

December 8, 2004

VIA ELECTRONIC FILING

The Honorable Michael K. Powell, Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20556

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 Chairman Powell:

The undersigned strongly urge you not to adopt any impairment standard of the type forwarded by Qwest and ACS of Anchorage (“ACS”).¹ The legal and policy failings of these proposals make it evident that these “tests”—or anything like them—have no place in the Commission’s effort to respond to the *USTA II* remand. In short, the proposals are contrary to the statutory impairment standard, run afoul of unchallenged findings in the *Triennial Review Order*, and find no basis in the record. Moreover, to the extent that these “tests” attempt to respond to particular factual situations in a handful of locations, other procedural vehicles are available (and have been used) to assess whether any specific regulatory relief is warranted.

First and foremost, the Qwest and ACS proposals are not properly before the Commission in this proceeding. Qwest and ACS seek relief from all unbundling requirements, even beyond those that were the subject of appeal to and remand by the *USTA II* court.² These retail market share tests would provide immediate relief from all unbundling obligations, including DS-0 loops, even though the *USTA II* court did not consider or address the Commission’s nationwide finding of impairment for this element.³ Thus, the Commission lacks authority to change its rules in this manner, as sufficient notice of its intent to make such a change has not been provided.⁴

¹ Letter from Cronan O’Connell, Vice President-Federal Regulatory Affairs, Qwest Communications, to Marlene Dortch, Secretary, FCC, WCB Docket Nos. 01-338, 04-313 (Dec. 7, 2004); Letter from Karen Brinkman, Latham & Watkins, Counsel to ACS, to Marlene Dortch, Secretary, FCC, WCB Docket Nos. 01-338, 04-313 (Dec. 3, 2004).

² In the *Order and Notice of Proposed Rulemaking* released on August 20, 2004, the Commission expressly limited itself to changes “to the Commission’s unbundling framework that are necessary, *given the guidance of the USTA II court.*” *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 19 FCC Rcd. 16,783, 16,788 ¶ 9 (2004) (emphasis added).

³ See *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

⁴ See *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (describing notice requirement of the Administrative Procedure Act).

It should also be noted that many other (proper) procedural vehicles are available to consider if and when extraordinary relief from regulatory requirements are appropriate. For example, Qwest itself initiated a forbearance proceeding to address the very issues it now claims should be addressed here.⁵ To the extent that the Commission seeks a more generalized procedure for review, then that matter can only be appropriately considered through a further notice of proposed rulemaking.

As to the proposals themselves, there are evident problems that underscore the need for a complete opportunity for review before any action is merited. For example, the cornerstone of both the Qwest and ACS tests is an assessment of retail market share. As the FCC previously concluded in the *Triennial Review Order*, inclusion of retail competition is circular where the competition is based largely on UNEs. The Commission concluded that “section 251(d)(2) requires us to ask whether requesting carriers are ‘impaired,’ not whether certain thresholds of retail competition have been met.”⁶ The Commission further specified, “In many instances, retail competition depends on the use of UNEs and would decrease or disappear without those UNEs; thus, a standard that takes away UNEs when a retail competition threshold has been met could be circular.”⁷ Indeed, reliance on market share would run counter to clear Commission precedent to the contrary, that market share (whether high or low) has never been an essential determinant of competition or market power.⁸ There is no basis in the record for reversing this conclusion—the Qwest and ACS “tests” ignore this finding—and doing so would be arbitrary and capricious.⁹

Moreover, neither Qwest nor ACS has provided evidence in the record of this proceeding to show that the sources of DS-0 loop impairment found in the first *Triennial Review Order* are mitigated as retail market share—particularly UNE-based retail market share—increases. For example, the high costs of self-provisioning loops and first-mover advantages (like exclusive incumbent access to the customer base and rights-of-way as preferential terms and minimal costs) are not diminished with retail market share acquired through access to UNEs.¹⁰ Without a clear explanation of the nexus between retail market share and diminished impairment, any change to the Commission’s DS-0 loop rules would be arbitrary and capricious. Likewise, neither Qwest nor ACS considers other sources of impairment, other than the presence of potential alternate facilities. These other sources of impairment (such as building access and

⁵ Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160 (c) in the Omaha MSA, WCB Docket No. 04-223 (filed June 21, 2004).

⁶ *TRO* at ¶ 114.

⁷ *Id.*

⁸ See, e.g., *WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) (citing *Motion of AT&T Corp to be Declared Non-Dominant for International Service*, 11 FCC Rcd 17,963, 17,976 (1996)).

⁹ Not only is the reliance on retail market share itself fatal, but also the Qwest proposal to aggregate CLEC market share to trigger non-impairment for the entire market is similarly impermissible. Even assuming *arguendo* that retail market share provided any indication of wholesale market conditions (which it does not), the combined retail market share would not be probative as to the individual impairment facing any individual competitor. This aggregated approach is also problematic for Qwest’s “competitive facilities” test, which also suffers from the same defects as the “distribution facilities prong” of the ACS test. See Letter from Tina M. Pidgeon, Vice President – Federal Regulatory Affairs, GCI, to Marlene Dortch, Secretary, FCC, WCB Docket Nos. 01-338, 04-313 (Dec. 7, 2004) at 2-3.

¹⁰ See *TRO* at ¶¶ 237-40.

rights-of-way) are significant,¹¹ and cannot be ignored consistent with the Commission's prior orders without being arbitrary and capricious.

The definition of the "market" under both proposals is also unsustainable. Neither ACS nor Qwest explains how the Commission can treat areas in which a CLEC may have its own DS-0 loops (or any other element) as part of the same geographic market as an area in which a CLEC does not have its own facilities. The Commission has consistently stated that geographic markets in telecommunications are point to point, but that it would aggregate markets with similar characteristics.¹² A geographic area in which there are multiple loop facilities does not share the same characteristics as a geographic area in which the ILEC has the only loop facilities. It would be arbitrary and capricious to conflate these geographic markets, because there is no basis in the record for concluding that these markets have similar characteristics. Moreover, this "entire market" approach also directly contradicts the core distinctions among the relevant markets for individual network elements. There is no record upon which the Commission could justify this fundamental change in course in its impairment analysis. Moreover, Qwest's proposed "test" unlawfully delegates to the ILEC critical geographic and product market issues. Those determinations must be made by the FCC, and must be subject to full challenge.

Given the lack of notice, record, and legal basis for either the Qwest or ACS proposals, it is clear that no action can be taken to implement either as part of this proceeding and that other appropriate procedural vehicles remain—including further notice—to develop the necessary record to address any of the complex matters they raise.

Sincerely,

/s/

Tina M. Pidgeon
Vice President, Federal Regulatory Affairs

/s/

Jonathan Lee
Sr. Vice President, Regulatory Affairs
CompTel/ASCENT

cc. The Honorable Kathleen Q. Abernathy
The Honorable Jonathan S. Adelstein
The Honorable Michael J. Copps
The Honorable Kevin J. Martin

¹¹ *Id.* at ¶¶ 205, 305, 320.

¹² *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Second Report and Order*, 12 FCC Rcd 15,756, 15,793 (¶ 64) (1997).