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December 7, 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:

In its recent reply comments in the above-referenced Triennial Review Remand proceeding, Verizon demonstrated that “fiber networks are highly scalable and that carriers generally channelize the signal riding over the fiber to serve various levels of demand, including demand for DS1s and DS3s, by individual customers.”¹ On November 12, 2004, AT&T filed an *ex parte* letter in this proceeding rehashing its oft-repeated claim that “deployment of loops and transport is generally uneconomic” at capacities of less than “2 DS3s for loops and 12 DS3s for transport.”² AT&T’s analysis is flawed at many levels, and its arguments are meritless.

AT&T fails to offer evidence of its actual deployment of fiber loops and transport and instead relies on a theoretical model of costs and revenues that yields results that are inconsistent with the factual record. Competitive LECs, including AT&T, have *already* deployed tens of thousands of known fiber loops. Where competitors have deployed such loops, there is obviously no impairment. And the proper starting point for determining where fiber can be deployed economically is to study the areas in which competitive fiber has in fact been deployed, rather than to begin with AT&T’s hypothetical “business cases,” which

¹ Reply Declaration of Robert F. Pilgrim ¶ 3 (attachment D to Reply Comments of Verizon), WC Docket Nos. 04-313 & 01-338 (filed October 19, 2004) (“Pilgrim Reply Declaration”).

² Ex parte letter from David L. Lawson, Sidley Austin Brown & Wood LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos 04-313 & 01-338, attachment at 1 (filed November 12, 2004) (“AT&T Nov. 12 Ex Parte”).

may or may not have ever resulted in the deployment of fiber. Regrettably, AT&T has consistently refused to provide data about the locations where it has deployed fiber loops and transport, leaving the FCC with no legitimate basis for accepting AT&T's arguments.³

Moreover, even on its own terms, AT&T's analysis is hopelessly flawed. No rational analysis of fiber deployment can consider a single route in isolation: competitors and incumbents alike deploy fiber in metropolitan areas using a ring architecture, and they then run lateral fiber routes off of those rings.⁴ The Commission's analysis of impairment must take into account the costs and revenues of a competitor's entire network in a given metropolitan area, which reflects the pattern of investment that new entrants into local markets actually make. By contrast, AT&T artificially focuses exclusively on the individual lateral routes and ignores everything else.⁵ By willfully disregarding the costs and revenues associated with the rest of the metropolitan fiber network, AT&T pursues an analysis that is untenable both legally and logically. New entrants make investment decisions and compete across a given metropolitan area, not simply with regard to an individual building or a particular two-or-three-block stretch of pavement, as AT&T seems to imagine.

Moreover, even AT&T's analysis of individual routes is misleading and unreliable. For example, AT&T devotes much of its *ex parte* to several purported reasons why it supposedly lacks access to incumbent LEC conduit. The first listed reason is that "ILECs have no incentive to make their conduit – and thus lower costs – available to rivals, especially for laterals to customer locations."⁶ But whatever incentives AT&T supposes incumbent LECs may have are irrelevant: incumbent LECs are *required* to make conduit available to competitors, and they regularly comply with that requirement. *See, e.g.*, 47 USC § 224(f)(1). Verizon alone has leased millions of linear feet of conduit to competitive LECs and continues to make conduit available at regulated rates.

Similarly mistaken is AT&T's complaint that incumbent LECs are hoarding spare conduit space by designating it as "reserved for future use."⁷ Verizon consistently makes spare conduit available to competitors on a nondiscriminatory basis, in accordance with ¶ 1170 of the *Local Competition Order*.⁸ Verizon does *not* reserve spare conduit for merely speculative

³ On a related note, AT&T's complaint that "the most 'congested' Bell conduits are exactly where competitors are most likely to need them – in downtown central business districts," *id.*, attachment at 3, ignores the fact that non-incumbent-LEC providers of fiber have already deployed massive amounts of fiber in precisely these areas, making alternative sources of supply a very real option for AT&T and other competitive LECs.

⁴ *See* Pilgrim Reply Declaration ¶¶ 4-5.

⁵ AT&T Nov. 12 Ex Parte, attachment at 5.

⁶ *Id.*, attachment at 1.

⁷ *Id.*, attachment at 1.

⁸ First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), modified on recon., 11 FCC Rcd 13042 (1996),

or potential future use, as AT&T implies; rather, Verizon's policy is not to designate conduit as "reserved" unless and until a fully engineered plan requiring the space has been approved and budgeted for, thus ensuring that the reserved capacity will be used quickly.

AT&T next complains, wrongly, that incumbents "leave their retired copper in existing conduits, filling up the available conduit space until such time as they may need capacity for their own purposes."⁹ Although Verizon does typically leave retired copper cable in place in order to protect the physical integrity of the conduit, Verizon considers the space that contains unused cable as spare and will, upon request, remove the cable in order to make the space available to a competitor just as it would for itself if Verizon required the space for its own use.

Nor is it true, as AT&T claims, that "when Bells construct new underground infrastructure, they typically install only a few conduits."¹⁰ Verizon often installs 12 ducts on major conduit runs. And AT&T's complaint that "much of the Bells' conduit is used for interoffice transport," is misleading.¹¹ Verizon does not maintain separate conduit for interoffice needs and local loop needs – the same conduit is used for both purposes and is made available to competitors as required by FCC rules. Furthermore, the replacement of copper cables with fiber has made it possible in many instances to increase interoffice transport capacity without building new conduit. Thus, most new conduit construction nowadays is used to provide local loops. The remainder of AT&T's points regarding conduit availability are similarly meritless and do not warrant individual responses.

More fundamentally, AT&T's filing is, for the most part, devoid of any specifics. AT&T fails to identify even a single instance in which it confronted any of the ostensible problems in practice. Such generalized objections do not survive critical scrutiny and cannot form the basis for a defensible finding of impairment. The simple truth remains that large amounts of existing conduit, from incumbent LEC, competitive LECs, and other utilities, can be – and is being – used by competitors to deploy fiber at much lower cost than would be needed to build new conduit in order to connect desired points.¹²

Consequently, AT&T's assertion that an incumbent LEC like Verizon "usually has pre-existing conduit . . . that allows it to provide services at lower incremental cost than their

vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

⁹ AT&T Nov. 12 Ex Parte, attachment at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² See Pilgrim Reply Declaration ¶¶ 12-14.

competitors” is false.¹³ Where incumbents have spare conduit available, it is available to competitors on nondiscriminatory terms. Where no existing conduit is available, the cost of constructing new conduit is substantially the same for incumbents as for competitors. And like competitive LECs, in order to reach customers on private property, incumbent LECs must convince the property owner to provide a path to serve the tenants located on the property. The Commission acknowledged in the *Triennial Review Order*¹⁴ “the barriers faced in deploying fiber loops . . . may be similar for both incumbent LECs and competitive LECs,”¹⁵ and AT&T has presented nothing in the record to support a contrary conclusion.

Nor does AT&T provide any facts to support the other flawed assumptions on which it bases its calculations. For example, AT&T continues to base its calculations on splice points that are about half a mile apart.¹⁶ Splices are added to cable to pick up customers. If all customers were spaced about half a mile apart around the network, then designing the network would be simple, and AT&T’s assumption would be reasonable. But that situation does not correspond to reality, and neither does AT&T’s assumption that splice points should be 2000 feet apart.¹⁷

Finally, AT&T continues to cling to the untenable view that a competitive LEC should be considered impaired anywhere that the specific LEC in question does not have “committed revenues” to ensure the profitability of a particular new facility. AT&T’s test could require the incumbent to provide facilities at TELRIC rates to all competitors in a particular location even if the incumbent has been displaced *completely* by competitors and no longer carries traffic to the location at all, so long as no one competitor has sufficient “committed revenue” to ensure profitability of the particular new facility. Neither the Telecommunications Act of 1996 nor common sense supports such a test that could lead to an impairment finding even after competition has advanced to the point where the incumbent LEC has been completely displaced by competitors, and when the revenue available at the location would justify one or more competitors building their own facilities. AT&T’s proposal is, therefore, flawed both legally and logically.

¹³ AT&T Nov. 12 Ex Parte, attachment at 6.

¹⁴ See Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*”), vacated in part and remanded, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA IP*”), cert. denied, *NARUC v. United States Telecom Ass’n*, 125 S. Ct. 313 (2004).

¹⁵ *Id.* ¶ 240 (“Both incumbent and competitive LECs must purchase fiber and the associated equipment, negotiate access to the necessary rights-of-way, obtain any necessary government permits, hire skilled labor, and manage their construction projects in order to deploy fiber loops. Moreover, by some estimates, competitive LECs enjoy advantages that incumbent LECs do not have, such as lower labor costs and superior back office systems”).

¹⁶ AT&T Nov. 12 Ex Parte, attachment at 5.

¹⁷ See Pilgrim Reply Declaration ¶ 5.

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

Sincerely,

A handwritten signature in black ink, appearing to be "Jeff Carlisle", written in a cursive style.

c: Jeff Carlisle
Michelle Carey
Tom Navin
Pam Arluk
Gail Cohen
Ian Dillner

Russ Hanser
Marcus Maher
Jeremy Miller
Carol Simpson
Tim Stelzig