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Via Hand Delivery

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Unbundled Network Elements,** CC Docket 01-338 and WC Docket 04-313

Dear Chairman Powell:

I am writing on behalf of the private equity firms identified on the signature page of this letter, to express concern over reports that the Wireline Competition Bureau may recommend that the Commission prevent CLECs from using unbundled DS-1 and DS-3 loops, and perhaps other network elements, to serve small business customers. Such a restriction would be unwise, unnecessary, contrary to the policy of the Telecommunications Act, and devastating to your efforts to promote investment in facilities-based carriers. We strongly urge you to reject any such recommendation.

Specifically, we understand that the Commission may consider a request by Verizon that it expand current exemptions to unbundling of "broadband" facilities, which currently apply only to predominantly residential premises, to other so-called "mass market" premises. The effect of such an exemption would be to eliminate most UNE loop access to these premises. It has been reported that the Bureau may recommend that the Commission define "mass market" customers as those using less than a certain quantity of telephone numbers at a particular location (such as 10 to 18 numbers).

As an initial matter, it is critical that the Commission understand what the consequences of the proposed definition would be. Customers with 10 or fewer lines make up a large share of the business market. We understand that a CLEC has obtained data from Dun & Bradstreet showing that **76% of business locations have five or fewer lines, and these locations generate an estimated 41% of all business wireline telecommunications expenditures.** Moreover, **88% of business locations have 10 or fewer lines, and account for 56% of expenditures.**[1] This means that a rule limiting the use of DS-1 loops to customers with more than 10 lines, for example, would eliminate

[1] We understand that the underlying data will be provided to the Commission in a separate *ex parte* submission by McLeodUSA.

access to 88% of business locations. Setting the line cutoff even higher, of course, would exclude even more locations.

The Verizon proposal would constitute an unwarranted U-turn in Commission policy. In the *Triennial Review Order*, ¶ 210, you squarely rejected any limitations on the use of UNE loops based on customer class. You specifically stated that "market classifications allow us to conduct our impairment analyses for the various loop types at a more granular level *but are not intended to prohibit the use of UNE loops by customers not typically associated with the respective customer market class*." Verizon did not seek reconsideration of the Order, nor did it challenge this particular finding on appeal, and the Court of Appeals did not address this finding in its *USTA II* decision. There is no reason for the Commission to revisit this issue now, and doing so would send a dangerous signal to Verizon and others that they can "move the goalposts" by making repeated demands for relief that the Commission has already considered and rejected.

Further, the Verizon proposal would make a mockery of the concept of "mass market" as it was discussed in the *Triennial Review Order*. That *Order*, ¶ 127, described the "mass market" as consisting of residential customers and "very small business customers ... [who] typically purchase ordinary switched voice service (Plain Old Telephone Service) and a few vertical features." This description would seem to cover home-based businesses and some very small "mom-and-pop" type businesses, not the typical small to medium enterprise customer. If the Commission wants to remain consistent with the market analysis it used in the *Triennial Review Order*, it cannot classify 10-line (or even 5-line) business customers as part of the mass market.

This proposal also turns the concept of impairment on its head. Unbundling is supposed to be required where competitive entry would be "impaired" without unbundling. Impairment is based on the existence of barriers to entry in a particular segment of the network. Obviously, the barriers to construction of competitive loop facilities to the locations typically occupied by small business customers are *greater* than the barriers to construction of loops to the premises of the largest enterprises. In the case of a large business, the revenues available to a competitive entrant may (sometimes) be sufficient to economically justify the deployment of additional loop facilities. However, the revenues available from serving a location occupied only by small businesses will almost *never* justify such construction, and in fact there are virtually *no* such locations actually served by non-ILEC loop facilities. It would make no sense at all to allow access to UNE loops where the barriers to entry are lower, and deny it where they are higher.

Finally, we reiterate that adoption of a line-size cutoff for access to UNE loops would have a devastating impact on facilities-based competition in the enterprise market. As already explained, there are no alternative facilities allowing CLEC access to premises occupied by these smaller business customers, so the denial of access to UNE loops would effectively foreclose CLECs from serving these locations. Because this would eliminate 50% or more of the CLECs' potential market, it would make most CLEC business plans unsustainable. In short, if the Commission were to adopt this proposal, no rational investor would consider investing in competitive facilities-based carriers.

For all the above reasons, we strongly urge you to reject any proposal to limit the availability of UNE loops based on customer size, line count, telephone numbers, or any similar cutoff. These

proposals are contrary to sound Commission policy, are contrary to the Telecommunications Act, and would be ruinous to your efforts to encourage facilities-based investment.

Very truly yours,

Andrew D. Lipman
Attorney for the following private equity firms:

Stolberg Equity Partners

Meritage Private Equity Funds

McCullen Capital

M/C Venture Partners

Ironside Ventures

Columbia Capital

Centennial Ventures

cc: Commissioner Kathleen Abernathy
Commissioner Jonathan Adelstein
Commissioner Michael Copps
Commissioner Kevin Martin
Jeffrey Carlisle