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December 7, 2004

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

Attached for inclusion in the public record of the above-referenced dockets is a written *ex parte* presentation from Thomas J. Sugrue, T-Mobile USA, Inc., to Chairman Powell.

Sincerely,



Gil M. Strobel

Attachment

cc: Pamela Arluk
Matthew Brill
Scott Bergmann
Michelle Carey
Jeffrey Carlisle
Sam Feder
David Furth
Daniel Gonzalez
Russell Hanser
Linda Kinney
Evan Kwerel
Christopher Libertelli
Paul Margie
Jennifer Manner
Jeremy Miller
John Muleta
Thomas Navin
Barry Ohlson
Jessica Rosenworcel
Austin Schlick
John Stanley
Jeff Steinberg
Bryan Tramont
Sheryl Wilkerson



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The Honorable Michael K. Powell, Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

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

Dear Chairman Powell:

T-Mobile USA, Inc. (T-Mobile) has shown in its comments and other submissions in this proceeding that, in the absence of access to unbundled network elements (UNEs), Commercial Mobile Radio Service (CMRS) carriers are impaired in their ability to compete as substitutes for the traditional wireline local exchange offerings of incumbent local exchange carriers (LECs).¹ T-Mobile further has demonstrated that access to UNEs would reduce substantially entry barriers that currently impede its ability to compete for those customers.

It has been suggested that even if CMRS carriers are “impaired” in their ability to compete with incumbent LECs without access to UNEs, CMRS carriers do not need access to UNEs to compete with other mobile service providers. According to this line of argument, competition in offering customers mobile services has flourished over the past decade without any provider having access to UNEs and, consequently, there is simply no evidence on which to base an impairment finding for CMRS providers generally.

This contrived effort to limit the access of CMRS carriers to UNEs is based on a fundamental misunderstanding of the manner in which competition between CMRS carriers and wireline LECs is likely to develop. The inability of CMRS carriers to compete effectively with wireline offerings to date is the product of entry barriers that access to UNEs could significantly erode. CMRS products offer, *inter alia*, the same ability to originate and terminate calls within local geographic areas that incumbent wireline services offer. As the Commission observed in its recent *Cingular/AT&T*

¹ See T-Mobile Comments at 17-22 (Oct. 4, 2004); T-Mobile Reply Comments at 6-15 (Oct. 19, 2004); letter from Gil Strobel, Lawler, Metzger & Milkman, to Marlene Dortch, FCC (Nov. 8, 2004). (Unless otherwise indicated, all comments and *ex parte* presentations cited herein were filed in WC Docket No. 04-313.)

Wireless order, the primary reasons that consumers today consider these services complements, rather than substitutes for one another, concern the relative prices and service quality of each.² The *Ninth Wireless Competition Report* similarly confirmed this point, finding that only about 5-6% of CMRS subscribers had replaced traditional wireline local exchange service with wireless service.³

As T-Mobile demonstrated in its comments, including the expert testimony of Dr. Williams, the ability of CMRS carriers to replace their reliance on excessively priced special access links with access to more efficiently priced UNEs would contribute substantially to the elimination of those barriers to head-to-head CMRS/wireline competition.⁴ Further, the FCC need not be concerned about whether CMRS providers would use such access to compete for wireline customers. The well-documented competitiveness of the CMRS marketplace would inevitably force providers to pass through savings in input costs to consumers in the form of lower prices and improved service quality, which would make those services more attractive to existing wireline customers, particularly residential customers. In short, providing CMRS carriers access to UNEs would lead inexorably to increased competition between those wireless services and traditional wireline services.

Nothing in the D.C. Circuit's *USTA II* decision precludes the Commission from granting the relief requested by T-Mobile. The *USTA II* court observed that CMRS providers did not appear to require access to UNEs in order to compete successfully to serve CMRS customers.⁵ That finding, however, clearly says nothing about whether CMRS carriers are impaired without access to UNEs in seeking to compete to serve the customers of wireline local exchange carriers. A conclusion that CMRS carriers are not impaired in their ability to compete with wireline carriers to serve wireline customers because they are not impaired in competing with other CMRS carriers to serve wireless customers would not withstand even cursory scrutiny, as a matter of law, policy or economics. Moreover, T-Mobile has shown that access to UNEs is vital in order for CMRS carriers to compete to replace wireline service offerings. Further, although some CMRS carriers, particularly those affiliated with incumbent LECs, may not currently have plans to compete for wireline customers, the natural operation of a competitive

² See *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp., for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶¶ 239-240 (2004) (FCC 04-255).

³ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 04-111, Ninth Report, 19 FCC Rcd 20597, ¶ 212, n.575 (2004) (FCC 04-216) ("*Ninth Wireless Competition Report*").

⁴ T-Mobile Comments at 19-22 and attached Declaration of Michael A. Williams.

⁵ *USTA v. FCC*, 359 F.3d 554, 575-576 (D.C. Cir. 2004) (*USTA II*).

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marketplace will force them to respond to the pricing and service quality initiatives of T-Mobile and thereby make competing CMRS products closer substitutes for wireline products.

Finally, although we believe that the Commission has an ample record on which to grant the relief requested by T-Mobile, we recognize that the Commission has the discretion to limit its consideration in this phase of the proceeding to those issues that have been remanded by the *USTA II* decision. With respect to CMRS access to UNEs, the only issue remanded by the Court is whether CMRS providers are entitled to access to UNEs to offer CMRS services in competition with other CMRS providers. Consequently, if the Commission restricts its review to the remanded issues, it need not determine in this order whether CMRS carriers are impaired without access to UNEs in competing with the incumbent LECs' residential wireline local exchange offerings. Should the Commission elect to decide that issue in a future phase of this proceeding, at a minimum it should make clear in this order that the only issue it is resolving is the remanded issue of whether CMRS carriers may obtain access to UNEs to compete with each other. Furthermore, the Commission should commit publicly to addressing the issue of CMRS access to UNEs to compete with wireline offerings promptly and in any event no later than the end of the second quarter, 2005. This issue is critically important to the ability of CMRS carriers to fulfill the FCC's hope of robust wireless/wireline intermodal competition.

In accordance with the Commission's rules, this letter will be filed in the public record of the above-referenced proceedings.

Respectfully submitted,

/s/ Thomas J. Sugrue

Thomas J. Sugrue

Vice President, Government Affairs

cc: Commissioner Abernathy
Commissioner Adelstein
Commissioner Copps
Commissioner Martin