

November 30, 2004

The Honorable Michael K. Powell, Chairman  
The Honorable Kathleen Q. Abernathy, Commissioner  
The Honorable Michael J. Copps, Commissioner  
The Honorable Kevin J. Martin, Commission  
The Honorable Jonathan S. Adelstein, Commissioner  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

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

Dear Chairman Powell and Commissioners:

On behalf of Centennial Ventures, Columbia Capital, Robert C. Fanch, Kohlberg Kravis Roberts & Co., M/C Venture Partners, Madison Dearborn Partners, LLC, Quadrangle Group, Richland Ventures, Seaport Capital Partners, and Wachovia Capital Partners we are again writing to express our concern that the Commission not break with its past policies in support of facilities-based wireline telecommunications competition, and, by doing so, strand billions of dollars in private investment. As you may know, our portfolio companies, or personal investments, include investments in competitive carriers, including competitive local exchange carriers ("CLECs"). Our portfolio companies include Cavalier Telephone, Cbeyond Communications, City Signal Communications, Conversent Communications, Elantic Networks, Florida Digital Networks, Focal Communications, Grande Communications, Looking Glass Networks, Mountaineer Telecommunications, NuVox Communications, PaeTec, Inc, US LEC, and Z-Tel Communications. These companies serve numerous markets throughout the United States over a mix of their own network facilities and loop/transport facilities leased from incumbent local exchange carriers ("ILECs") as unbundled network elements ("UNEs"). Moreover, unless, or until, alternative facilities become available, our portfolio companies will continue to require access to the loop and transport facilities of the incumbents.

We have always been grateful for the your (and the entire Commission's) steadfast support of goals we are trying to accomplish, through our investments in the firms listed above. Indeed, as many of our portfolio companies are ALTS members, we have frequently taken comfort in, and been assured by, the words you spoke to them exactly three years ago.

The FCC recognizes the importance of unbundled loops and other UNEs to competitors hoping to enter local markets. ... I am guided by a strong belief in facilities-based competition. I have consistently expressed my view that facilities providers, like you, are the key to robust competition. Facilities-based

competitors offer the promise of more substantial and enduring investment in local markets. ... You should understand that when I speak of facilities-based providers we mean YOU, not just full facilities providers like cable companies. I recognize that access to the loop, critical network elements, and collocations remain important.<sup>1</sup> (*emphasis in the original*)

Based on these policy commitments by you, and the Commission's consistent reinforcement of these commitments over the last 3 years, we undersigned investors have provided several billion dollars of the over \$50 billion in capital funds that have been expended on alternative telecommunications facilities. The particular type and location of our facilities investments were selected precisely to mesh with loop and transport network elements whose lease from the incumbent carriers as UNEs had been clearly supported by the Commission and the Telecommunications Act. Without cost-based access to these leased facilities, our competitive investments are essentially worthless: disconnected network nodes and transport facilities leading to nowhere – similar to the partially-constructed highway overpasses or ramps that dot some major U.S. cities. We believe you understand this point, but we are, nonetheless, concerned that the FCC might retreat from its core principles under pressure from the Bells, and in undue deference to an activist Court of Appeals panel that seeks to usurp the Commission's role as the expert regulator.

It is fatuous to expect, as the Bells frequently suggest, that, upon elimination of cost-based access to loops and transport, subsequent billions of dollars in competitive capital will follow the already-invested \$50 billion in order to provide customer loops or to complete connections between network nodes that were constructed with the initial investment. Returns on this first \$50 billion (partially due to regulatory vacillation) have been inadequate to nonexistent. But long lead times for construction, less dense aggregations of traffic and assured targeted retail price responses by the incumbents, will make returns on a second wave of investment smaller than those on the first wave. Eliminating current UNE access to dark fiber, high capacity loops and transport and loop-transport combinations will massively increase competitors' capital service costs midway through current business plan implementations. Such actions will only accelerate capital flight from competitive wireline markets. You can be assured that if this regulatory rollback occurs, further investment will *not* be forthcoming, existing competitive investments will largely go to waste and monopoly will be reestablished for the foreseeable future in telecommunications markets.<sup>2</sup>

Thus, we believe the Commission's central goal in this remand proceeding must be to restore investor confidence in competitive telecommunications by providing unequivocal support for clear and *effective* policies that guarantee facilities-based competitive carriers' rights to access incumbent carriers' high capacity loops and

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<sup>1</sup> Remarks by Michael K. Powell, Chairman, Federal Communications Commission, to the Association for Local Telecommunication Services, Crystal City, Virginia, November 30, 2001 (available at: <http://www.fcc.gov/Speeches/Powell/2001/spmcp111.html>).

<sup>2</sup> Analogously, if an airline has not yet obtained scale economies prior to a significant fuel price increase, its investors will respond by letting the airline go out of business rather than invest more money to become a jet fuel producer.

transport (and loop-transport combinations) on an unbundled basis pursuant to Sections 251 and 252 of the Telecommunications Act. To do so, we believe that the Commission must adopt the following principles.

1. **Be clear and consistent in expressing unbundling principles.** Only *consistent* government policies can create a climate that will encourage economic growth and capital investment. This concept won the Nobel Prize for economics this year, and was captured succinctly in a quote from one of the laureates, “[a] lot of people make decisions based on what they think the government is going to do in the future ... so it’s important for a government to follow the rules so people can have faith in them.”<sup>3</sup> If the Commission gains a reputation for oscillating regulatory policy, all future private investment in telecommunications (or any other service overseen by the by Commission) will be chilled as investors discount potential opportunities due to their legitimately heightened concerns that current policies will be short-lived. For this reason, the Commission must articulate its pro-competitive policies broadly and upfront – and not allow these policies to be developed or eviscerated through a drip of repeated grants of “limited” waivers or exemptions.

Furthermore, for investments to bear fruit, it is essential that government policies remain consistent *over a reasonable time horizon*. Because of the fixed and sunk nature of telecommunications investment, business cases supporting new investment must be built on substantial recovery periods – frequently exceeding ten years.<sup>4</sup> Unless investors are comfortable that regulatory policies will be consistent over a similar time period, they will not risk their funds.

2. **Do not allow initial competitive deployments to create a Catch-22.** Even in a stable business and regulatory environment, it takes years of negative cash flow before competitive carriers reach minimum efficient scales that permit their overall cost levels to reach parity with the incumbents’. And unbundled access to incumbents’ loop and transport facilities is required both to *reach* and to *maintain*

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<sup>3</sup> Nobel laureate Finn Kydland quoted in, “Norway’s Kyland, Prescott of U.S. Win Nobel Economics Prize,” available at: [http://216.109.117.135/search/cache?p=Norway%27s+Kydland%2C+Prescott+of+US+win+Nobel+Economics+Prize&sm=Yahoo%21+Search&toggle=1&ei=UTF-8&u=story.news.yahoo.com/news%3Ftmpl%3Dstory%26cid%3D1506%26e%3D14%26u%3D/afp/nobel\\_economics&w=norway%27s+kydland+prescott+us+win+nobel+economics+prize&d=7F04DEBCAC&icp=1&.intl=us](http://216.109.117.135/search/cache?p=Norway%27s+Kydland%2C+Prescott+of+US+win+Nobel+Economics+Prize&sm=Yahoo%21+Search&toggle=1&ei=UTF-8&u=story.news.yahoo.com/news%3Ftmpl%3Dstory%26cid%3D1506%26e%3D14%26u%3D/afp/nobel_economics&w=norway%27s+kydland+prescott+us+win+nobel+economics+prize&d=7F04DEBCAC&icp=1&.intl=us)

<sup>4</sup> “While we will ideally try to get a return on the capital within 5-7 years, we have, on occasion, extended the life of a fund to 10-13 years if doing so was necessary in order to successfully realize a capital gain for our limited partners.” Declaration of James N. Perry, Jr., Madison Dearborn Partners, LLC in support of Reply Comments of CompTel, CC Docket No. 01-338, 96-98, 98-147 (July 17, 2002) at ¶ 5. “As a private equity investor, M/C Ventures raises pools of capital from other investors, who agree to commit their capital to an M/C Ventures fund for a minimum of 10 years.” Declaration of Peter H. O. Claudy, M/C Venture Partners in support of Reply Comments of CompTel, CC Docket Nos. 01-338, 96-98, 98-147 (July 17, 2002) at ¶ 3.

this minimum scale. If initial competitive deployment of certain facilities or success in attracting initial customers is used as a “trigger” to curtail UNE availability – and thus force migration to monopoly-priced special access services – the Commission may be assured that further competitive deployments will be halted. Investors will not fund the real losses anticipated in early years unless they expect that initial competitive successes can be advanced – not just sustained – and certainly not rolled back.<sup>5</sup>

Thus, the only appropriate basis for denying unbundled access to a particular set of loops and/or transport facilities is the already in-place existence of multiple facilities-based carriers that serve substantial shares of a precise market using completely non-incumbent carrier facilities. In particular, the Commission’s touchstone for determining when existing competition is sufficiently established to consider rescinding UNE lease requirements is the existence of multiple competitive wholesalers of the element in question, **for example DS1 loops or transport**, that use non-incumbent facilities. It is only when this barrier is scaled that retail competition becomes widespread. Until that happens, UNEs must continue to be available.

3. **Micro-management doesn’t work.** The Commission should not presume any ability to make accurate predictive judgments about the potential for competitive deployments in any particular market based on deployments in allegedly “similar” markets or based on back-of-the-envelope business case analyses. As investors, we well know that our information about a competitive carrier’s business prospects is always inferior to the information known by the company’s expert management. We must trust the wisdom of these managers to deploy capital only where it is most economic. We doubt very much that the Commission or the Courts have market knowledge and business acumen that exceeds that of the managers whose business survival depends on their attention to the specific market realities at hand. The Commission should recognize the significant limits on its ability to make rational predictive judgments on these matters and not presume to micro-manage or second-guess competitive management decisions by substituting its own theoretical guesses for real-world market decisions.

In close, it is urgent that the Commission reaffirm the principles of facilities-based local competition that have been consistently articulated both by the Chairman and all Commission decisions since enactment of the Telecommunications Act. In order to prevent wholesale abandonment of previously invested competitive capital – and to provide the springboard for increments to already-invested capital – the Commission

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<sup>5</sup> Note that any policy of rolling back UNE availability for targeted business segments is especially pernicious. Competitive carriers’ business plans are based on the assumption that their deployed facilities will address as wide a base of customers as possible. Of necessity, some of these customers will be more successfully attracted and profitable than other customers. If “use restrictions” or UNE rollbacks narrow this addressable market (and especially if these actions prune away the most profitable market segments), the overall business case fails and facilities deployment will be foreclosed.

must articulate an unwavering policy that assures continued cost-based access to dark fiber, last-mile high capacity loop and transport facilities, and combinations of these two facilities.

Thank you for your kind attention.

Sincerely,

\_\_\_\_\_/s/  
James Wade  
M/C Venture Partners

\_\_\_\_\_/s/  
Michael Huber  
Quadrangle Group

\_\_\_\_\_/s/  
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\_\_\_\_\_/s/  
Rand G. Lewis  
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