis. The D.C. Circuit addressed that question as well in *USTA II*, and its resolution of that question is dispositive of the issue here. Although the court left open the question whether the availability of tariffed offerings, *standing alone*, is sufficient to require a no-impairment finding, *see id.* at 576, the court did squarely hold that, where competitors are *actually using* incumbents' special access services to compete successfully in a market, there can be no finding of impairment. In fact, the Court emphasized this point repeatedly. *Id.* at 576 ("Where 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 592 ("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 markets belies any suggestion that the lack of unbundling makes entry uneconomic."); *id.* at 593 ("the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access ... *precludes* a finding that the CLECs are 'impaired' by lack of access to the element under § 251(c)(3).") (emphasis added).

In reaching this conclusion, the D.C. Circuit recognized that competitors can obtain the same facilities either as UNEs or as special access and, therefore, that the primary difference between them is one of price. And the court held that, as part of its impairment analysis, the Commission must consider whether competitors *need* the price break that comes with UNE pricing. *See USTA II*, 359 F.3d at 577 ("What the Commission may not do is compare unbundling only to self-provisioning or third-party provisioning, arbitrarily excluding alternatives offered by the ILECs."). In doing so, the Court squarely rejected the Commission's rationale that considering "tariffed services as an alternative" to unbundling "would give the incumbent LECs unilateral power to avoid unbundling at TELRIC rates simply by voluntarily making elements available at some higher price." *Id.* at 576. As the Court explained, "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." *Id.* The court held, therefore, that where "competitors have access to necessary inputs [through special access] at rates that allow competition not only to survive but to flourish" the answer to the question whether they need the added price break associated with UNEs is clearly no, and there is no "need for the Commission to impose the costs of mandatory unbundling." *Id.* at 576. And the Court emphasized that in such circumstances "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." *Id.* at 592.

The D.C. Circuit's conclusion follows from the Supreme Court's ruling that the Commission cannot regard "*any* increase in cost . . . imposed by denial of a network element" as a UNE as a source of impairment warranting imposition of unbundling under § 251(c)(3). *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 at 389-90 (1999). Such an interpretation of the Act, the Court held, "is simply not in accord with the ordinary and fair meaning" of the terms Congress used. *Id.* at 390. And the D.C. Circuit merely followed the Supreme Court's holding when it explained, as noted above, that "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.” *USTA II*, 359 F.3d at 576.

This is precisely the analysis that the court itself applied in the specific instances where it directly addressed the role that the availability of special access plays in the impairment analysis. With respect to wireless carriers, the D.C. Circuit found that the record “clearly show[ed] that wireless carriers’ reliance on special access has not posed a barrier that makes entry uneconomic.” *Id.* at 575. Indeed, the court noted that the “FCC and the wireless intervenors do not challenge” this conclusion. *Id.* at 576. And the court rejected each of the Commission’s rationales for why wireless carriers should be able to replace those special access facilities with cheaper UNEs despite the absence of any evidence of impairment. *See id.* at 576-77. Similarly, with respect to long-distance carriers, the court noted that “CLECs have pointed to no evidence suggesting that they are impaired with respect to the provision of long distance services” given their success in competing in that market using special access. *Id.* at 592. The court stressed that in these circumstances — “where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic” — carriers “cannot generally be said to be impaired.” *Id.* Likewise, with respect to “‘conversions’ of wholesale special access purchases to UNEs,” the court again emphasized that 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.’” *Id.* at 593. And the Court recognized that it would create “anomalies” if CLECs that already were competing successfully using special access were “barred from access” to UNEs, while other carriers entering the market would not be barred, and the court therefore emphasized that “if history showed lack of access to [UNEs] had not impaired CLECs in the past, that would be evidence that similarly situated firms would be equally unimpaired going forward.” *Id.*

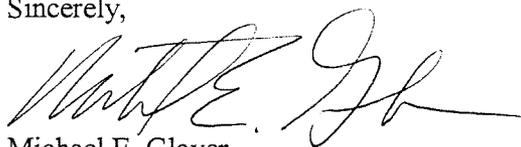
The Court’s holding directly governs the issue here. In a number of previous submissions, Verizon has demonstrated (with supporting data) that, in the 20 MSAs in Verizon’s territory in which special access demand is most heavily concentrated, competitors are actively and successfully using special access to provide high capacity services throughout those MSAs to business customers of all shapes and sizes, including small- and medium-sized businesses, rather than using UNE high capacity loops, transport, and EELs, including UNE DS-1 loops.¹ In fact, the vast majority — more than 90 percent by all measures — of the high capacity facilities that Verizon provides to other carriers are sold in the form of special access rather than UNEs. Moreover, some 80 percent of Verizon’s high capacity special access services are sold at wholesale to other carriers, who then use those circuits to provide service to their own customers, rather than to business customers directly. And while wholesale sales to other carriers are growing, sales to end user business customers are not. Other incumbents have made similar showings on the record for the MSAs that they serve.

¹ *See, e.g.*, Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338 *et al.* (filed June 24, 2004); Letter from Michael E. Glover, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338 *et al.* (filed July 2, 2004); Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338 *et al.* (filed July 19, 2004); Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338 *et al.* (filed July 29, 2004).

Hon. Michael Powell
August 20, 2004
Page 4 of 4

Under *USTA II*, this evidence of actual competition using special access services, rather than high-capacity loop or transport UNEs, precludes a finding of impairment as to those elements, at a minimum, in these or other similarly situated MSAs.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael E. Glover", with a long horizontal flourish extending to the right.

Michael E. Glover