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December 3, 2004

Ex Parte

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

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

Dear Ms. Dortch:

I am writing to address various claims regarding dark fiber UNEs that CLECs have made in recent ex parte letters and presentations filed in the above-referenced dockets. In general, these new filings continue to misstate the legal standards the Commission is bound to apply, and either ignore or distort the relevant facts. Thus, like the CLECs' previous submissions, these new filings do not provide the Commission with any legitimate basis to make a finding of impairment with respect to dark fiber.

Verizon has demonstrated that competing carriers are not impaired without access to dark fiber UNEs. Competing carriers are competing successfully either by using their own lit fiber, obtaining lit or dark fiber from other competitive suppliers, or by using special access services.[1] Although there are more than 11,000 known buildings where CLECs have deployed fiber-based electronics in Verizon's top-40 MSAs alone, competing carriers have obtained a total of only 936 unbundled dark fiber transport facilities and only 50 unbundled dark fiber loops throughout Verizon's entire region.[2] There are at least 80 competitive fiber providers within Verizon's region, and these carriers are offering services at all levels of capacity, many of them make that capacity available on a wholesale basis, including as dark fiber, and all are capable of doing the same.[3]

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1 *See* Verizon Reply at 79-80.

2 *See* Verizon Reply at 79; Lataille/Jordan/Slattery Reply Decl. ¶ 49.

3 *See* Verizon Reply at 79; Verses/Lataille/Jordan/Reney Decl. Exh. 4A; Lataille/Jordan/Slattery Reply Decl. ¶¶ 30-31; *2004 Fact Report* at III-18 & Table 11.

Alpheus and segTEL argue that the Commission should nonetheless require dark fiber UNEs because it "encourages facilities based investment" in the electronics used to light fiber.[4] But this argument obscures the fact that competing carriers would still be using the ILEC's underlying transmission facilities, which they already do when they obtain special access. Indeed, competing carriers provide a vast array of services — everything from wireline and wireless voice to packet-switched data services such as ATM and Frame Relay — by attaching electronics to special access circuits. Thus, requiring unbundled access does not promote any additional investment beyond the investment that competing carriers are already making. Rather, it merely enables competing carriers to obtain the underlying transmission facilities at a lower price, which is not a valid basis for impairment. *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 390-91 (1999).

For similar reasons, there is no merit to the claim that the availability of UNE dark fiber "encourages the growth of broadband services," or that "the loss of access to UNE dark fiber loops . . . will result in disconnection" of broadband services.[5] Indeed, the Commission has consistently found — including in three recent orders — that requiring unbundling of the fiber or packet switching facilities used to provide broadband services will *deter* the deployment of broadband services, not promote it.[6] Moreover, the Commission has acknowledged that the provision of broadband services is *already* highly competitive,[7] the D.C. Circuit has affirmed that finding,[8] and there is no evidence to suggest that this competition has emerged due to the availability of dark fiber UNEs. To the contrary, as noted above, competing carriers have obtained only minuscule amounts of dark fiber UNEs in the past.

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4 Ex Parte Letter from Paul Hobby, Alpheus Communications, L.P., and Jeremy Katz, segTEL Inc., to Marlene Dortch, FCC, WC Docket No. 04-313, at 3 (Nov. 17, 2004) ("Alpheus/segTEL 11/17/04 Ex Parte").

5 Alpheus/segTEL 11/17/04 Ex Parte at 4.

6 *See, e.g.*, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, ¶ 24 (2004) ("*271 Forbearance Order*") (granting forbearance from enforcing the requirements of section 271 to broadband facilities, holding that these requirements "have the effect of discouraging BOC investment in this emerging market, diminishing their potential effectiveness as competitors today and in the future."); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 15856, ¶ 7 (2004) (eliminating unbundling of FTTH facilities in MDUs because "[i]t would be inconsistent with the Commission's goal of promoting broadband deployment to the mass market to deny this substantial segment of the population the benefits of broadband by retaining the regulatory disincentives associated with unbundling."); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 20293, ¶ 15 (2004) (eliminating unbundling of FTTC loops because "the costs of unbundling hinder deployment of FTTC loops that otherwise would occur."); *Triennial Review Order* ¶¶ 3, 272, 278, 288.

7 *See, e.g.*, *271 Forbearance Order* ¶ 22 & n.65 (and FCC orders cited therein); *Triennial Review Order* ¶¶ 229, 292.

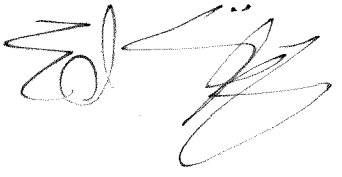
8 *See USTA v. FCC*, 359 F.3d 554, 582 (D.C. Cir. 2004) ("*USTA II*") (affirming FCC's finding of "robust intermodal competition" for broadband on the basis of "very strong record evidence, including cable's maintenance of a broadband market share on the order of 60%").

A few CLECs also repeat the claim that requiring access to UNE dark fiber "is an efficient use of excess deployed fiber that is spare."[9] As Verizon explained, however, it is simply incorrect to assume that spare fiber would lie dormant if not subject to unbundling.[10] Fiber is not deployed with the intention that it remain dark; it is deployed so that it will be available to be lit as demand increases.[11] If that dark fiber is provided to CLECs, however, then when anticipated demand arises, ILECs will have to deploy *additional* fiber to meet that demand. And the net result of such policies is that the cost of fiber deployment will be shifted from CLECs to ILECs, and that CLECs will rely on the ILEC facilities rather than deploy their own, despite the Commission's holding that ILECs have no particular cost advantage over CLECs in the deployment of fiber. *See Triennial Review Order* ¶ 240.

Finally, Alpheus and segTEL argue that, because the Commission previously relied on the availability of dark fiber UNEs in determining whether to eliminate OCn UNEs, the Commission "cannot eliminate dark fiber loops without reinstating OCn loops."[12] But in the wake of *USTA II*, it is clear that the Commission not only has the authority to eliminate OCn loops on independent factual grounds, but is required to do so, and the record here clearly warrants such an approach. Indeed, CLECs in this proceeding have not even seriously argued that they are impaired without access to OCn loops. To the contrary, the record shows that competing carriers have deployed tens of thousands of fiber route miles that they are using for both loops and transport; that lit fiber is available from dozens of wholesale suppliers; and that competing carriers are capable of filling in their networks with special access services.[13] By contrast, competing carriers have obtained very small amounts of OCn UNEs.[14] Thus, whether or not dark fiber UNEs remain available, the Commission must retain its rules precluding unbundling of OCn UNEs.

Please place this letter in the record of the above proceedings.

Sincerely,



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9 Alpheus/segTel 11/17/04 Ex Parte at 3; *see also* Ex Parte Letter from Greg Scott, Integra, to Marlene Dortch, FCC, WC Docket No. 04-313 & CC Docket No. 01-338, at 2 (Nov. 16, 2004).

10 *See* Verizon Reply at 79-80.

11 *See* Pilgrim Reply Decl. ¶ 7.

12 Alpheus/segTel 11/17/04 Ex Parte at 2.

13 *See* Verizon Comments at 42, 54-65; Verizon Reply at 48-51, *2004 Fact Report* at III-3 to III-7, III-14, Table 9, III-39 to III-40.

14 *See, e.g.*, Verses/Lataille/Jordan/Reney Decl., Exh. 7.

c: Jeff Carlisle
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