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Ex Parte

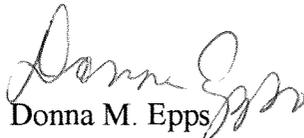
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Elements Platform, WC 03-157

Dear Ms. Dortch:

The attached white paper summarizes some of the evidence in the record in the above-referenced proceeding. This white paper demonstrates that forbearance from the Commission's access charge rule satisfies Section 10's standards for forbearance. Consistent with the Commission's rules, I am filing one electronic copy of this white paper and request that you place it in the record.

Sincerely,


Donna M. Epps

cc: Tamara Preiss
Julie Saulnier
Jeremy Marcus

FORBEARANCE FROM THE COMMISSION'S ACCESS CHARGE RULE SATISFIES THE STANDARDS OF SECTION 10

This letter summarizes, for the convenience of the Commission, some of the evidence in the record demonstrating that forbearance from the access charge rule satisfies the section 10 standards for forbearance. As we show here, that conclusion is all the more true now in light of the further guidance from the D.C. Circuit reiterating that the statutory impairment standard to determine when a given element must be unbundled in the first place is appropriately applied on a service-specific basis, and that the standard is not satisfied where, as here, the record demonstrates the existence of extensive intermodal competition. For this reason alone, there is no basis for reimposing the UNE-P access charge rule that was vacated by the D.C. Circuit. In addition, the same considerations that underlie this conclusion also demonstrate that the forbearance standard is satisfied even if the access charge rule were to be (incorrectly) reimposed in whole or in part.

The access charge portion of Verizon's petition asks that the Commission forbear from its rule permitting UNE-P CLECs to collect exchange access charges for the origination and termination of long distance traffic instead of the incumbent that actually provides the exchange access service. Thus, for purposes of section 10(a), the question here is whether the payment of access charges to UNE-P CLECs rather than to incumbents is somehow necessary to ensure just and reasonable long distance rates paid by consumers, or is otherwise necessary to protect consumers. The answer to that question is no for at least two separate reasons.

First, the existence of vigorous intermodal and intramodal competition for the origination and termination of long distance traffic ensures that exchange access rates, and hence long distance rates, will remain at just and reasonable levels. Indeed, some 40 percent of long distance traffic already originates or terminates on wireless networks. And still further long

distance traffic is now handled by VOIP services that originate or terminate over broadband connections and bypass the local switched network, and those services continue to expand rapidly. Any effort to increase exchange access rates would only cause the volume of traffic that uses these intermodal alternatives to increase.

Second, even if that competition is ignored, exchange access rates are subject to regulatory constraints, including caps on the levels of exchange access rates that incumbents such as Verizon can charge. Consequently, even in the absence of the extensive intermodal competition that now exists, rates still could not be increased. Thus, for each of these reasons, the UNE-P access charge rule is not necessary to ensure that those rates remain just and reasonable, and forbearance from that rule satisfies section 10(a)(1).

Verizon's petition also satisfies the section 10(a)(2) and 10(a)(3) criteria for forbearance for largely the same reasons. The competition in both the exchange access and long distance markets provides ample protection for consumers, and the UNE-P access charge rule is not necessary for that purpose. Further, forbearance would serve the public interest by making UNE-P pricing at least somewhat more economically rational, eliminating a windfall that promotes uneconomic entry via UNE-P, and ensuring that money intended to support the network infrastructure used to provide exchange access goes to the carriers actually providing that service. As a result, forbearance would help to restore economically rational incentives to invest and promote the continued development of facilities-based competition, including intermodal competition.

1. The D.C. Circuit's recent opinion in *United States Telecomm. Ass'n v. FCC*, 359 F.3d 554 (2004) ("*USTA II*"), reaches three key conclusions that support a grant of Verizon's petition. Indeed, applying those conclusions in this case strongly reinforces *both* that there is no

impairment with respect to the origination and termination of long distance traffic, so that there is no basis for reimposing a requirement to provide unbundled access to local switching for this purpose *and* that the forbearance standards of section 10 are satisfied in this case.^{1/}

First, the court reaffirmed its holding in *Competitive Telecommunications Assoc. v. FCC*, 309 F.3d 8, 12-14 (2002) (“*CompTel*”), that the impairment standard must be evaluated on a service-specific basis. As the court explained, in *CompTel*, it “held that the Commission acted reasonably in disaggregating the *impairment* issue, and in ordering unbundling only with respect to the service for which it found impairment.” *USTA II*, 359 F.3d at 591-92; *see also id.* at 575 (holding that the Commission had “failed to conduct the requisite impairment analysis for wireless providers”).

Second, the court reiterated that in evaluating the competitive state of a market, 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 a given market. *See id.* at 575; *see also id.* at 571 (issue is “whether a market is suitable for competitive supply”). Thus, in determining whether competition is impaired in a market where competitors have not yet deployed facilities (or have deployed them to a lesser extent), the Commission must consider competitive deployment in “similarly situated” markets. *Id.* at 575. Further, the court expressly “reaffirm[ed] *USTA I*’s holding that the Commission cannot ignore intermodal alternatives” in evaluating the state of competition. *Id.* at 572-73. In particular, the

^{1/} For purposes of this paper, we focus solely on the question of whether there is any basis for requiring unbundled access to local switching for purposes of originating or terminating long distance traffic. As Verizon has demonstrated at length elsewhere, the statutory impairment standard is not satisfied with respect to local switching for any purpose and therefore no basis exists for reimposing an unbundled switching requirement generally. As we show here, that conclusion is all the more true with respect to the origination and termination of long distance traffic, where more than 40 percent of such traffic already bypasses the local switched network.

court noted that the presence of “robust intermodal competition” would ensure that “mass market consumers will still have the benefits of competition,” regardless of the degree to which CLECs using UNEs were present in a market. Such intermodal competition is especially relevant here, because, as we briefly summarize below, the evidence in the record demonstrates the existence of robust intermodal competition to originate and terminate long distance calls. And, as the court observed, “[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.

Third, the court made clear that the long distance market is already extremely competitive at existing rates for the relevant inputs. As the court explained, there is “no evidence suggesting that [carriers] are impaired with respect to the provision of long distance services,” including the origination and termination of long distance calls, and there is “robust competition in the relevant markets [that] belies any suggestion that the lack of unbundling makes entry uneconomic.” *Id.* at 592. The court further noted that as to “mass market switching . . . the evidence indicated the presence of many markets where CLECs suffered no impairment in the absence of unbundling.” *Id.* at 587. In these circumstances, forbearance from the Commission’s access charge rule is especially warranted because there is no plausible basis for finding that competition for long distance services, and in particular exchange access, is impaired without access to UNE switching.

Although the court’s analysis focused on the unbundling standards of section 251(d)(2), the same findings are relevant to the analysis here, under section 10(a). In fact, the court’s focus on the fact that intermodal competition, such as that which is present here, ensures that

consumers will have the benefits of competition even in the absence of unbundling is equally relevant to the inquiry required by section 10(a).

2. As outlined above, the access charge portion of Verizon's petition satisfies section 10(a)(1) because permitting UNE-P CLECs to collect access charges is not necessary to ensure that charges, practices or classifications are just and reasonable. For these purposes, the ultimate focus of section 10(a)(1) is the charges to consumers in the long distance market. *See, e.g.,* Recommended Decision, *Federal-State Joint Board on Universal Service*, 16 FCC Rcd. 6153, 6195 (Dec. 22, 2000) ("Consumers are and should be the ultimate beneficiary of the 1996 Act."). In that respect, the forbearance provision reflects the basic antitrust principle that the government should intervene in the marketplace only "for the 'protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). The Commission has long identified that same principle with the 1996 Act more generally. *See, e.g.,* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 618 (1996) (local competition rules should be, as "Congress intended, *pro-competition*" rather than "*pro-competitor*").

To be sure, exchange access is an input to the provision of long distance service, and if the rates for exchange access were unreasonable, those increased costs potentially could be passed on to consumers through higher long distance rates. However, forbearance from the UNE-P access charge rule will not lead to increased exchange access rates for at least two reasons.

First, as the evidence in the record demonstrates, the market for the origination and termination of long distance traffic is robustly competitive.^{2/} As a result, there are no incentives for any access provider to *raise* access rates and thereby lose customers altogether to these competitive alternatives. More than 40 percent of long distance traffic now originates or terminates on wireless networks that entirely bypass the incumbents' switched exchange access service.^{3/} In addition, other platforms that bypass switched exchange access and that are not subject to access charges are widely available. For example, as of the end of 2003, cable companies already offered circuit-switched voice telephone service to 15 percent of homes nationwide.^{4/}

VoIP services -- which originate or terminate traffic (or both) on broadband connections and therefore bypass the public switched telephone network -- are increasingly displacing traditional wireline long distance. In the first quarter of 2004, each of the six major cable operators — whose networks reach 85 percent of U.S. households — had either begun commercial deployment of VoIP telephony service, or had announced aggressive plans to do so imminently; analysts expect all the major cable companies to offer VoIP to nearly 100 percent of

^{2/} See Letter from Donna M. Epps, Verizon, to Marlene Dortch, FCC, Docket No. WC 03-157, at 15-22 (June 24, 2004); Letter from Donna M. Epps, Verizon, to Marlene Dortch, FCC, Docket No. WC 03-157 (July 28, 2004) (“*July 28 Ex Parte*”).

^{3/} Yankee Group News Release, *U.S. Consumer Long Distance Calling Is Increasingly Wireless, Says Yankee Group* (Mar. 23, 2004), at http://www.yankeegroup.com/public/news-releases/news_release_detail.jsp?ID=PressReleases/news_03232004_cts.2.htm.

^{4/} *Technological And Market Developments Since The Triennial Review Further Demonstrate That Competitors Are Not Impaired Without Access To Unbundled Mass Market Switching*, enclosed with *July 28 Ex Parte*, at 6 (“*Ex Parte Switching White Paper*”); J. Halpern, et al., Bernstein Research Weekly Notes, *US Telecom and Cable: Faster Rollout of Cable Telephony Means More Risk for RBOCs, Faster Growth for Cable*, at Ex. 1 (Jan. 9, 2004).

their cable homes passed over the next two to three years.^{5/} VoIP appears to be the long distance carriers' chosen method for serving the mass market. AT&T, for example, now provides VoIP service in over 170 markets and has struck numerous co-marketing, co-branding, and similar deals with a variety of cable companies.^{6/} Moreover, consumers with access to *any* broadband connection have a choice among multiple other national and regional VoIP providers such as Vonage. Between 85 and 90 percent of U.S. households are now able to obtain a broadband connection from a provider other than their incumbent local telephone company.^{7/}

^{5/} *Ex Parte Switching White Paper* at 6-7; J. Halpern, *et al.*, Bernstein Research Weekly Notes, *US Telecom and Cable: Faster Rollout of Cable Telephony Means More Risk for RBOCs, Faster Growth for Cable*, at 3 (Jan. 9, 2004) (“Nearly every major cable MSO has indicated over the past month that it will offer cable telephony service to every, or nearly every, household in its footprint by 2005, with Time Warner Cable and Cablevision targeting year-end 2004”); *see also* J. Hodulik, *et al.*, UBS, *High-Speed Data Update for 3Q03* at 12 (Dec. 1, 2003) (“By the end of 2005/2006” the four major “cable operators will have rolled out a cable telephony service across substantially all of their respective footprints, representing total homes of approximately 70 million”).

Each of these major cable operators also has concentrations of customers in the Verizon east local service areas. For example, Cablevision already offers voice telephone service using VoIP to 100 percent of its 4 million cable homes passed in metropolitan New York and New Jersey. *Ex Parte Switching White Paper* at 7; Cablevision News Release, *Cablevision Completes Network Rebuild* (Dec. 3, 2003). Time Warner has already deployed VoIP in sixteen of its markets, and is “on track” to deploy service to “essentially all” of its cable systems – which pass a total of 18 million homes – “by the end of 2004.” *Ex Parte Switching White Paper* at 7; Time Warner News Release, *Time Warner Reports First Quarter 2004 Results* (Apr. 28, 2004) at 5; A. Breznick, *Cable MSOs Pick Up VoIP Pace, Shrug Off Vonage*, *Comm. Daily* at 3 (May 24, 2004); Time Warner Inc., 2004 Trending Schedules (Apr. 28, 2004), http://www.timewarner.com/investors/trending_schedules/xls/04_28_04.pdf. Comcast has told analysts it will have half of its 40 million homes passed “VoIP ready” by year-end 2005 and all of its homes passed VoIP ready by year-end 2006. *Ex Parte Switching White Paper* at 8; P. Grant, *Comcast Pushes into Phone Service*, *Wall St. J.* at A3 (May 26, 2004).

^{6/} *See, e.g., Ex Parte Switching White Paper* at 10; AT&T News Release, *AT&T To Offer AT&T CallVantageService with Adelphia High-Speed Internet Access* (Sept. 1, 2004); Jim Hu, CNET News, *AT&T Strikes VoIP Deals with Cable*, available at http://news.com.com/AT%26%2338%3BT+strikes+VoIP+deals+with+cable/2100-7352_3-5316842.html?tag=nl.

^{7/} *See Ex Parte Switching White Paper* at 10; NCTA, *Broadband Services*, at <http://www.ncta.com/Docs/PageContent.cfm?pageID=37>; *see also* J. Halpern, *et al.*, Bernstein

In addition to vigorous intermodal competition, access services are subject to significant intramodal competition. Competitive access providers (“CAPs”), of course, offer exchange access services in competition with those of the incumbent and have obtained substantial market share. *See, e.g., Triennial Review Order* ¶ 44. Moreover, many CLECs are also long distance carriers; these entities can deploy their own switches instead of using UNE-P, which would enable the CLEC to collect access charges itself for the origination and termination of long distance calls, while the long distance company avoided the payment of access charges to the incumbent. As of year-end 2003, facilities-based CLECs had deployed approximately 10,000 circuit and packet switches nationwide.^{8/} Those switches have been used to serve local customers in wire centers that contain approximately 86 percent of the Bell companies’ access lines.

3. As the D.C. Circuit has made clear, there is “robust competition in the relevant markets” and “no evidence suggesting that [carriers] are impaired with respect to the provision of long distance services,” including the origination and termination of long distance calls. *USTA II*, 359 F.3d at 592. Under these circumstances, there is no basis for requiring unbundled access to local switching for purposes of originating and terminating long distance traffic. Accordingly, there is no basis for re-imposing the UNE-P access charge rule for this reason alone.

In addition, these same facts also demonstrate that the forbearance standards of section 10 are abundantly satisfied.

Research Call, *Broadband Update: DSL Share Reaches 40% of Net Adds in 4Q . . . Overall Growth Remains Robust*, at 7, Exhibits 1 & 6 (Mar. 10, 2004) (cable broadband available to 92.3 percent of total cable homes passed).

^{8/} *July 28 Ex Parte* at 2; New Paradigm Resources Group, Inc., CLEC Report 2004, Ch. 4 at Tables 17 & 19(18th ed. 2004).

a. To begin with, section 10(a)(1) is satisfied because, this competition ensures that switched exchange access rates (and therefore long distance rates paid by consumers) will remain just and reasonable.^{9/} More than 40 percent of long distance traffic already originates or terminates on wireless networks, and competition will only increase with the emergence of other intermodal platforms that bypass switched exchange access (and access charges) entirely. And the extensive intermodal competition in the long distance market overall means that incumbents have every incentive to price exchange access at market rates: if exchange access were priced too high and those costs were passed on to consumers in their long distance rates, consumers would switch to competing platforms, which are not subject to access charges, even faster than they already have, and incumbents would lose even more switched access revenue. In light of these competitive forces, switched exchange access rates (and therefore the long distance rates paid by consumers) will remain just and reasonable even absent the Commission's access charge unbundling rule. As the Commission itself has previously recognized in conducting the section 10(a)(1) analysis, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory."^{10/}

^{9/} 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 ¶ 176 (2000), *rev'd in part sub nom., Tex. Office of P.U.C. v. FCC*, 265 F.3d 313 (5th Cir. 2001) (target access rates set by CALLS are "just and reasonable").

^{10/} Memorandum Opinion Order, *Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd. 16252, ¶ 31 (1999); *see also* Memorandum Opinion and Order, *Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, as Amended, and Request for Relief to Provide International Directory Assistance Services*, CC Docket No. 97-172, FCC 04-67 ¶ 16 (rel. Mar. 19, 2004) (concluding that Verizon's, SBC's, and BellSouth's request for forbearance with respect to their

In addition, even if the competitive constraints on switched exchange access rates are ignored, those rates are still subject to regulatory constraints. In the case of incumbents such as Verizon, for example, the Commission's *CALLS Order* caps the originating and terminating access rates that Verizon may charge at levels the Commission has determined are just and reasonable.^{11/} Thus, if the Commission were to forbear from its UNE access charge rule, Verizon could not raise its exchange access rates above levels the Commission has already determined are just and reasonable.^{12/}

b. Finally, sections 10(a)(2) and 10(a)(3) are satisfied for largely the same reasons. That is, the Commission's access charge rule is unnecessary to protect consumers, *see* 47 U.S.C. § 160(a)(2), and forbearance is in the public interest, 47 U.S.C. § 160(a)(3). As described above, the vigorous competition in the market for the origination and termination of long distance calls already protects and benefits consumers, and existing regulatory constraints provide an additional layer of protection for consumers. These dual protections will continue to protect consumers absent the access charge rule. Further, the access charge rule *harms* the public interest by making UNE-P pricing even more economically irrational. The rule creates a windfall for carriers that do not actually provide the work (or facilities) used in exchange

international directory assistance services satisfied section 10(a)(1) because these carriers "likely would face competition from interexchange carriers . . . , Internet service providers, and others in the provision of those services.").

^{11/} *See generally* 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 (2000), *rev'd in part sub nom.*, *Tex. Office of P.U.C. v. FCC*, 265 F.3d 313 (5th Cir. 2001).

^{12/} *Id.* ¶ 176.

access,^{13/} and it diverts money intended for investment in the network infrastructure used to provide exchange access from the carriers -- the incumbents -- that actually provide such access service. Thus, forbearance from this rule would serve the public interest by helping to restore economically rational incentives for carriers to invest in network facilities and by promoting the continued development of facilities-based competition, including intermodal competition.

^{13/} See, e.g., Petition for Expedited Forbearance of the Verizon Telephone Companies, WC 03-157, at 8-9, 14-15 (July 1, 2003).