**Qwest**
607 14th Street, NW, Suite 950
Washington, DC 20005
Phone 202-429-3120
Fax 202-293-0561

**Melissa E. Newman**
Vice President-Federal Regulatory

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***EX PARTE*** FILED VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, DC 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

**Submitted at the Request of FCC Staff**

Dear Ms. Dortch:

At the request of the staff of the Federal Communications Commission ("Commission" or "FCC") and pursuant to 47 C.F.R. §§ 1.1203(a)(1), 1.1204(a)(10)(iii) and 1.1204(a)(10)(iv), the following *ex parte* communication is submitted for inclusion in the record of the above-captioned dockets.

1. Introduction.

This presentation addresses how to harmonize the Commission's impairment analysis with the reality that some network elements can be used to provide both services for which impairment can be found and other services for which there is no impairment. For example, assuming *arguendo* that impairment can be found for competitive local exchange carriers ("CLECs") desiring to use high capacity loops and transport for the provision of local exchange service, it remains clear that such a finding cannot be made if the carrier desires to use the same circuits for the provision of exchange access service, commercial mobile radio service ("CMRS") or interexchange service. This lack of impairment is conclusively documented by the fact that competition in these markets is thriving despite the unavailability of high capacity loop unbundled network elements ("UNEs"). To a large extent carriers in these markets still utilize incumbent local exchange carrier ("ILEC") high capacity loop and transport services, but they make use of ILEC tariffed services rather than UNEs.[1] The *USTA II* decision[2] confirmed that, at

[1] This analysis is based on straightforward economic principles. In this case, the "downstream" markets—*i.e.*, those that rely on ILEC inputs—are fully competitive without access to UNEs,

the very least, impairment could not be found (and unbundling could not be ordered) for services which are already flourishing without the use of UNEs. Given the fact that, as the *USTA II* Court affirmed, there are significant public interest dangers inherent in ordering unbundling in markets where there is no impairment, the FCC clearly has a duty to establish an analytical framework that prevents the use of UNEs to provide interexchange, CMRS and exchange access services.

To address concerns that too much reliance on the existence of tariffed special access services in conducting an impairment analysis involving existing circuits might undermine other aspects of the impairment analysis, we suggest that the Commission consider another approach to preventing use of UNEs for unauthorized purposes which does not directly implicate the impairment test. This approach is based on use of the "at a minimum" language of Section 251(d)(2) of the Act.[3] Under this language, the FCC may decline to order unbundling even in cases where there may be a valid impairment finding if such action serves to advance other valid public policy goals.[4]

2. The Commission can enact reasonable prohibitions against use of UNEs for the provision of services for which impairment cannot be found without implicating the impairment test itself.

Obviously the most direct manner in which to ensure that the statutory impairment test is met is through the simple process of declaring that a network element does not meet the impairment test. In cases where a network element might meet the impairment test for some services, but not others, the Commission is nevertheless required to enact a structure that prevents misuse of the UNE structure to provide services for which there is no impairment. While an impairment analysis is still the most straightforward approach to this issue, the Commission can also rely on the "at a minimum" language of Section 251(d)(2) of the Act to protect the impairment standard through other means. It is by now clear that the "at a minimum" language of the Act permits the

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relying where necessary on ILEC special access services. Because these downstream markets are already competitive without UNEs, these markets cannot pass the impairment test even if they do in fact rely on ILEC special access services.

[2] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.) ("*USTA II*"), *cert. denied sub nom. Nat'l Ass'n of Regulatory Util. Commr's v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004).

[3] 47 U.S.C. § 251(d)(2).

[4] In suggesting this alternative approach, we do not retreat from Qwest's original position that the existence of tariffed special access substitutes eliminates practically all high capacity loop and transport facilities from the list of UNEs for all purposes. In addition, lest there be any confusion, this analysis deals with services where impairment is found (*e.g.*, local exchange services), not services such as long distance, exchange access and CMRS where impairment cannot be found.

FCC to pursue valid public policy goals by refusing to order unbundling contrary to the public interest even where strict application of the impairment standard in a vacuum would result in unbundling.[5] It is also clear that the ability of CLECs to use UNEs for services for which there is no impairment is contrary to the Act and to the public interest.[6] The Commission can properly enact structural rules to prevent this misuse from occurring.

There are several approaches which can be utilized to limit use of UNEs for services for which there is no valid impairment finding in situations where the carrier can order the element on an unbundled basis for authorized uses. For purposes of this analysis we examine carrier use of ILEC high capacity (DS-1 and DS-3) facilities to provide interexchange service, exchange access service, CMRS and local exchange service. Of these four services, only local exchange service reasonably fits within the ambit of a valid impairment finding.[7] Thus, a high capacity loop could not be ordered as a UNE for the purpose of providing interexchange, CMRS or special access services. Assuming that such a loop could be ordered for the provision of local exchange service, the Commission is faced with the issue of how to both protect the interests of CLECs using the loops for the provision of local exchange service, and those using the same loops for non-authorized services. Qwest proposes several potential solutions to this question.

*a. Circuit Flipping Prohibition.*

Qwest has generally approached circuit flipping[8] under the impairment test. However, given the fact that the vast majority of Qwest's existing special access circuits (*i.e.*, those purchased under tariff) have been purchased for the sole or primary purpose of providing long distance, special access or CMRS service,[9] a simple prohibition against the "flipping" of existing special access circuits to UNE prices would have as its primary impact the prevention of the use of high capacity loops and transport for services for which no impairment finding can lawfully be made. To the extent that some of these special access circuits are being used to provide local exchange services, either primarily or substantially, these circuits would be in the vast minority. Thus, the

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[5] *USTA II*, 359 F.3d at 583-85.

[6] *See*, *e.g.*, *USTA II,* 359 F.3d at 563; *USTA I*, 290 F.3d 415, 427-28 (D.C. Cir. 2002), and the discussion and case law referenced in Qwest's Comments, filed herein on Oct. 4, 2004, at 21-30.

[7] Qwest makes this assumption *arguendo*. Our position that high capacity loops and transport should not be available as UNEs for any purposes is not hereby abandoned or compromised.

[8] That is, repricing existing special access circuits at UNE rates.

[9] *See Ex Parte* Letter to Marlene H. Dortch from Andrew D. Crain and Melissa E. Newman, filed herein on December 8, 2004, documenting that the largest interexchange carriers ("IXCs") and wireless carriers together purchase 80% of all special access channel terms (DS1 and DS3). The remaining 20% includes smaller IXCs as well as CLECs that combine interexchange and local exchange services over a single facility and were not able to meet earlier restrictions requiring that UNEs be utilized substantially for local exchange services.

public interest in the prevention of the unauthorized use of UNEs to provide services for which there is no impairment would be significantly furthered by the prohibition against circuit flipping is both valid and necessary. Such a rule could be enacted without implicating at all the impairment analysis applicable to the use of high capacity loops and transport for the provision of local exchange service.

*b. Requirement that only local circuits be permitted to be flipped.*

A second structural approach to the problem of the unauthorized use of UNEs would focus on the certification requirements of Section 69.115(e)(6) of the Commission's rules. This section of the Commission's rules requires that a purchaser of ILEC interstate special access pay a surcharge on each special access voice grade equivalent circuit unless it certifies that the terminating device on the line has been disabled so as to prevent long distance traffic from "leaking" into the local exchange. The rule assesses the surcharge on:

> (6) Any termination of a line that the customer certifies to the exchange carrier is not connected to a PBX or other device capable of interconnecting a local exchange subscriber line with the private line or WATS access line.

We suggest that, while not perfect, this certification rule provides a reasonable surrogate for determining whether an ILEC special access line is being used for local exchange purposes. If such a certification has been made, it indicates that the special access line has been disabled from providing long distance service into the local exchange, which means that there can be no "leakage" of either local or long distance traffic into that exchange. If no certification is made, it means that the circuit does enable access into the local exchange. Qwest submits that those special access lines for which certification has been made (and, concomitantly, special access surcharges have not been paid) are *ipso facto* used entirely for long distance traffic between the customer's premise and the IXC's point-of-presence ("POP"), and that they do not carry local traffic (either directly or through "leakage" of long distance traffic into to the ILEC's switch). At the very minimum, it is necessary that the Commission prohibit the "flipping" of any special access circuit for which a certificate under Section 69.115(e)(6) of the FCC's rules has been filed unless it conducts a detailed inquiry into whether particular circuits are in fact being used to provide local exchange service, including an inquiry into whether the PBXs or other devices connected to the special access lines have been disabled to prevent leakage of long distance traffic into the local exchange, and whether the surcharge has been improperly withheld.[10]

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[10] The rules provide that certification can only be made if the PBX or other device has actually been disabled to prevent leakage into a local exchange. *See* In the Matter of Clarification of Sections 69.5 and 69.115 of the Rules of the Federal Communications Commission, *Memorandum Opinion and Order*, 57 Rad. Reg. (P&F) 2d 1630, 1636 (1985), *aff'd on recon.*, *Memorandum Opinion and Order*, 59 Rad. Reg. (P&F) 2d 107, 112-13 and ¶ 19 (1985). The

*c. Architectural restrictions.*

The Commission in the *Triennial Review Order* established various architectural limitations that reduced the ability of carriers to use ILEC high capacity loops and transport to provide special access and long distance service.[11] Qwest has suggested several modifications to these architectural protections that will make them more effective.[12] These changes to the FCC's existing rules should be adopted as part of the FCC's efforts to avoid the anti-competitive impacts of unbundling of network elements at TELRIC prices for use in provision of those services for which a valid impairment finding cannot be made.

3. The Commission cannot lawfully establish an impairment test that defines relevant markets based on perceived competition for service to individual buildings or that relies on the existence of wholesale competition.

A number of CLECs have suggested that the proper relevant market for determining impairment for high capacity loops is each individual building across the nation. There have been reports that the Commission is considering an impairment analysis based on the existence of actual wholesale competition to specific buildings or the existence of CLEC competitive fiber to individual buildings, whether offered to other carriers as a wholesale product or not. Qwest submits that any analysis that was predicated on limiting a market to individual buildings would not be lawful, especially if that analysis was based solely on the existence of extant competition at the time of the impairment determination. Furthermore, reliance on the existence of wholesale competition to eliminate unbundling requirements in a market is flatly inconsistent with the D.C. Circuit's decisions in *USTA I* and *USTA II*.

The two most obvious problems with a building-by-building approach are legal in nature. The Court in *USTA II* specifically vacated FCC unbundling rules that were based on the existence of actual competition on specific routes. The Act requires that an impairment finding be made only in those cases where natural monopoly characteristics within a particular market make that market unsuitable for competition in the absence of the availability of the UNE. It is self evident

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mere fact that the PBX or other device is not used for that purpose is not sufficient to permit lawful certification.

[11] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16978, 17353-66 ¶¶ 595-619 (2003), *vacated and remanded in part and aff'd in part, USTA II,* 359 F.3d 554.

[12] Letter from Robert L. Connelly, Jr. to Marlene H. Dortch, November 24, 2004, pp. 5-10.

that examining only actual competition on specific routes says nothing about the suitability of a properly defined market for competition. As was pointed out during the *USTA II* oral argument, the fact that a competitive fiber route exists on Pennsylvania Avenue in DC cannot be ignored in examining whether a market which includes Constitution Avenue and Independence Avenue is *in toto* not suitable for competition. And the *USTA II* Court made this very clear when it vacated the FCC's high capacity loop and transport unbundling rules. The Court questioned "how the Commission can simply ignore facilities deployment along similar routes when assessing impairment."[13]

Some CLECs have suggested that their marketing plans are limited to single buildings, and that their marketing plans identify the relevant market for determining impairment.[14] AT&T takes this argument so far as to claim that its own business plans do not permit it to construct any fiber until after a specific customer has actually signed up for AT&T service, and then AT&T claims to construct only as much fiber as is necessary to serve that individual customer.[15] CLEC business plans, especially those (like AT&T's) that are doomed to failure *ab initio* because no rational enterprise would ever conduct its business in such a fashion, cannot be used as a substitute for intelligent analysis of the suitability of rationally defined markets for competitive market entry. As has been documented in Qwest's comments and in the independently filed UNE Fact Report, there has been extensive construction of competitive high capacity loop facilities in all major markets.[16] At the very least, the Commission must adopt a test for impairment that is based on actual markets and their suitability for competition, not artificial markets and the presence of constructed facilities.

The second problem with the building-by-building test under consideration is that it relies on the presence of *wholesale* competition in the particular market under consideration. As the D.C. Circuit made clear in both *USTA I* and *USTA II*, the Commission's unbundling analysis must consider all competition in the market, including intermodal competition and self provisioning, even if those competitors do not provide a wholesale alternative to the ILEC's network. For example, in *USTA II*, the Court upheld the Commission's limitations on unbundling of broadband networks, in part based on the existence of intermodal competition. The Court noted that the existence of "intermodal competition in broadband, particularly from cable companies,

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[13] *USTA II*, 359 F.3d at 575.

[14] *See*, *e.g.*, *Ex Parte* presentation of XO Communications, dated Dec. 8, 2004.

[15] *See* discussion of AT&T's claims in the Reply Comments of Qwest Communications International Inc., WC Docket No. 04-313 and CC Docket No. 01-338, dated Oct. 19, 2004 at 24-25.

[16] *See* UNE Fact Report 2004, Prepared for and Submitted by BellSouth, SBC, Qwest, and Verizon, October 2004 at Section III. Qwest submits that CLEC construction would have been considerably more extensive had the availability of TELRIC-priced facilities not been made so readily available by regulators.

means that, even if CLECs proved unable to compete with ILECs in the broadband market, there would still be vigorous competition from other sources."[17] A Commission rule that continues to require unbundling unless there is a certain level of *wholesale* competition would ignore the "state of competition" in the market, in violation of the D.C. Circuit's mandate.[18] Such a "naked disregard of the competitive context" would directly conflict with the Court's earlier decisions.[19]

Sincerely,

/s/ Melissa E. Newman

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[17] *USTA II*, 359 F.3d at 580.

[18] *USTA I*, 290 F.3d at 429.

[19] *Id.* at 430.