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December 7, 2004

Ex Parte

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Ex Parte Presentation, *Unbundled Access to Network Elements*, WC
Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

I am writing to address the Bells' arguments that the Commission should extend its existing "use restriction" on loop-transport UNE combinations ("EELs") to stand-alone unbundled loops. Such an extension would be unlawful because there is no legal basis for the Commission to retain its existing use restrictions with respect to EELs, let alone extend them to individual UNEs. Moreover, even if the Commission were to decide that the existing EELs use restriction should be retained in any form, it would be clearly improper to extend that restriction to stand-alone UNE loops. Doing so would both preclude competitive carriers from obtaining UNE loops to provide many services for which impairment clearly exists and retard the deployment of alternative facilities-based metro networks. At the same time, there is simply no risk that a use restriction on standalone loops is necessary to prevent interexchange carriers ("IXCs") from "gaming" the system by converting special access circuits to UNE loops to provide only long distance services because IXCs never rely exclusively on special access in the form of standalone loops for dedicated access to long distance services.

1. In *USTA II*, the Court struck down the Commission's requirement that UNEs may only be used to provide "qualifying services."¹ The Court held that long distance services are indisputably "telecommunications services" within the meaning of § 251(d)(2) of the Communications Act and that carriers are expressly permitted use UNEs to provide such services

¹ *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 594 (D.C. Cir. 2004) ("*USTA II*") ("We vacate the Commission's distinction between qualifying and non-qualifying services.")

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to the extent that an element at issue otherwise meets the standards for unbundling.² Thus, the Court stated that, on remand, the Commission must *eliminate* its “service eligibility” criteria for EELs unless the Commission is able to make a finding of “non-impairment” for long distance services based on a service-specific inquiry.³

There is simply no basis in the record to conclude that there is lack of impairment with respect to loops (or loop-transport combinations) used to provide long distance services. AT&T and others have shown that competitive carriers are unable to self-provide high capacity loops (DS1s, dark fiber and up to 2 DS3s per location) even when they are able to use them to offer the *full range* of services – and thus earn the full range of revenues – that could be generated over the facility, *including* long distance services.⁴ These economic facts necessarily demonstrate that carriers are also impaired if the same facilities were used to provide *only* interexchange services. That is because the same economic considerations that lead to a finding of impairment with respect to the *full* range of services that could be offered over a facility necessarily impair carriers that use the same facility to provide only a single category of service, including interexchange service. Moreover, by forcing a competitive carrier to *split* its total demand into two pieces (one for UNE-loops and one for non-UNE-loops), its average cost per loop facility would only go up for both.⁵

This fundamental impairment analysis is not refuted by the alleged “fact” that long distance competition is “flourishing” even where IXCs are currently purchasing special access service. The record evidence shows that competition is, in fact, foundering, because competitive carriers that purchase special access are facing significant financial challenges. Numerous competitive carriers have been forced into bankruptcy or liquidated outright.⁶ The carriers facing financial challenges range from the so-called “Big 3” IXCs to the smallest niche carriers, and include the very carriers that the Bells have touted are thriving using special access.⁷ Thus, the extent to which these carriers purchase special access services is evidence that special access is the disease, not the cure.

Nor is it true that lack of impairment is established because IXCs traditionally used special access services to serve long distance customers. The Bells have only recently entered

² *Id.* at 592.

³ *Id.*

⁴ *See, e.g.*, AT&T Comments at 26-52, 138-39 & Fea-Giovanucci Dec. ¶¶ 64-65.

⁵ *Id.*, Fea-Giovanucci Dec. ¶¶ 24-36.; *see also* 11/18/04 Alpheus *et al.* Ex Parte at 2.

⁶ *Id.*, Selwyn Dec., Att. 2.

⁷ AT&T Reply at 72-74; *see also* MCI Reply at 110 (“[E]ven where carriers are relying on special access today . . . they are often not doing so profitably”).

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enterprise long distance markets (and still do not provide service to all segments of the market).⁸ At the same time, enterprise customers are typically served under multi-year term contracts.⁹ To the extent that a competitive carrier is providing long distance service to a customer under an existing contract, the Bell cannot “win” that customer’s long distance business until the contract expires. For these reasons, special access services purchased to serve these contractually bound customers – who were won at a time when the Bells had no ability and incentive to price squeeze and all long distance carriers were on an equal footing – clearly says nothing about a competitor’s ability to use special access to compete head-to-head against the Bells for long distance services when these contracts expire, or for new long distance business. Thus, even if the Commission were to (incorrectly) determine that competitors are not impaired in the provision of long distance services to customers under existing contracts, the radical changes in the long distance market – which now enable the Bells to offer long distance services in reliance on their enormous access cost advantages -- compel the Commission to permit competitive carriers to purchase UNEs to provide long distance services. At the very minimum, UNEs must be available to carriers when competing for new long distance customer contracts or at the time existing contracts expire.

Likewise, the mere fact that a competitive carrier may continue to purchase special access to serve local or new long distance customers does not demonstrate a lack of impairment. AT&T virtually never purchases special access to provide “stand-alone” local service to enterprise customers; rather, it provides these customers with bundles of local and long distance service. One of the principal reasons why AT&T is able win such customers, despite its access cost disadvantage, is that AT&T is still today able to offer an array of long distance services that the Bells do not yet have the full capability to provide (and have not yet established a reputation for services of the quality demanded by most enterprise customers).¹⁰ But as the Bells gain that

⁸ AT&T Comments, Benway *et al.* Dec. ¶ 65; MCI Reply at 111-12; 11/11/04 Loop-Transport Coalition Ex Parte, Att. at 7; *see also* Verizon, Bruno Dec. 16 (“Verizon could not compete seriously for such [enterprise] business until it has received authority to provide long distance services in *all* of its service territories, which occurred just last year.”) (emphasis in original).

⁹ AT&T Comments, Benway *et al.* Dec. ¶ 25; *Triennial Review Order*, 18 FCC Rcd. 16978, ¶ 128 (2004).

¹⁰ Relatedly, in cases where customers desire service to multiple geographic locations throughout the country (or the world), an individual Bell may lack a significant access charge advantage because it too must purchase special access from the other Bells to meet that customer’s needs. *Cf.* AT&T Reply at 79-80 (collecting Bell statements that they are targeting customers with substantial in-region business – precisely where an individual Bell can leverage its access charge advantage). However, as AT&T showed, the Bells are increasingly convincing such customers to split their business among multiple providers. AT&T Reply at 71 & Benway-Leshner-Dionne Reply Dec. ¶¶ 7-10.

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capability, they will be able to offer enterprise customers the same bundled offerings as IXC's can today.

2. But even if the Commission were, contrary to the factual record, to find that long distance carriers are not impaired without access to UNEs and readopt some form of use restrictions for EELs, it should certainly not apply them to stand-alone loops. Doing so would clearly "disqualify" the use of UNEs for "local" services for which competition is indisputably not "flourishing." For example, Covad has shown that application of the Commission's existing use restrictions would preclude carriers from purchasing UNE loops to provide certain xDSL transport services.¹¹ Similarly, Alpheus has shown that vast majority of its private line data and exchange access services – which are indisputably local services – would not satisfy the Commission's existing EELs eligibility criteria if applied to stand-alone loops.¹²

There is absolutely nothing in *USTA II* that even remotely requires the Commission to extend its EELs use restrictions to stand-alone loops. However, even if the Commission believed that *USTA II* requires it to consider such an extension, the Commission clearly has a factual and legal basis upon which to *decline* to do so under these circumstances. Where application of use restrictions designed to prevent loops being used solely to provide long distance services would, in fact, *also* prevent carriers from using UNE loops to provide services for which impairment clearly exists, *USTA II* expressly provides that the Commission may "balance [these] two legitimate but conflicting goals" – *i.e.*, "prevention of 'gaming' by CLECs seeking to offer services for which they are not impaired, and the preservation of unbundled access for CLECs seeking to offer services for which they are impaired."¹³ This is particularly true given that the costs of complying with the existing use restrictions are substantial¹⁴ and that the Bells have come forward with *no* evidence that competitive carriers have been converting special access circuits to UNE loops to provide only long distance services.¹⁵ Indeed it would be impossible for Bells to do so because IXC's never rely exclusively on special access in the form of standalone loops for dedicated access to long distance services. At a minimum, putting aside the need for interoffice transport within the incumbent network, an entrance facility is always required to connect the loop component of special access to the IXC's point of presence. Thus, applying use restrictions to stand-alone loops in these circumstances would "be a *vastly over-inclusive*

¹¹ 11/19/04 Covad Ex Parte at 2.

¹² 11/18/04 Alpheus *et al.* Ex Parte at 4.

¹³ *USTA II*, 359 F.3d at 592-93.

¹⁴ Loop-Transport Coalition Comments at 120-21.

¹⁵ 11/18/04 Alpheus *et al.* Ex Parte at 2. In fact, the evidence of record is that there have been no "conversions" of stand-alone loops to provide only long distance services. *Id.* at 3.

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solution in search of a very narrow, speculative problem,”¹⁶ or more accurately, a problem that does not exist.

The Commission may – and should – also reject application of existing use restrictions to stand-alone loops under its “at a minimum” authority in § 251(d).¹⁷ Requiring competitive carriers to satisfy use restrictions when purchasing stand-alone loops is clearly contrary to the Commission’s core goal of promoting facilities-based competition.¹⁸ By definition, before a carrier can lease a stand-alone local loop, it must already have made a significant investment in network local facilities. Quite obviously, to the extent that competitive carriers are forced to purchase stand-alone loops as above-cost special access services, their incentive to extend their local networks is clearly diminished. This disincentive is further compounded by the fact that the loop component of special access service is the element that is least susceptible to competitive pricing pressure.

3. Finally, even if the Commission were to retain some form of use restrictions on EELs, it must substantially modify the existing service eligibility requirements. As noted above, and as explained in detail in AT&T’s opening comments,¹⁹ the existing service eligibility criteria are overbroad in three important respects, and as a result they prevent competitive carriers from leasing EELs to provide telecommunications services that indisputably compete directly with those offered by incumbent LECs. First, the requirement that a competitive carrier have a minimum number of “interconnection trunks” in a LATA and provide service using a Class 5 switch prevents it from obtaining EELs to provide local private line services, because local private line services directly connect customer locations, and thus do not require traffic either be switched or exchanged between the competitive carrier and the ILEC.

Second, the existing service eligibility criteria even prevent competitive carriers from obtaining EELs to provide many types of local voice services. For example, AT&T offers a local voice service to enterprise customers using its legacy interexchange switches. These “Digital Link” services are indisputably local in nature but they are not necessarily served by a “§ 251(c)(6) collocation,” and they do not typically include a 911 capability because of the technical limitations of those switches. The Commission’s 911 requirement also effectively

¹⁶ *Triennial Review Order* ¶ 592 n.1824 (emphasis added).

¹⁷ As the D.C. Circuit court expressly “assumed” in *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002), § 251(d)’s “at a minimum” clause authorizes rules that require unbundling even in conditions where impairment does not exist if there is good cause for the requirement, such as furthering a core statutory policy.

¹⁸ See *Triennial Review Order* ¶¶ 22, 70, 114, 200, 242, 448; *Local Competition Order*, 11 FCC Rcd. 15499, ¶¶ 172, 325, 635, 685 (1996).

¹⁹ AT&T at 142-45.

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requires a competitive carrier to provide local *outbound* voice services. This in turn excludes competitors' ability to use UNEs to provide competitive local *inbound* voice services, which are typically provisioned without 911 capability.

Third, the Commission's current restrictions deny EELs to carriers that would provide wholesale local access to carriers that offer local service and data services. Wholesale access providers typically do not have local numbers assigned to their circuits and do not provide 911 functionality. Moreover, it is unlikely that competitive carriers would provide such wholesale services using local voice switches or local interconnection trunks, nor would they need to be certificated to provide local voice service.

Fourth, the existing EELs restrictions prohibit competitive carriers from purchasing UNEs to provide telecommunications services that are used to deliver advanced data services such as Internet access and VoIP. Local data services often do not require local interconnection trunks or § 251(c)(6) collocations. Continued application of use restrictions thus retards the deployment of the very services that the Commission is charged with fostering under § 706 of the Telecommunication Act.

To the extent the Commission (unlawfully) seeks to retain its service eligibility criteria, it must at least adopt the more narrowly tailored rules AT&T identified in its initial comments.²⁰ AT&T's alternative criteria are easily administered and would still prevent IXCs from using EELs where they have not sought to build out a local network. At the same time, AT&T's criteria preserve carriers' incentive to build out their local networks where feasible.

Very truly yours,

/s/ C. Frederick Beckner III
Counsel for AT&T Corp.

²⁰ *Id.* at 145-49.