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December 2, 2004

FILED ELECTRONICALLY

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

Re: WC Dkt. No. 04-313
CC Dkt. No. 01-338

Dear Ms. Dortch:

As the FCC prepares to decide whether to require ILECs to provide various network functions as UNEs, I write in order to reiterate that the agency has a duty to consider not only whether the requirement is necessary to avoid impairing competition but also the substantial damage to investment that the requirement would produce. The Commission's failed network unbundling regime has limited telecom investment over the past eight years and has been invalidated on three occasions by the federal courts. Now, finally, the Commission should establish legally sustainable UNE provisioning rules that encourage investment.

The vast majority of evidence presented within the last two months involves the question of whether competition will be impaired if ILECs are not required to provide as UNEs various functions, particularly UNE-P, enterprise transport, and high capacity loops. CLECs contend that mandating the provision of these functions is necessary to avoid impairment, and ILECs contend otherwise. Thousands of pages of evidence have been presented to the Commission on the impairment question.

If the Commission concludes that the record fails to show impairment without the availability of these functions as UNEs, Section 251 of the Act prohibits the agency from requiring ILECs to provide them as UNEs. Just as important, however, is that if the Commission is unsure about whether competition will be impaired without requiring the provision of these functions as UNEs, or even if the agency concludes that the requirement is necessary to avoid impairment, the Commission still may not lawfully require ILECs to

provide the functions as UNEs unless the record also shows that the impairment outweighs the damage that results from mandating the provision of these functions as UNEs. This was made clear by the D. C. Circuit in its order reviewing the agency's Triennial Review decision. There, the Court held that the Commission has an obligation to consider not only impairment in the absence of mandating the provision of given network functionality as a UNE, "but also the costs of unbundling (such as discouragement of investment in innovation)" if provision as a UNE were required.[1] Importantly, the Court ruled that the Commission is not merely authorized to consider the harm caused by a decision to mandate unbundling in order to avoid impairment, but instead has a duty to balance this harm against the impairment and, if it requires ILECs to provide a given network feature as a UNE, to explain why the record shows that the harm is outweighed by the need to avoid impairment.[2] In a subsequent order, the same court made clear that a Commission decision mandating the provision of a given function as a UNE on the ground that competition otherwise is impaired would be unlawful as "arbitrary and capricious, not the product of reasoned decisionmaking" unless the record showed that the risk of impairment outweighs the damage caused by requiring provision of the function as a UNE.[3]

In this proceeding, an *ad hoc* coalition of 34 telecom manufacturers offered substantial evidence in its Comments showing that requiring ILECs to provide UNE-P and enterprise loops and transport as UNEs would (i) provide a serious disincentive for both ILECs and CLECs to invest in new telecom infrastructure and (ii) put a big drag on the U.S. economy as a whole.[4] No party -- in their own opening comments, in reply to the manufacturing coalition's opening Comments, or in a subsequent *ex parte* filing - has offered evidence to the contrary. Under these circumstances, the Commission has no choice than to eliminate the requirement to provide these network functions as UNEs, an action that not only represents the only lawful course but that also is in the public interest

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1 *USTA v. FCC*, 359 F. 3d 554, 572 (D.C. Cir. 2004).

2 *Id.* at 580 (noting that while the FCC must consider whether the absence of mandatory provisioning as a UNE will result in impairment, that "far from barring consideration of factors such as an unbundling order's impact on investment, [an earlier court order had] clearly read the Act . . . to mandate exactly such consideration").

3 *Verizon v. FCC*, No. 03-2396, slip op. at 10 (D.C. Cir., July 16, 2004).

4 *See* "Comments of Ad Hoc Telecom Manufacturer Coalition", Oct. 4, 2004; *ex parte* letter by Ad Hoc Telecom Manufacturer Coalition, Oct. 8, 2004. *See also* "Reply Comments of Renaissance Integrated Solutions", Oct. 13, 2004. In the aggregate, manufacturer coalition participants employ roughly 12,500 people in more than 20 states and Canada, and they make a wide variety of products used by both ILECs and CLECs.

since it would help stimulate capital spending by both ILECs and CLECs and improve the nation's economy generally.

Respectfully submitted,

Rodney L. Joyce
for Ad Hoc Telecom Mfg. Coalition

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