

Dee May
Vice President
Federal Regulatory



Verizon Communications
1300 I Street, NW • Suite 400W
Washington, DC 20005

Phone 202-515-2529
Fax 202-336-7922
dolores.a.may@verizon.com

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:

This letter is in response to the November 2, 2004, letter filed by CompTel and various other competitive local exchange carriers (“CLECs”), and the Rebuttal Declaration of Gary J. Ball attached to that letter.¹ Rather than submit information about their own networks, and their use of other CLEC networks and ILEC special access, the CLECs have chosen to rely on the so-called “QSI Study.” In reality, that document is not a study at all, but instead by its own terms purports to represent aspects of the record from the *Triennial Review Order* (“TRO”) state proceedings, which were terminated without resolution after the TRO was vacated by the court.² Verizon and others have demonstrated that the QSI Study is facially unsound, because it relies entirely upon limited evidence produced by CLECs in state TRO proceedings, which was materially incomplete.³

¹ See Letter to Marlene H. Dortch, FCC, from CompTel/ASCENT, *et al.*, WC Docket No. 04-313, CC Docket Nos. 01-338, 96-98, and 98-147 (filed Nov. 2, 2004) (“CLEC Letter”).

² See “Analysis of State Specific Loop and Transport Data: Impairment Analysis,” attached to Letter to Marlene H. Dortch, FCC, from CompTel/ASCENT, *et al.*, WC Docket No. 04-313, CC Docket Nos. 01-338, 96-98, and 98-147 (filed Oct. 4, 2004) (“QSI Study”).

³ See Declaration of Lynn Walker, ¶¶ 26-27 (“Walker Declaration”), attached as Attachment F to Reply Comments of Verizon, WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 19, 2004) (“Verizon Reply”). See also Reply Affidavit of Shelley W. Padgett, ¶¶ 19-36 (“Padgett Affidavit”), attached as Attachment 5 to BellSouth Reply Comments, WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 19, 2004) (“BellSouth Reply”); Reply Declaration of Aniruddha Banerjee, Ph.D., ¶¶ 77-80 (“Banerjee Declaration”), attached as Attachment 2 to BellSouth Reply; Joint Declaration of Scott J. Alexander and Rebecca L. Sparks on Behalf of SBC Communications Inc., ¶¶ 16, 32-62 (“Alexander/Sparks Declaration”),

Moreover, whatever data was available in state *TRO* proceedings was limited even further through the QSI Study's use of "filters" designed to exclude evidence that CLECs are not impaired without access to ILEC facilities.⁴ In the CLEC Letter and Ball Declaration, the CLECs attempt to rehabilitate the QSI Study. Although the Ball Declaration tries to gloss over these shortcomings, its analysis – like the so-called study it attempts to defend – is patently hollow. Many of the specific errors in the Ball Declaration have already been addressed by SBC.⁵ Verizon agrees with the analysis in the Alexander/Sparks Rebuttal Declaration, and will only emphasize a few key points here.

The majority of the CLECs' arguments attempt to justify the data and analysis used in the QSI Study as consistent with that adopted by the CLECs in the state *TRO* proceedings. *See, e.g.*, Ball Declaration, ¶¶ 5-6, 9-15. However, the "analysis" is flawed in a number of key respects. As an initial matter, CLECs studiously ignore the fact that the instant proceeding is *not* based on the same standards that were in existence in the state *TRO* proceedings; rather, the Commission is determining what level of impairment standard to apply after the court *reversed* the test set forth in the *TRO*.⁶ Therefore, whatever limitations might have been applicable to the state *TRO* proceedings are simply not relevant in establishing an evidentiary record now that the *TRO* triggers have been overturned.

Moreover, the "filters" and other tactics employed by the CLECs to limit the evidentiary record produced in state *TRO* proceedings – devices also adopted by the QSI Study – were not based on accurate interpretations of the *TRO* triggers, but instead were intentionally designed to eliminate much of the evidence relevant to a non-impairment showing.⁷ For example, CLECs *admit* that they applied a filter in the QSI Study "to eliminate facilities serving more than the capacity limits (i.e., facilities with more capacity than may be purchased as UNEs),"⁸ even though those facilities can be channelized to provide DS1s and DS3s.⁹ The QSI Study "filters" also eliminated evidence of areas where a single competing carrier had provided facilities, which significantly undercounts deployment at lower capacity levels.¹⁰

attached as Attachment B to SBC Reply Comments, WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 19, 2004).

⁴ Walker Declaration, ¶¶ 26-27; Alexander Sparks Declaration, ¶¶ 39-62.

⁵ *See* Joint Declaration of Scott J. Alexander and Rebecca L. Sparks on Behalf of SBC Communications Inc., attached to Letter to Marlene H. Dortch, FCC, from Christopher M. Heimann, SBC (filed Nov. 16, 2004) ("Alexander/Sparks Rebuttal Declaration").

⁶ *See United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

⁷ *See* Walker Declaration, ¶ 27; Banerjee Declaration, ¶¶ 77-80; Alexander/Sparks Declaration, ¶¶ 39-60.

⁸ *See* Ball Declaration, ¶ 10.

⁹ *See* Walker Declaration, ¶ 12.

¹⁰ *See* QSI Study, at 9-19. As SBC points out, "Almost by definition, a location that simultaneously supports two or more competing carriers has significant traffic volume, and carriers are accordingly more likely to deploy facilities at capacities above DS1 or DS3 to serve such locations. QSI's 'filter' thus limited

On the transport side, CLECs continue to claim that “backhaul” facilities should be excluded from consideration,¹¹ even though the *TRO* did not exclude such facilities as counting toward the self-provisioning trigger.¹² The CLECs also admit that the QSI Study eliminated evidence of CLECs that were wholesale providers if the CLECs “swore under oath that they were *not* wholesalers of high capacity loops or dedicated transport between ILEC wire centers,” even though, in many cases, the CLEC testimony often was contradicted by evidence of CLEC’s own offerings.¹³ For example, AT&T denied that it was a wholesale provider of high capacity loop facilities in all states where it put in a loop case, but its 2004 10K stated that it offers “wholesale networking capacity and switched services to other carriers,” and at least two other CLECs identified AT&T as their wholesale supplier of DS1 loops in California.¹⁴ Thus, it appears that AT&T’s denial “under oath” was simply a play on words, attempting to characterize their wholesale services as something else in order to avoid admitting to their existence.¹⁵

Verizon and others have presented evidence of numerous other ways that CLECs avoided providing relevant evidence in the state *TRO* proceedings,¹⁶ and the Ball Declaration only proves that the same ploys were used to manipulate the analysis presented in the QSI Study.¹⁷ For example, while the Ball Declaration states that evidence produced by ILECs in the state *TRO* proceedings “was included and *analyzed in the context of the CLECs’ own representations of their networks and services as well as the requirements of the TRO,*”¹⁸ it is apparent that the QSI Study “analyzed” ILEC data by applying filters and CLEC adjustments to exclude evidence of existing competitive facilities.¹⁹

its analysis to the locations where deployment at the one-or-two DS3 level, or the DS1 level, is *less* likely to be found.” Alexander/Sparks Rebuttal Declaration, ¶ 11.

¹¹ See Ball Declaration, ¶ 12.

¹² See Alexander/Sparks Rebuttal Declaration, ¶¶ 18-21.

¹³ See Walker Declaration, ¶ 22; Ball Declaration, ¶ 13; Alexander/Sparks Declaration, ¶¶ 29-31, 50-54; Alexander/Sparks Rebuttal Declaration, ¶ 17.

¹⁴ Walker Declaration, ¶ 22.

¹⁵ See *id.*; see also, Alexander/Sparks Declaration, ¶¶ 50-53.

¹⁶ See Walker Declaration, ¶¶ 5-22; Padgett Affidavit, ¶¶ 17-22, 26-31, 42-46, 51-53, 56-57; Banerjee Declaration, ¶¶ 78-79; Alexander/Sparks Declaration, ¶¶ 27-31, 36, 45-46; Alexander/Sparks Rebuttal Declaration, ¶¶ 13, 17.

¹⁷ See, e.g., Ball Declaration, ¶ 4 (“The filters that were applied to the data were consistent with those subject to extensive review and cross-examination in the state proceedings.”).

¹⁸ Ball Declaration, ¶ 6 (emphasis added).

¹⁹ See, e.g., Ball Declaration, ¶ 7 (stating that GeoResults data “cannot be relied upon”); *id.*, ¶¶ 10, 12 (describing various “filters” QSI Study used to exclude data); *id.*, ¶ 13 (stating that QSI Study removed evidence of CLEC wholesalers if CLECs “swore” they were not providing wholesale services).

In addition, the CLECs' evasiveness in providing relevant data was only one factor that limited the utility of the data produced in the state *TRO* proceedings (and thus, the usefulness of the QSI Study relying on that data). The description that Administrative Law Judge Schnierle gave of the Pennsylvania *TRO* proceeding could be echoed in many states: "[D]ue to the FCC's rules, the Commission's attribution of the burden of proof to Verizon, and the limited time available for the proceeding, the information obtained was somewhat less than comprehensive."²⁰

The fact is that the records created in the state *TRO* proceedings were characterized by CLEC recalcitrance to provide relevant data, combined with very limited time and resources available for conducting the state *TRO* proceedings, and a focus on *TRO* triggers that are no longer in existence.²¹ In addition, most of the proceedings were halted before completion when the *USTA II* decision was rendered.²² In the 12 states where Verizon participated in *TRO* proceedings, all were terminated or held in abeyance before a final decision was reached.²³

Although CLECs claim that the "results" of their data collection methods were "validated by the assessments of regulators in three major states," CLEC Letter, at 1 & n.1, this claim also is wrong. The three states they cite in support – Michigan, California, and New York – all terminated before conclusion.²⁴ In California, for example, although a report was issued with some of staff's opinions, that report was never voted on by the California PUC commissioners, and at least one commissioner filed comments with the FCC disavowing staff's analysis of several issues.²⁵

All of these facts lead to the inescapable conclusion that the evidence produced in the state *TRO* proceedings does not create a sufficient record upon which to conduct an impairment analysis. The QSI Study, based on a CLEC-defined subset of the data produced in the state *TRO* proceedings, is meaningless.

²⁰ Michael C. Schnierle, Pennsylvania Public Utilities Commission, *Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Network Elements*, Docket I-00030099, Summary of Record Evidence, at 13 (June 25, 2004). According to the Pennsylvania PUC, a copy of this summary was submitted to the FCC on CD-ROM on October 5, 2004. See Supplemental Filing by the Pennsylvania Public Utility Commission of Additional Record Evidence from State "9-month" Proceeding, WC Docket No. 04-313, CC Docket No. 01-338, at 1 (filed Oct. 14, 2004).

²¹ Walker Declaration, ¶¶ 5-22; Padgett Affidavit, ¶¶ 18-29; Alexander/Sparks Declaration, ¶¶ 34-36.

²² Walker Declaration, ¶¶ 23-25; Alexander/Sparks Rebuttal Declaration, ¶¶ 34-36.

²³ Walker Declaration, ¶ 23. The result was similar in other state *TRO* proceedings. See Alexander/Sparks Rebuttal Declaration, ¶¶ 34-36.

²⁴ See Walker Declaration, ¶¶ 23-24; Alexander/Sparks Rebuttal Declaration, ¶¶ 34-36.

²⁵ See Letter to Marlene H. Dortch, FCC, from Commissioner Susan P. Kennedy, California Public Utilities Commission, at 1, 2 (filed Oct. 18, 2004) (stating that the staff report "does not reflect the views of the Commission" and "very likely" would have been "changed in a final decision had the parties been allowed to comment on the CPUC Staff Report or had the Commission continued the proceeding").

Sincerely,

A handwritten signature in cursive script that reads "Dee May". The signature is written in black ink and is positioned below the word "Sincerely,".

c: Christopher Libertelli
Scott Bergmann
Matthew Brill
Daniel Gonzalez
Jessica Rosenworcel
Jeff Carlisle
Michelle Carey
Tom Navin
Gail Cohen
Ian Dillner
Russ Hanser
Christina Langlois
Marcus Maher
Jeremy Miller
Carol Simpson
Tim Stelzig
Cathy Zima