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*EX PARTE*

October 15, 2004

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW, TW-A325  
Washington, DC 20554

*Re: In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313 and CC Docket No. 01-338*

Dear Ms. Dortch:

On October 14, 2004, Melissa Newman, Cronan O'Connell, Craig Brown, and Wendy Moser of Qwest Communications International Inc. ("Qwest"), and Michael Sullivan and Kathryn Zachem of Wilkinson Barker Knauer, LLP, also representing Qwest, met with Michelle Carey, Russell Hanser, Jeremy Miller, Ian Dillner, Chris Canter, Christina Langlois, Gail Cohen, Carol Simpson, Tim Stelzig, Cathy Zima, and Marcus Maher of the Wireline Competition Bureau; John Stanley and Christopher Killion of the Office of General Counsel; and Erin Boone of the Office of Strategic Planning and Policy Analysis. During the meeting, Qwest discussed its Comments filed in this docket and the information in the attached handout.

In accordance with Commission Rule 47 C.F.R. § 1.49(f), this *ex parte* letter is being filed electronically for inclusion in the public record of the above-referenced proceedings pursuant to Commission Rule 47 C.F.R § 1.1206(b)(2).

Sincerely,  
/s/ Cronan O'Connell

Attachments

Copy to:  
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Ms. Marlene H. Dortch, Secretary  
February 13, 2003

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# **Qwest Ex Parte Discussion Docket 04-313**

## **October 14, 2004**

# Overview

- ◆ Based on USTA I and USTA II, unbundling may be required only where impairment has been demonstrated.
- ◆ In particular, the Commission must take into consideration:
  - ▶ Existence of special access
  - ▶ Existence of intermodal competition
- ◆ The Commission's impairment test must comply with the general principles established by the Supreme Court and the D.C. Circuit Court
  - ▶ Alternatives

## Two Specific Circumstances Where the Use of Special Access Precludes Unbundling

1. “Circuit Flipping”
2. “Similarly situated” carriers and additional facilities

# 1. “Circuit Flipping”

- ◆ Circuit flipping is the conversion of an existing special access circuit, or a portion of such a circuit, to a UNE priced at TELRIC
  - ▶ It also includes the disconnection by a carrier of an existing special access circuit and subsequent new connection of a UNE to carry the traffic previously provided on the special access circuit
  - ▶ It also includes such a conversion indirectly through another carrier
- ◆ Circuit flipping can not pass the impairment test

# Use of Special Access Precludes Unbundling

- ◆ USTA II mandates a finding that a carrier is not impaired if the carrier is already using special access to serve a particular customer.
  - ▶ There is no way that carrier can be impaired in its ability to serve that customer without UNEs
  - ▶ The countervailing factors identified in USTA II (administrability, risk of ILEC abuse) do not apply to conversions
- ◆ “The ILECs make an independent attack on the Commission's decision to allow ‘conversions’ of wholesale special access purchases to UNEs. As we discussed in the section on wireless carriers, the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates, i.e., under § 251(c)(4), **precludes** a finding that the CLECs are ‘impaired’ by lack of access to the element under § 251(c)(3).” 359 F.3d at 593 (emphasis added)

## 2. “Similarly Situated” Carriers and Additional Facilities

- Use of an existing special access circuit in the market also precludes the Commission from finding that “similarly situated” carriers in that market are impaired
- Likewise, such use by a carrier precludes a finding of impairment for additional facilities purchased by that carrier in the market

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# Intermodal competition cannot be ignored

- ◆ Evidence of the presence of a direct competitor of any type in a market demonstrates that there is not a natural monopoly
- ◆ USTA I and USTA II confirm that such competition cannot be ignored even if it does not currently provide a wholesale alternative for requesting carriers (USTA I, 290 F.3d at 429; USTA II, 359 F.3d at 582)
- ◆ In the Qwest region, intermodal competition is not limited to the largest wire centers or MSAs
- ◆ The presence of robust competition from cable competitors in markets such as Omaha demonstrate the lack of impairment in such markets
- ◆ Cable companies compete in the market for small and medium sized businesses

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# Cable Competition

- ◆ Cable companies have installed fiber and Class 5 voice switches to compete in the business market
- ◆ Cable Companies market the full range of business services including DS1s, DS3s, and SONET private line services
- ◆ Time Warner Cable, Cox Communications, Charter Communications, and Cablevision Systems market to the small, medium and large business market
  - ▶ See article regarding Midcontinent cable cut
  - ▶ As of the Beginning of 2003, Cox Communications had over 12,000 business lines in the Omaha, NE MSA

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# The Commission's Impairment Test Must Comply with the General Principles Established by the Supreme Court and the D.C. Circuit Court

- ◆ A finding of impairment is a prerequisite for unbundling, and such impairment cannot be presumed
- ◆ Unbundling must be limited to those facilities that possess natural monopoly characteristics

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# Impairment is a prerequisite to unbundling and cannot be presumed

- ◆ Impairment is the “touchstone” and a “specific statutory requirement” of every unbundling determination (USTA I, II)
- ◆ The Commission has the burden of finding where impairment exists – not exceptions where impairment is lacking
- ◆ If the Commission does not make a finding supported by substantial evidence that competitors in a given area are impaired, unbundling is not permitted under section 251

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# Unbundling must be limited to those facilities that possess natural monopoly characteristics

- ◆ The key issue is whether the ILEC retains a natural monopoly over the element sought, such that the element is “unsuitable for competitive supply”
- ◆ The existence of a competitive alternative (e.g., special access or intermodal competition) in the market or another comparable market demonstrates the absence of natural monopoly characteristics in that market
- ◆ The Commission can not ignore the existence of competition in a market, as urged by the CLECs
- ◆ The multiple-competitor triggers adopted in the TRO are inconsistent with this standard

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# Unbundling must be limited to those facilities that possess natural monopoly characteristics

- ◆ The impairment determination turns on a lack of access to a network element, not whether TELRIC would be cheaper
- ◆ Only after an impairment finding is made and unbundling required does the price of an unbundled element become relevant
- ◆ The impairment analysis must use a consistent methodology for determining the cost of constructing a network element
- ◆ The availability of the network element at a “just and reasonable” rate bars a finding of impairment

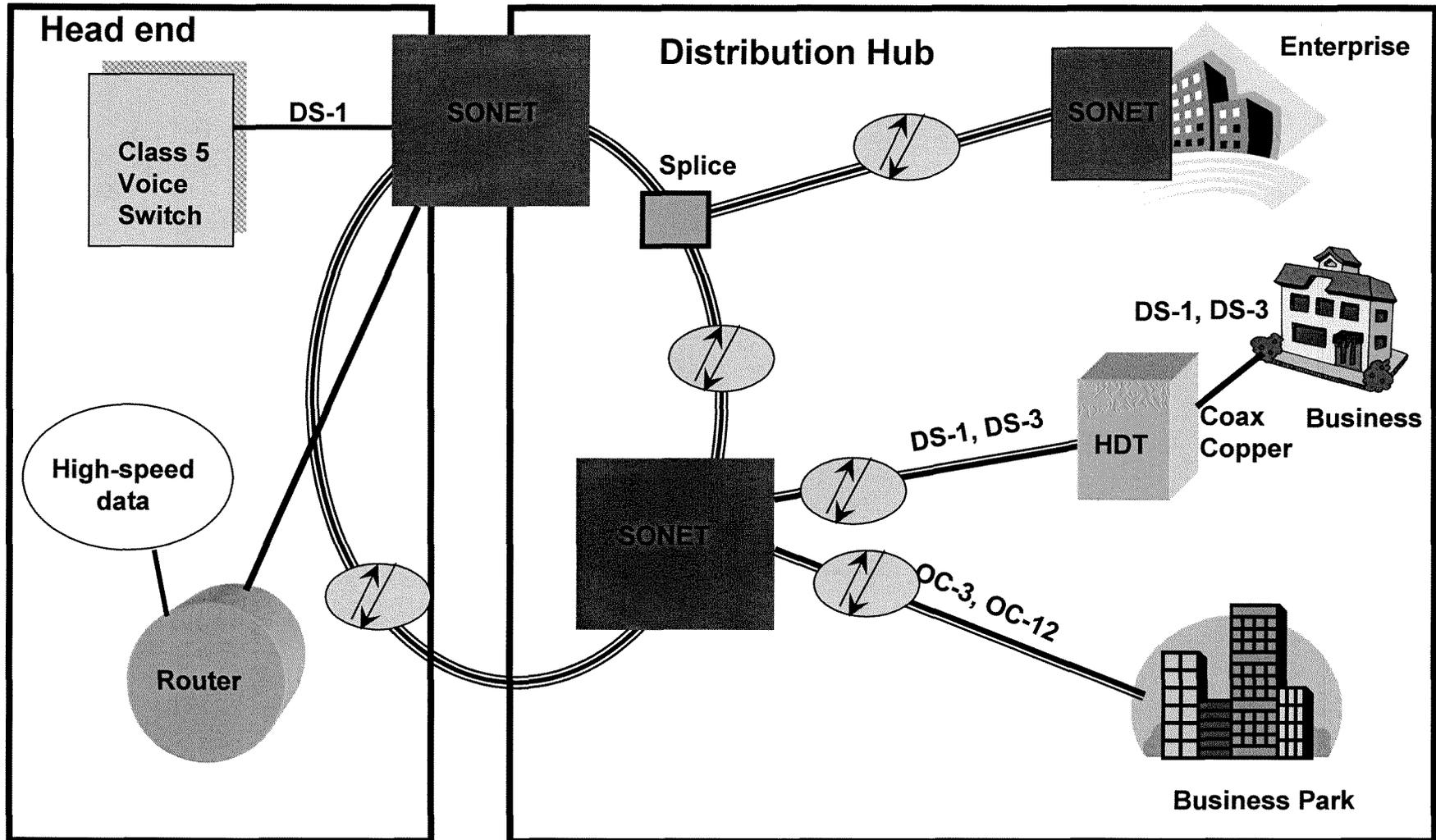
# Alternatives

- ◆ As set forth in Qwest comments, there should be no unbundling of high capacity transmission facilities
- ◆ However, to the extent the Commission does not eliminate unbundling entirely, it should consider the following:
  - ▶ No unbundling of any dedicated transport facilities, or of loops above DS1 level
  - ▶ No unbundling of DS1 loops in the following areas:
    - Wire centers with 5,000 or more total RBOC and CLEC business access lines
    - MSAs where 50% or more of the wire centers in that MSA have fiber collocation, competitive fiber or fiber equivalent deployed (such as coaxial cable or other equivalent transmission technology)
    - Wire centers in the remaining MSAs where fiber collocation, competitive fiber or fiber equivalent has been deployed
    - Local calling areas in non-MSA areas that have at least one wire center where fiber collocation, competitive fiber or fiber equivalent has been deployed

# Competitive Facts Support Consideration of these Alternatives

- ◆ Qwest has seen robust competition in wire centers of this or smaller size
- ◆ Much of this competition is from intermodal competitors such as cable operators, adjacent rural ICOs, and municipalities
- ◆ Deployment of competitive fiber or fiber equivalent to a majority of the wire centers in an MSA or local calling area demonstrates that such deployment is economically feasible
- ◆ Competitors can expand reach as necessary
- ◆ These thresholds may be different for other ILECs based on different competitive characteristics and size
  - ▶ *Discretion under “at a minimum” clause*
  - ▶ *Statutory goal of imposing less unbundling burden on relatively smaller ILECs*

# Cable Business Offering Architecture



HDT: Host Digital Terminal