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December 7, 2004

**VIA ELECTRONIC FILING**

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

Re: WC Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

New Edge Network, Inc. ("New Edge Networks") submits this letter to oppose application of EEL eligibility criteria to stand-alone UNE loops. Application of EEL eligibility criteria to stand-alone loops would be unlawful, unnecessary, and harmful to facilities-based competition. Assuming the Commission believes that some restrictions are appropriate to prevent use of stand-alone loops for exclusive provision of interexchange voice service, the Commission must establish a carve-out for data services. New Edge Network owns a nationwide multi-services network with more than 850 carrier-class switches and Internet routers. New Edge Networks has one of the country's largest coverage footprints with a strong presence in small and midsize markets. Its customers include telecom carriers, small to midsize businesses, and large corporations.

**Use Restrictions on UNE Loops Would Hinder Facilities-Based Competition**

Apart from the fact, as described below that extending application of EEL criteria to stand-alone UNE loops would be unlawful, this step would seriously harm facilities-based competition. The Commission established the EEL criteria to encourage facilities-based competition and prevent carriers that do not offer local services from using UNEs to provide long distance service.[1] In the *Triennial Review Order* the Commission explained that "[b]y gaming our eligibility criteria, we mean the case of a provider of exclusively non-qualifying service obtaining UNE access in order to obtain favorable rates or to otherwise engage in

[1] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587, 9597 ¶ 18 (2000); *see also Competitive Telecommunications Assoc. v. FCC*, 309 F.3d 8, 14 (D.C. Cir 2002).

regulatory arbitrage."[2] However, New Edge and other CLECs are not providing "exclusively non-qualifying services," but are instead providers of local service including local data service and exchange access. The *TRO* specifically found that "qualifying services" are "those telecommunications services that have been traditionally within the exclusive or primary domain of incumbent LECs," including "local exchange services, such as POTS and local data service, and access services, such as xDSL and high-capacity circuits."[3] Therefore, local and other data services provided by New Edge are precisely the type of services that the Act and the Commission have sought to promote.

However, EEL criteria do not readily accommodate data services because they were designed to assure that the relevant circuits carry voice traffic. Therefore, extending application of EEL criteria to stand-alone loops would undermine competitive service providers' ability to offer competitive services, preclude innovation in advanced services, and otherwise hinder the goal of encouraging facilities-based competition in the telecommunications market. Instead of encouraging the deployment of facilities to provide innovative broadband services, this step would limit the availability of data service providers to offer competitive broadband services by effectively locking such providers out of UNE loops.

Applying EEL criteria to stand-alone loops would also conflict with the Commission's policy objective of encouraging IP-enabled services.[4] It would make little sense for the Commission, by applying EEL criteria to stand-alone loops, to preclude provision of competitive data services that permit provision of the VOIP and other IP-enabled services that the Commission is seeking to promote.

New Edge Networks cannot overstate the devastating effect on its operations of applying EEL criteria to stand alone loops. Data services are a very significant portion of New Edge Networks revenues and operations. It has devoted very significant resources to provision of data services. New Edge has collocated in 600 central offices, has deployed 800 ATM switches and 68 IP routers, offers service in 98% of LATAs and to 2,600 cities nationwide, and has 21 regional aggregation points..[5] If for no other reason, the Commission should not apply EEL criteria to stand-alone loops because of the harmful impact on the growth and provision of data services.

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[2] *TRO*, ¶ 591.

[3] *See TRO*, ¶ 140.

[4] *See, e.g., IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking (rel. Mar. 10, 2004) (instituting a rulemaking on the regulation of VoIP and other IP-enabled services, and noting the Commission's policy of encouraging advanced telecommunications capabilities); *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order (rel. Nov. 12, 2004) (preempting an order of a state regulatory agency attempting to impose legacy telephone regulations on Vonage's IP-telephony services).

[5] See http://www.newedgenetworks.com/_popfiles/map_nen-overview.pdf for a current map of New Edge Networks' coverage.

**Application of EEL Criteria to Stand-Alone Loops Is Totally Unnecessary**

Apart from the fact that application of EEL criteria to stand-alone loops would unlawfully preclude CLEC access to network elements for which they would be impaired, it would also be arbitrary and capricious for the Commission to take this step because it is totally unnecessary. In the *Triennial Review Order*, the Commission specifically noted that "the record does not indicate concern over misuse of voice-grade UNE loops, high-capacity loops, or other UNEs."[6] The Commission also noted:

> [A]lthough a requesting carrier must provide qualifying services to obtain access to loops, lower-capacity EELs and other UNEs and UNE combinations, we need not provide more detailed rules for application of these requirements to other elements at this time, given the lack of controversy and the greater administrative burdens that enforcing such protections places on requesting carriers, incumbent LECs, and the Commission.[7]

The Commission also cited a Covad *Ex Parte* letter noting that instituting "a regime of use restrictions on stand-alone UNE loops, which affects all facilities-based carriers, to avoid speculative concerns about access charge bypass by a few carriers would be a vastly over-inclusive solution in search of a very narrow, speculative problem."[8] Nothing has changed since the *Triennial Review Order* to warrant the drastic and plainly harmful step of applying EEL criteria to stand-alone UNE loops.

Nor is there any record evidence suggesting that IXCs could or would use UNE loops (as opposed to EELs) to avoid ILEC special access. CLECs that use stand-alone UNE loops typically access those UNE loops in the end offices serving the customer loop locations. By contrast, IXCs access loops (or the special access equivalent, *i.e.* channel terminations) using EELs or special access circuits and interoffice mileage between the customer's serving wire center and other ILEC wire centers. In other words, there is no danger of a flash-cut from special access to stand alone UNE loops because the IXCs lack the collocation presence to obtain access to stand alone loops. This is evident from the fact that the availability of stand-alone UNE loops for the past eight years has not led to conversions of access circuits to stand-alone loops.

Moreover, the Notice of Proposed Rulemaking in this proceeding did not specifically raise this issue.[9] Consequently, the record in this proceeding lacks any significant discussion or

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[6] *TRO*, ¶ 592.

[7] *See Id.*

[8] *TRO*, n.1824 (citing Covad Jan. 21, 2003 *Ex Parte* Letter at 3).

[9] *See Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 771 (D.C. Cir. 1988) (clarifying that the Commission must provide proper notice of a proposed rulemaking that is "adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process"); *MCI Telecommunications v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995) (vacating and remanding FCC rules due to

debate concerning a need to apply EEL criteria to stand-alone UNE loops. Although several RBOCs have casually requested that the Commission undertake this action, none have provided any significant discussion on the issue nor have any provided any adequate reasoning on how the Commission could lawfully adopt such a step without also unquestionably increasing the likelihood of court review.[10] Because there is no record to support applying EELs to stand-alone loops, or any other evidence showing a need to apply restrictions to use of stand-alone loops, it would be arbitrary and capricious for the Commission to apply EEL criteria to stand-alone loops. The lack of record support and notice on this issue would violate the Administrative Procedures Act.

**Application of EEL Criteria to Stand-Alone UNE Loops Would Be Unlawful**

Under *USTA II* and the Act, the Commission may limit unbundled access to network elements only where the requesting carriers would be unimpaired without unbundled access to the network element.[11] Presumably, therefore, depending on the particular regulations adopted, the Commission might be able to adopt safeguards that preclude access to UNEs for provision exclusively of voice interexchange services if the Commission finds that carriers are not impaired with respect to provision of that service. Conversely, however, the Commission may not adopt restrictions that preclude use of UNEs for provision of services where impairment exists, such as use of loops to provide local data services.

The record in the above referenced dockets clearly shows that carriers offering local exchange access or data services are impaired without access to stand-alone loops.[12] CLECs use the same physical facilities including loops to provide voice and non-voice (data) services and local and interexchange services. In particular, CLECs face significant economic barriers to duplicating those loops. In this proceeding, the Commission will find that CLECs remain impaired without unbundled access to loops in a variety of circumstances. Therefore, CLECs are clearly impaired without access to UNE loops for provision of data, including local data, services.

However, the EEL criteria would preclude use of stand-alone loops for data services because they are designed to assure that EELs are used to provide voice services. These criteria, therefore, are grossly overbroad and would have the affect of precluding access to UNEs for provision of services for which CLECs would be impaired, namely for local and other data services. Therefore, the Commission may not lawfully apply these criteria to stand-alone loops.

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inadequate notice under the Administrative Procedure Act as clarified by *Florida Power*); *Sprint v. FCC*, 315 F.3d 369, 374 (D.C. Cir. Jan 21, 2003) (stating that the Commission must use the notice-and-comment procedures set forth in the Administrative Procedure Act before making "substantive changes in prior regulations.").

[10] *See* Verizon Comments at 78-79; SBC Comments 97-98. *See also TRO*, ¶¶ 590-611; 47 C.F.R. § 51.318

[11] *See USTA v. FCC*, 359 F.3d 554, 591-592 (D.C. Cir. 2004) ("*USTA II*")

[12] *See, e.g.*, TRO, ¶¶ 197-202, 237-240.

**A Carve-Out for Data Services Is Necessary**

In light of the harmful impact on provision of data services, the Commission should establish a carve-out that will exclude application of EEL criteria to stand-alone loops used to provide data telecommunications services. In this connection, New Edge Networks supports Covad Communication's recent proposal concerning the implementation of EEL eligibility criteria to high-capacity loop UNEs. Covad's letter of November 19, 2004 notes that EEL eligibility criteria "were not designed to accommodate the provision of data telecommunications services on UNE facilities. Rather, they were designed expressly to prevent the "gaming" of special access tariffs for the provision of specific non-qualifying services (e.g., interexchange long-distance services), as explained in the *Triennial Review Order*."[13] Covad suggests that the Commission adopt the following alternative eligibility criteria:

> For all new high-capacity loop facilities ordered under an interconnection arrangement established pursuant to new eligibility criteria adopted by the Commission for high-capacity loop facilities (including EELs, DS-1 UNE loops and DS-3 UNE loops), requesting carriers could self-certify that they meet the following requirements:
>
> > (1) That the requesting carrier will provide a data telecommunications service over the requested facilities;
> >
> > (2) That the requesting carrier will not solely provide interexchange voice telecommunications service interconnected with the Public Switched Telephone Network over the requested facilities; and –
> >
> > (3) That the requested facilities will terminate in a central office collocation arrangement.[14]

Assuming the Commission does not adopt the Covad proposal, the Commission should defer consideration of application of any use criteria to stand-alone loops until it has an adequate record. The current EEL requirements were extensively debated on the record and were the result in part of extensive negotiations between ILECs and CLECs. New Edge Networks is very concerned that the Commission may inadvertently harm data services or permit gaming by ILECs if it acts in the current quickly moving proceeding to fashion "architectural" safeguards

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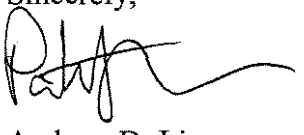
[13] *See* Letter from P. Goyal, Covad Communications Company to M. Dortch, FCC, WC Docket Nos. 04-313 and 01-338 (Nov. 24, 2004).

[14] *Id.*

for application to stand-alone loops. Given the total lack of evidence of use by IXCs of stand-alone UNE loops to bypass special access, the reduced potential that they could in any event use stand-alone loops to do so in contrast to EELs, the Commission should first seek comment on any such safeguards.

Sincerely,



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