



December 8, 2004

VIA ELECTRONIC FILING

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

Re: 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:

In recent meetings, XO Communications, Inc. (“XO”) has been asked about proposals to extend the EEL eligibility criteria to stand alone DS1 and DS3 UNE loops. In response to these requests, XO reviewed the proposals submitted by Covad Communications and Qwest Communications International Inc.,¹ and hereby submits the following letter for the Commission’s consideration.

XO opposes the imposition of any use restrictions on stand alone UNEs. There is no record evidence of a special access conversion “problem” with respect to stand alone loops. Unbundled DS1 and DS3 loops have been available pursuant to the FCC’s rules since 1996. During that time, the FCC has not imposed any use restrictions on stand alone UNE loops, and has prohibited incumbent LECs from imposing any “limitations, restrictions or requirements” on requests for unbundled elements.² Throughout this eight year period, requesting telecommunications carriers have been free to convert special access channel terminations to

¹ Letter from Praveen Goyal, Covad Communications to Marlene H. Dortch, WCB Docket Nos. 04-313 and 01-338, November 19, 2004 (“Covad et al. Ex Parte”); Letter from Praveen Goyal, Covad Communications, to Marlene H. Dortch, WCB Docket Nos. 04-313 and 01-338, November 24, 2004 (“Covad Ex Parte”); Letter from Cronan O’Connell, Qwest Communications International Inc., to Marlene H. Dortch, WCB Docket Nos. 04-313 and 01-338, December 7, 2004 (“Qwest Ex Parte”).

² 47 C.F.R. § 51.309(a).

UNEs, yet there is no evidence in the record that carriers have done so in any significant numbers. If carriers did not convert such circuits to UNEs in the past, there is no reason to expect that such conversions will suddenly occur in massive numbers. The purported “problem” of conversion to stand alone UNEs, therefore, is not an actual case or controversy before the Commission, but rather a request for protection against an unproven possible future activity. The imposition of a highly intrusive regulatory restriction based solely on a perceived future occurrence runs counter to the Commission’s deregulatory approach for competitive service providers and is unjustified on this record. Accordingly, the Commission should reject this problem as speculation that can be dealt with later, if a “problem” should develop in the future.

XO further agrees with Covad et al. that the proposed “problem” rests on a shaky legal foundation.³ In *USTA II*, the D.C. Circuit criticized the Commission’s use of a “qualifying services” restriction to limit access to EELs.⁴ The court admonished the Commission that it could not exclude “non-qualifying” services from Section 251(c)(3)’s definition of “telecommunications services.”⁵ The touchstone of any limitations on network elements must be determinations of impairment or non-impairment, applied to properly defined markets. Thus, any party seeking to exclude specific services from the unbundling obligation bears the burden to show that requesting telecommunications carriers are not impaired in the appropriate market, be it long distance services, CMRS services or otherwise. The Commission cannot reimpose a “qualifying services” test through the back door channel of a restriction on conversions to stand alone UNEs.

Even if the FCC were inclined to proceed with some restriction on stand alone UNEs, XO agrees with Covad that the EEL eligibility restrictions are ill suited to this purpose. The Commission has long considered data telecommunications services to be an eligible use of stand alone unbundled network elements. Indeed, in the *Triennial Review Order*, the Commission made clear that “qualifying services” for purposes of competitor access to network elements included “local exchange services, such as POTS and *local data service, and access services, such as xDSL and high-capacity circuits.*”⁶ Application of the EEL eligibility criteria to stand alone UNEs would impede the use of UNEs for data telecommunications services, because the restrictions were not drafted with data telecommunications services in mind.⁷ These restrictions should not be used to bar data telecommunications services that have traditionally been offered in competition with LEC services, including but not limited to intraLATA private lines, SONET and internet access services.

XO believes that the alternative eligibility criteria presented in Covad’s ex parte of November 24, 2004 would be a workable alternative were the Commission inclined to adopt use restrictions. As XO understands Covad’s proposal, a requesting telecommunications carrier could convert tariffed services to stand alone DS1 and DS3 loops if it satisfied *either* the EEL

³ *Covad et al. Ex Parte* at 5.

⁴ *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 591-92 (D.C. Cir. 2004) (*USTA II*).

⁵ *Id.*

⁶ *TRO*, ¶ 140 (emphasis added, footnotes omitted).

⁷ As many commenters already have pointed out, the requirements that the carrier assign a local telephone number to the circuit and provide 911 capability have no application in the data telecommunications context.

eligibility criteria *or* Covad's data service test.⁸ This approach is much easier to administer than other alternatives and is a simple and direct way to ensure that competition in data telecommunications services is not impeded by any conversion restriction. Therefore, to the extent the Commission finds it necessary to adopt some restriction on stand alone UNEs, it should include Covad's proposed language permitting the use of the UNE to provide a data telecommunications service.

Respectfully submitted,

/s/ Chris McKee

Chris McKee
Executive Director of Legal and Regulatory Affairs

⁸ *Covad Ex Parte* at 2.