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December 8, 2004

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
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:

Today, Ivan Seidenberg, Tom Tauke, Susanne Guyer, Virginia Ruesterholz and Mike Glover of Verizon met with Chairman Michael Powell, Legal Advisors Chris Libertelli and Bryan Tramont, Jeff Carlisle of the Wireline Competition Bureau and Austin Schlick of the General Counsel's office to discuss the above proceeding. All issues discussed were consistent with Verizon's position on the record. Additionally, the attachment was provided to Chairman Powell is being submitted for placement on the record. Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Ann D. Berkowitz".

Attachment

cc: Chairman Powell
Commissioner Abernathy
Commissioner Adelstein
Commissioner Copps
Commissioner Martin
Bryan Tramont
Chris Libertelli
Jeff Carlisle
Austin Schlick
Matt Brill
Scott Bergmann
Dan Gonzalez
Jessica Rosenworcel
Michelle Carey
Pam Arluk
Tom Navin
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December 8, 2004

Ex Parte

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W., TW-B204
Washington, D.C. 20554

Re: Unbundled Access to Network Elements, WC Docket No. 04-313 and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338

Dear Chairman Powell:

Dear Chairman Powell:

One of the success stories for the Commission in recent years has been its pro-competitive deregulation of special access services. The gradual deregulation of special access services has helped to nourish a growing, facilities-based competitive market for high-capacity services, as well as a viable wholesale business at competitive rates.

Retail competition has advanced to such an extent that Verizon is primarily a wholesale provider in this market. As much as 80 percent of Verizon's special-access revenues comes from sales to other carriers, rather than directly to end-user business customers. This is true for Verizon's sales of special access overall and for its sales of DS1s and DS3s in particular — roughly 85 percent of Verizon's revenues for DS1s and DS3s comes from sales to other carriers. As a result of this competition, Verizon's special access prices have fallen by 20 percent annually since 2001.

Imposing broad unbundling requirements will undermine the continued development of facilities-based competition for high-capacity services and the viability of the wholesale market. It would also foster increased dependence by CLECs on below-cost TELRIC rates. Indeed, that was precisely the effect of the Commission's prior decisions adopting UNE rules for mass-market voice facilities. Any unbundling requirements the Commission does adopt, therefore, should be narrowly tailored and adhere to the following three principles.

- Any trigger for finding impairment and requiring unbundling should be objective, administrable, and consistent with binding judicial precedent.
- Any unbundling obligation should be crafted to avoid perpetuating indefinite reliance on UNEs.
- Any unbundling obligation cannot permit conversion of existing special access services to UNEs and should include meaningful eligibility requirements for new UNEs.

Impairment Triggers Must Be Objective, Administrable, and Consistent with Precedent.

High-Capacity Loops. A rule that would require unbundling of high-capacity loops on a route-by-route, building-by-building basis unless competitors are already serving that building using facilities deployed by a carrier other than the incumbent is precluded by *USTA II* and other decisions.

Instead, the Commission, at a minimum, should adopt a rule eliminating unbundling of high-capacity loops in wire centers with more than 5,000 business lines, as well as for buildings outside those wire centers that are served by non-ILEC fiber. About 15 percent of Verizon's total wire center locations with special access revenues have more than 5,000 business lines, and those wire centers are where CLECs have targeted their deployment and where the majority of business customers are located. In addition, the evidence demonstrates that, where CLECs have deployed fiber to a building, they can channelize that fiber to provide service at the DS1 and DS3 levels, either for their own use or on a wholesale basis. As explained below, this test would be objective, administrable, and consistent with precedent, while a route- and building-specific test requiring the presence of a wholesaler would not.

First, any lawful impairment test must focus on the "ability" of competitors to compete without UNEs, not on whether actual competition already is occurring without UNEs. That is exactly what the 1996 Act says. *See* 47 U.S.C. § 251(d)(2). Moreover, it is what the Supreme Court and D.C. Circuit have repeatedly confirmed. The dispositive questions are whether "competition is *possible*" and whether a particular element is "*unsuitable* for competitive supply" — not whether competition is *occurring* and whether an element is *being* competitively supplied. *USTA v. FCC*, 359 F.3d 554, 575 (D.C. Cir. 2004) ("*USTA II*") (emphasis added); *USTA I*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA P*") (emphasis added); *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999). The Commission itself has expressly recognized this, stating that there should be no unbundling where evidence demonstrates "the *potential* ability of competitive LECs" to compete without UNEs notwithstanding the absence of "*actual* competitive facilities." *Triennial Review Order* ¶ 506. Any test that finds "no impairment" only where competition is actually occurring, therefore, could not be sustained on review.

Second, the D.C. Circuit also expressly rejected the Commission's previous reliance on route-specific tests, holding that the Commission cannot "simply ignore facilities deployment along similar routes when assessing impairment," and cannot "treat competition on one route as *irrelevant* to the existence of impairment on the other." *USTA II*, 359 F.3d at 575. At a

minimum, therefore, the Commission should adopt an objective trigger for high-capacity loops that recognizes that competitors are providing high capacity facilities today to buildings in major urban centers and office parks — the areas where competitive deployment is most extensive.

Third, the Commission cannot limit its impairment inquiry for high-capacity loops to the question whether a *wholesaler* serves a particular building. The Supreme Court and D.C. Circuit have repeatedly admonished the Commission for artificially limiting the types of non-UNE competition that will count for purposes of assessing impairment. *See Iowa Utils. Bd.*, 525 U.S. at 389; *USTA I*, 290 F.3d at 429; *USTA II*, 359 F.3d at 577. Indeed, the Commission itself has recognized that “an analysis that focused exclusively on the wholesale market would fail to give weight to the possibility or actuality of self-provisioning,” let alone other methods of competing. *Triennial Review Order* ¶ 110. Such an exclusive focus on wholesalers, moreover, would conflict with basic antitrust principles. *See, e.g.*, 2A Phillip E. Areeda, *et al.*, *Antitrust Law* ¶ 423, at 81-82 (2002). Indeed, a CLEC’s decision whether to act as a wholesaler is not linked in *any* degree to “natural monopoly.” *USTA I*, 290 F.3d at 427. Finally, the focus on alternative wholesalers misconceives the purpose of the 1996 Act, which is to benefit consumers by opening markets to competition, in whatever form. It is not to benefit specific competitors, much less to ensure that individual competitors have a choice of wholesale suppliers.

Fourth, any impairment test should turn on objective, easily verifiable information, not information that is exclusively within the possession of CLECs — such as whether a competitor is acting as a wholesaler for or has self-provided facilities to a particular building. Indeed, it would be arbitrary and capricious to require incumbents, to obtain a no impairment finding, to prove that a competitor is actually offering wholesale service, has deployed facilities to serve a building, or is serving a certain number of business lines in a particular area, as that information is in competitors’ hands. *See Atlanta College of Medical & Dental Careers, Inc. v. Riley*, 987 F.2d 821, 830-31 (D.C. Cir. 1993). Such a requirement, moreover, would impermissibly place the burden on incumbents to prove the absence of impairment, when the Supreme Court and the D.C. Circuit have repeatedly made clear that unbundling cannot be ordered without a finding of impairment based on substantial evidence. *See, e.g.*, *USTA II*, 359 F.3d at 582.

Although some might contend that CLECs will have the incentive to publicize the specific buildings where they act as a wholesaler or have self-provided facilities — because that will preclude UNE competition to such buildings — CLECs have repeatedly proven that they will not reveal that information. In the state proceedings, CLECs refused to come forward with information on their networks and wholesale operations. *See generally* Walker Decl. For example, AT&T denied that it provided wholesale high-capacity loops — contradicting its statements to the SEC and the testimony of CLECs that purchase such services from AT&T. *See id.* ¶ 22. Similarly, no CLEC submitted maps (or other data) here showing where they are competing using their own facilities, third-party facilities, or ILEC special access, or where they are enabling other competitors to offer service using their facilities. And despite claims of an inability to offer wholesale service, where Verizon has sought to provide out-of-region service in part using facilities obtained from other carriers, it has received bids from numerous CLECs offering wholesale services. *See* Verizon Comments at 40-41; Cuddy Decl. ¶¶ 4-8; Verizon Reply at 51; Cuddy Reply Decl. ¶¶ 3-6.

Dedicated Transport. A route-by-route test for transport — even if based on general characteristics of wire centers — would be unlawful for much the same reasons as a route- and building-specific test for high-capacity loops. A route-by-route test that uses ILEC wire centers as the end points of the routes ignores the manner in which CLECs deploy transport. Rather than recreating routes between ILEC wire centers, they route the traffic first to a centralized point of aggregation. And the D.C. Circuit has held that “[a]ny process of inferring impairment (or its absence) from levels of deployment depends on a sensible definition of the markets in which deployment” occurs. *USTA II*, 359 F.3d at 574. For this reason, any impairment test for transport should be “one-ended.” Where a wire center satisfies appropriate density thresholds, the Commission should not require unbundling into or out of that wire center.

Unbundling Obligations Should Avoid Perpetuating Indefinite Reliance on UNEs.

As explained above, broad unbundling rules will encourage increasing CLEC dependence on TELRIC-priced elements — as happened in the mass market — and will undermine existing facilities-based competition in and a competitive wholesale market for high-capacity services. The Commission, therefore, should not permit CLECs to obtain UNE DS1 loops indefinitely or in unlimited quantities. Instead, any unbundling obligation imposed should be narrowly tailored to be consistent with the Congress’s goal in the 1996 Act of developing facilities-based competition.

First, in any areas where the Commission finds that there is no impairment, it may establish a transition mechanism to give carriers time and incentive to move from relying on UNEs to other options, whether their own facilities, third-party facilities or ILEC special access. During that transition, the Commission would have the authority to include transitional price caps or other measures to provide all carriers with incentives to move toward commercially negotiated market-based price levels for access to ILEC high capacity facilities. The D.C. Circuit and other courts of appeals have repeatedly emphasized that the Commission must be accorded substantial leeway in crafting transitional mechanisms. *See, e.g., Bachow Communications, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001); *Community Television, Inc. v. FCC*, 216 F.3d 1133 (D.C. Cir. 2000); *PSWF Corp. v. FCC*, 108 F.3d 354, 358 (D.C. Cir. 1997). Indeed, the Commission itself has explained that, where an element no longer must be unbundled under § 251, that the Commission has authority under § 201 to establish requirements, including rates, for the transitional period. *See Triennial Review Order* ¶ 267 (“inherent in the Commission’s authority to establish transitional rules is its authority to establish transitional rates”).

Second, where the Commission does find impairment, the Commission should find that a CLEC that obtains a high-capacity UNE loop should be limited to serving that location using UNEs for a period of one year. The evidence in the record demonstrates that competing carriers are providing DS1 and DS3 service to many customers without using UNEs, and that many of their customers purchase only a single DS1, demonstrating that such competition is possible.¹

¹ *See* Ex Parte Letter from Thomas Jones, Willkie, Farr & Gallagher (counsel for Time Warner Telecom), to Marlene Dortch, FCC, CC Docket Nos. 01-338 *et al.*, at 1-2 & Taylor-Boto Decl. at 3 (Dec. 1, 2004).

CLECs' primary response is to claim that the economics of deployment require them to reach a critical mass of demand. A one year limitation provides CLECs with the ability to serve their initial customers and to market additional services, before it reaches the "make-or-buy" decision point, at which it would self-deploy a facility or lease the necessary capacity at market rates from the ILEC or another carrier.²

Third, the Commission should find that a CLECs can obtain no more than 6 DS1 loops to a particular building. This limit is just below the point at which deployment of facilities is economic, to provide added incentive for CLECs to switch from UNEs to facilities-based competition as soon as possible. Using the DS3 UNE loop rate as a proxy for the cost of an efficient competitor to deploy a DS3 loop, self-deployment is economic when the total monthly rate for leasing DS1 UNE loops exceeds the monthly DS3 UNE rate. In Verizon's region, that point occurs, both on average and at the median, at 8 DS1 UNE loops, though it can occur at as few as 2 DS1 loops.³ A limit of 6 DS1 loops to a particular building, therefore, ensures that, in the majority of cases, self-deployment occurs as soon as CLECs reasonably anticipate obtaining enough customers at a particular location to warrant self-deployed facilities. At that point, the CLEC faces a "make-or-buy" decision and can either continue to use the ILEC's facilities, by purchasing DS1s as special access or moving to a DS3 to obtain a lower effective rate; can switch to a third-party's facilities; or can build its own facilities.

To ensure that carriers do in fact transition to other alternatives, the Commission should provide that, when these limits are exceeded, pricing for all of a CLECs' UNE loops to a building will shift to special access pricing.

No Conversions of Existing Special Access Services and Application of Meaningful Eligibility Requirements for New UNEs.

As Verizon has demonstrated elsewhere, the Commission must consider the availability of special access in its impairment analysis and, moreover, must account for the fact that carriers are successfully providing DS1 and DS3 high-capacity services to business customers of all shapes and sizes using special access.⁴ Indeed, this is why about 85 percent of Verizon's special access revenues for DS1s and DS3s comes from sales to other carriers.

At a minimum, however, the Commission cannot permit competitors to convert to UNEs existing DS1 and DS3 special access facilities that they already are using successfully to serve customers. Indeed, the D.C. Circuit held that, "[w]here competitors have access to necessary

² See, e.g., ALTS Comments at 71-72 ("Based on carriers' experience, a 12-month transition for these customer locations is reasonable."); Loop & Transport Comments at 107 ("self-provisioning loops takes . . . 3-6 months"); *id.* at 112 ("construction of a lateral typically takes 10-12 months").

³ See Ex Parte Letter from Edwin J. Shimizu, Director – Federal Regulatory Affairs, Verizon, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, *et al.* (Dec. 8, 2004).

⁴ See, e.g., Verizon Comments at 54-65; Verses/Lataille/Jordan/Reney Decl. ¶¶ 52-59; Verizon Reply at 81-100; Lataille/Jordan/Slattery Reply Decl. ¶¶ 11-32.

inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling.” *USTA II*, 359 F.3d at 576. Instead, evidence demonstrating that carriers are successfully competing using special access “precludes a finding” that such carriers “are ‘impaired’ by lack of access to the element under § 251(c)(3).” *Id.* at 593. As the D.C. Circuit further recognized, this means that CLECs currently competing using special access are “barred from access to [those facilities] as unbundled elements.” *Id.*

Nor could the Commission’s unbundling requirements, consistent with binding judicial rulings, apply without regard to the service a competitor is providing. The D.C. Circuit has expressly held that the Commission cannot make impairment findings “detached from any specific markets or market categories,” *USTA I*, 290 F.2d at 426, and instead must make “impairment findings [on a] service-by-service” basis, *Competitive Telecomms. Ass’n v. FCC*, 309 F.3d 8, 12, 14. For these reasons, as Verizon has demonstrated, the Commission cannot require unbundling of high-capacity loops to serve large enterprise customers or for long-distance or wireless carriers. Nor can it permit CLECs to purchase UNEs on behalf of long-distance or wireless carriers. As to each market segment, the existence of widespread, non-UNE competition today precludes a finding of impairment.⁵

In particular, in order to preclude the use of unbundled elements for the long distance market — where there is no basis for an impairment finding — the Commission should strengthen the eligibility criteria it had previously adopted and expand those criteria to apply to stand-alone loops and transport, as well as combinations of UNEs. The Commission accordingly should do more than merely reinstate some version of the eligibility criteria adopted in the *Triennial Review Order*, which had the very different purpose of merely ensuring that competing carriers were *capable* of providing local service. Indeed, under those criteria, a carrier could use a circuit entirely for long-distance service and still qualify to obtain that circuit as a UNE. Instead, the Commission should adopt meaningful tests that ensure that CLECs are *actually using* any EELs or individual UNEs for local service.

If the Commission maintains the same basic architectural framework established in the *Triennial Review Order*, it should, at a minimum, make the following changes to its prior criteria:⁶

- The Commission should require instead that a CLEC maintain at least one DS1 trunk for every five DS1 EELs, and that this trunk actually be used to carry traffic. This will help ensure that the facility in question is actually used in some substantial measure to provide local voice service. When a DS1 circuit is used exclusively to provide local voice services, however, there needs to be one DS1

⁵ See, e.g., Verizon Comments at 70-75; Verizon Reply at 103-105; *2004 Fact Report* at II-18 to II-19, II-27 to II-31, III-29 to III-30.

⁶ See Ex Parte Letter from Edwin J. Shimizu, Director – Federal Regulatory Affairs, Verizon, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, *et al.* (Dec. 7, 2004).

interconnection trunk for every five voice circuits, which roughly translates into one DS1 interconnection trunk for every five DS1 EELs.

- The Commission should require that each of the circuits connects to a switch capable of providing local voice service. In order to provide local voice services over a circuit, competing carriers must, at a minimum, connect that circuit to a switch capable of providing those services. Given that this step is a necessary prerequisite to providing local service, it is in no way onerous to a CLEC that seeks to use UNEs for that purpose.
- The Commission should require that, when a CLEC orders high-capacity UNEs or EELs, it provide information with its order regarding the local telephone number assigned to each circuit, the interconnection trunk identification number, the local switch CLLI code to which the circuit is attached, and the collocation terminating connecting facility assignment. These requirements will help obviate the need for expensive and intrusive audits while at the same time providing assurance that carriers use UNEs only for the services for which the Commission has found impairment. Moreover, such requirements are not burdensome, because CLECs should maintain all the information they need to certify that they meet the relevant criteria.

Changes such as these will ensure that the eligibility criteria prevent the use of UNEs for services for which the Commission has not found impairment without inhibiting the ability of CLECs to use UNEs, where impairment has been found, to provide competitive local services.

Decisions Not To Require Unbundling Should Be Binding and Self-Effectuating.

Where the Commission does not make a finding of impairment and therefore cannot reinstate a UNE rule that was vacated in *USTA II*, the Commission should take steps to ensure that CLECs and state commissions do not impede or negate the Commission's determinations that incumbents are not required to provide certain elements as UNEs under § 251(c)(3). To the extent the Commission determines that there is no impairment and that carriers, therefore, are not permitted to add new UNEs, it should adopt an explicit date when that determination is binding on all carriers — namely, the effective date of the order. To the extent the Commission adopts any transition periods with respect to the embedded base of UNEs, it should explicitly provide that the dates in those transition rules also are binding on all carriers. Forcing incumbents to go through a “change of law” renegotiation process before they could cease providing UNEs for which the Commission has not found impairment or otherwise declined to require unbundling would merely be an unlawful means of perpetuating the Commission's prior unlawful unbundling requirements indirectly.

The Commission unquestionably has the authority to correct the consequences of its vacated unbundling rules. See *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965); Order, *Qualcomm Inc. Petition for Declaratory Ruling Giving Effect to the Mandate of the District of Columbia Circuit Court of Appeals*, 16 FCC Rcd 4042, ¶ 18 (2000). In addition, in other contexts, such as with collocation, the Commission has already made its

Michael K. Powell
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unbundling rules mandatory and self-effectuating. There is every reason for the Commission to take the same action here, where a decision not to impose unbundling requirements follows three successive vacatur of prior, unlawful UNE rules.

Sincerely,

/S/

Susanne A. Guyer

/S/

Michael E. Glover