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November 17, 2004

EX PARTE

VIA ECFS

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

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

Dear Ms. Dortch:

On Friday, November 12, 2004, Andrew Crain, Steve Davis, Melissa Newman and Cronan O'Connell of Qwest Communications International Inc. ("Qwest"), and Kathryn Zachem of Wilkinson Barker Knauer, LLP, also representing Qwest, met with Matthew Brill, Legal Advisor to Commissioner Kathleen Abernathy. During the meeting, Qwest discussed Triennial Review issues. The discussion was consistent with Qwest's comments and *ex partes* as filed on the record in the above-referenced proceedings. Qwest addressed two issues in detail, circuit flipping and the proposed glide path in the event that CLECs are found to not be impaired by lack of access to switching as a UNE.

Circuit Flipping

Qwest discussed the impact of the *USTA II*[1] decision on the ability of carriers to convert, or "flip," special access circuits to UNEs. In that decision, the D.C. Circuit Court held that a finding of impairment is precluded when carriers who are currently obtaining circuits under special access tariffs and using them successfully for the provision of service in a competitive market.[2] The Court concluded that "the Commission's impairment analysis must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired . . . What the Commission may not do is compare unbundling only to self-

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1 *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied*.

2 *Id.,* 359 F.3d at 593.

provisioning or third-party provisioning, arbitrarily excluding alternatives offered by the ILECs."[3] In the EEL context, the *USTA II* Court found that the use by CLECs of tariffed special access circuits to be dispositive evidence that they were not impaired and, therefore, could not convert their existing special access facilities to UNEs. Their successful use in a competitive service of "critical ILEC facilities," obtained pursuant to special access tariffs, "precludes a finding that the CLECs are 'impaired' by lack of access to the element under § 251(c)(3)."[4] Far from allowing the Commission to deem special access usage irrelevant, the Court held it to be dispositive, *precluding* an impairment finding. The Court's reasoning applies to all circuits purchased as special access, not just EELs.

In the case of special access circuits, the Commission has the best possible evidence that carriers are not impaired by lack of the availability of UNEs to provide service using those circuits – business decisions made in the market. The carrier has made a business decision that it is economically feasible to serve that particular customer using the circuit purchased at special access prices. Thus, there is no legal basis for a finding that carriers are impaired by not having the ability to convert their special access circuits to UNE prices.

Qwest explained that special access circuits are used by carriers to provide local exchange traffic as well as inter and intraLATA toll traffic. If a carrier is using the circuit for only toll traffic, and the carrier wins the customer's local business, the carrier can add the local traffic to the special access circuit at a minimal marginal cost. If the circuit is at or near capacity, a "no circuit flipping" rule would not preclude that carrier from purchasing an additional circuit at UNE prices to serve the customer – presuming of course that the Commission has determined that the UNE is available in that geographic area. The rule Qwest proposes to prohibit circuit flipping applies <u>only</u> to the flipping of existing circuits, or gaming to achieve the same result. The rule does not prohibit purchasing additional circuits at UNE prices to a location.

Qwest addressed the argument raised by several CLECs that certain ILECs have wrongfully refused to provision UNEs claiming that facilities do not exist, when in fact facilities are available. (If facilities do not exist, it is entirely proper for an ILEC to deny a request to construct a high-capacity UNE). If an ILEC is wrongfully concealing the availability of facilities from CLECs in order to avoid making them available at TELRIC prices, that issue should be addressed through an enforcement or complaint action with regard to the allegedly offending ILEC. The *USTA II* decision is clear that the Commission cannot order unbundling when there are more narrowly-tailored alternatives that address the perceived problem without imposing all of the costs of unbundling.[5] Even if there were a legal basis – which there is not – for finding impairment based upon a particular ILEC's refusal to provision UNEs when facilities exist, such an allegation certainly could not form the basis for finding impairment in the regions of other ILECs.

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[3] *Id.,* 359 F.3d at 577.

[4] *Id.,* 359 F.3d at 593.

[5] *Id.*, 359 F.3d at 570. *See also id.* at 563 ("[T]he Commission is obligated to establish unbundling criteria that are at least aimed at tracking relevant market characteristics and capturing significant variation.").

Qwest also addressed the argument made by some CLECs that impairment has been demonstrated because some CLECs have not been able to operate their entire business enterprises profitably and have filed for bankruptcy. There are many reasons why certain companies fail to make a profit or file for bankruptcy, and most of those reasons have absolutely nothing to do with the availability of UNEs. A company may be mismanaged; a company may take on too much debt; the market may have a temporary glut of unanticipated new entrants or excess capacity; or a company simply may not be able to sell as many services as it had anticipated. None of these reasons justify a legal finding of impairment. More importantly, none of these reasons undermine the key fact about special access circuits – the carrier has made a business decision that, for that particular circuit to that particular customer at that particular location, it is economical to serve the customer at special access prices.

The rule that is compelled by the evidence is simple – existing circuits cannot be converted from special access prices to UNE prices. In this regard, the Commission can minimize the opportunities for disputes by carefully crafting its rules to avoid opportunities for gamesmanship.[6]

Switching Glide Path

Qwest explained that, in the event that the Commission finds that CLECs are not impaired by not having access to switching as a UNE, there is no legally-justifiable reason to establish a transition for the embedded base of UNE-P customers in Qwest's region. Ten CLECs, including MCI and Z-Tel, have signed agreements with Qwest that provide for the availability of an alternate to UNE-P (named QPP) for the next five years. Those agreements have been filed with the Commission pursuant to Section 211 and are available to all CLECs operating in Qwest's region.

Once again, the Commission has the best available evidence – actions taken by businesses actually operating in the market – that QPP is an economically-reasonable alternative to UNE-P in Qwest's region. Because CLECs operating in the market have demonstrated that QPP is an acceptable alternative to UNE-P, and because that product is available to other CLECs, there is no reason for the Commission to establish a separate glide path for UNE-P customers in Qwest's region.

In accordance with FCC Rule 1.49(f), this *ex parte* letter is being filed electronically *via* the Electronic Comment Filing System for inclusion in the public record of the above-referenced dockets pursuant to FCC Rule 1.1206(b)(2).

Sincerely,
/s/ Andrew D. Crain

Copy to:
Matthew Brill (matthew.brill@fcc.gov)

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[6] Qwest attached its proposed rule language as Attachment A to its November 10, 2004 *ex parte* letter.