Dee May
Vice President
Federal Regulatory

1300 I Street, NW, Suite 400 West
Washington, DC 20005

Phone 202 515-2529
Fax 202 336-7922
dolores.a.may@verizon.com

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Ex Parte

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

Re: Petition for Forbearance Under 47 U.S.C. § 160 (c) for Imposition of Additional Unbundling Obligations, WC Docket No. 05-170; Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338

Dear Ms. Dortch:

Verizon and others have shown that the pending petitions for forbearance filed by XO *et al.* and Fones4All should be denied because they are, in fact, improper petitions for reconsideration that seek to reverse Commission findings of no impairment and to impose obligations to provide UNEs under § 251(c)(3).[1] Such obligations can be imposed only pursuant to the explicit standard Congress set forth in § 251(d)(2); the *de*regulatory tool of forbearance does not provide an alternative means of doing so. Recent ex partes by XO *et al.*[2] and Fones4All[3] do not call any of this into question.

As an initial matter, both XO *et al.* (at 2) and Fones4All (at 3) claim that the *Qwest Omaha Forbearance Order*[4] supports their unprecedented efforts to create § 251(c)(3) UNE

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[1] *See, e.g.*, Ex Parte Letter from Dee May, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-170 *et al.* (May 30, 2006) ("Verizon Ex Parte"); Opposition of Verizon to Petition for Forbearance, WC Docket No. 05-170, at 2-6 (filed Sept. 12, 2005); Opposition of Verizon to Petition for Expedited Forbearance, WC Docket No. 05-261, at 3-6 (filed Oct. 14, 2005).

[2] Ex Parte Letter from Steven A. Augustino, Kelley Drye & Warren LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-170 (June 6, 2006) ("XO *et al.* Ex Parte").

[3] Ex Parte Letter from Ross A. Buntrock, Womble Carlyle Sandridge & Rice, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-261 ("Fones4All Ex Parte").

[4] Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415, ¶ 13 (2005) ("*Qwest Omaha Forbearance Order*"), *petitions for review filed, Qwest Corp. v. FCC*, Nos. 05-1450 *et al.* (D.C. Cir.).

obligations through forbearance. But they misread that order. There, the Commission held that it can grant forbearance from existing unbundling requirements without also finding that the impairment standard in § 251(d)(2) is not satisfied.[5] The Commission's holding follows from the D.C. Circuit's holding that forbearance "obviously comes into play *only* for [§ 251(c)(3) UNE] requirements that exist."[6] But the fact that the Commission can grant forbearance even where the Commission previously found that the impairment standard is met says nothing about the different question presented here, which is whether the Commission can impose UNE obligations without first making the findings required by § 251(d)(2). The Supreme Court and the D.C. Circuit have decisively answered that question, and their holdings preclude the use of forbearance to create UNE obligations.[7]

Equally unavailing are attempts by XO *et al.* and Fones4All to recharacterize the rules that are the subject of their petitions as mere "limitations" on, or "exceptions" to, UNE obligations. In fact, all of the rules codify findings by the Commission that there is no impairment and, therefore, no unbundling requirement.

First, although XO *et al.* (at 5-6) continue to describe the Commission's rule precluding CLECs from obtaining UNE DS1 loops in certain wire centers as "an exception to or limitation on" a "general[]" obligation to unbundle DS1 loops everywhere, the *TRRO*[8] clearly holds otherwise. The Commission expressly found "*no impairment* for DS1-capacity loops only in those wire center service areas with 60,000 business lines and four fiber-based collocators" and that CLECs "are *not impaired* without access to DS1-capacity loops at any location within the service area of [such] a wire center." *TRRO* ¶¶ 146, 179 (emphases added). XO *et al.*'s only response is to quote a portion of the executive summary stating the Commission's finding that CLECs "are impaired without access to DS1-capacity loops *except* in any building within the service area of a wire center" meeting the Commission's test. *Id.* ¶ 5 (emphasis added). But the only proper reading of this summary — particularly given the express statements from substantive paragraphs of the *TRRO* quoted above — is that the Commission held in the *TRRO* that CLECs are impaired *except where they are not impaired*, which is in the wire centers that meet the Commission's test.

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[5] *See id.* ¶ 14 n.48 ("reject[ing] commenters' proposals that [it] interpret and apply the section 251(c)(3) impairment standard . . . to [the] forbearance analysis"); *id.* ¶ 67 n.177 (explaining that, in reviewing a forbearance petition, the Commission is not "making national impairment findings," but instead is "applying the statutory standards of section 10 in a specific geographic market").

[6] *See, e.g.*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 579-80 (D.C. Cir.) ("*USTA II*") (emphasis added), *cert denied*, 125 S. Ct. 313, 316, 345 (2004).

[7] *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391-92 (1999); *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002); *USTA II*, 359 F.3d at 571-72, 574.

[8] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) (emphasis added), *petitions for review pending*, *Covad Communications Co. v. FCC*, Nos. 05-1095 *et al.* (D.C. Cir. oral arg. May 15, 2006) ("*Triennial Review Remand Order*" or "*TRRO*").

Second, XO *et al.* (at 5) claim that the prohibition on obtaining more than 10 UNE DS1 transport circuits on a route does not reflect the Commission's application of its impairment inquiry. Again, the *TRRO* is to the contrary. The Commission made clear that its rules requiring ILECs to provide only a certain number of high-capacity loops or transport circuits to a location or on a route were based on its conclusion that CLECs "are *not impaired* without access" to multiple such facilities as UNEs. *TRRO* ¶ 177 (DS3 loops) (emphasis added); *accord id.* ¶ 131 ("no impairment" for DS3 transport above cap); *see id.* ¶ 181 & n.489 (explaining that the DS1 loop rule and the "similar" DS1 transport rule are based on the same reasoning as the DS3 loop rule). Indeed, in the specific context of DS1 transport, the Commission held that its "DS3 *impairment conclusions* should apply" when a CLEC seeks more than 10 DS1 transport circuits on a single route. *Id.* ¶ 128 (emphasis added). Finally, all of these rules are based on the Commission's application of its reasonably efficient competitor test, which is part of the impairment analysis, and its conclusion that an "efficient" carrier could compete — and, therefore, is not impaired — without the specified number of high-capacity loops or transport circuits as UNEs. *E.g.*, *id.*

Third, XO *et al.* (at 3-4) continue to assert that the EEL eligibility criteria that the Commission adopted in the *Triennial Review Order*[9] and expressly retained in the *Triennial Review Remand Order*[10] are unrelated to the Commission's impairment analysis. Here, too, the CLECs are wrong. In upholding the eligibility criteria, the D.C. Circuit recognized that the Commission, in establishing those criteria, was striking a "balance[]" between "the 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 service for which they *are impaired*." *USTA II*, 359 F.3d at 592-93. Not only did the D.C. Circuit thus expressly recognize the link between the criteria and the impairment inquiry, but it had previously held — and reiterated in *USTA II* — that the impairment standard requires this very "balanc[ing]" between "the costs and benefits of unbundling." *Id.* at 570; *accord id.* at 563, 572. XO *et al.* may dislike the balance the Commission struck,[11] but there can be no serious dispute that the Commission struck that balance as an application of the impairment analysis in § 251(d)(2).

Fourth, Fones4All does not dispute — because it cannot — that there is no default obligation to provide mass-market circuit switching as a § 251(c)(3) UNE, either alone or in combination with other UNEs. Instead, it points to Checklist Item 6. *See* Fones4All Ex Parte at

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[9] *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶¶ 590-629 (2003) ("*Triennial Review Order*" or "*TRO*") (subsequent history omitted).

[10] *See TRRO* ¶ 85 n.244 (explaining that the Commission "d[id] not disturb the EEL eligibility criteria established in the *Triennial Review Order*"); *accord id.* ¶¶ 230 n.644, 234 n.659.

[11] Indeed, XO *et al.* make clear that they are actually seeking reconsideration when they point (at 4) to the Commission's post-*TRO* approvals of mergers, which they claim warrant the striking of a different balance. In fact, on the same day they filed their forbearance petition, XO *et al.* also filed a petition for reconsideration that also sought elimination of the EEL eligibility criteria.

2.[12] But Fones4All's forbearance petition has nothing to do with any obligations BOCs have under § 271, as Fones4All's avowed goal is to obtain the UNE Platform at TELRIC rates under § 251.[13] In any event, switching provided under Checklist Item 6 cannot be used to recreate the UNE-P, as BOCs have no obligation to provide such switching at TELRIC rates or in combination with other elements.[14]

Finally, while XO *et al.* (at 4, 6) and Fones4All (at 3) continue to rely on the *Core Forbearance Order*[15] and the *TracFone Forbearance Order*,[16] Verizon has shown that the Commission's actions in those others orders are readily distinguishable. The *Core Forbearance Order* modified a Commission-established, transitional payment obligation and did not purport to undo a prior Commission determination that a statutory obligation — there, § 251(b)(5) — did not apply.[17] Here, in contrast, the petitioners improperly seek to use forbearance to reverse determinations not to require unbundling under § 251(c)(3). Similarly, while the *TracFone Forbearance Order* imposed additional requirements on the party benefiting from the conditional grant of forbearance, the petitioners here seek to impose additional obligations on others — namely, the ILECs — so that they can reap the benefits.

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[12] Fones4All (at 1 n.4) also repeats an earlier argument that the Bureau cannot, on delegated authority, invoke the 90-day extension in § 160(c). The Bureau, of course, did so on June 8, 2006, and the Bureau's action was consistent with Congress's authorization of delegations of authority to agency officials, with limited exceptions not implicated here. *See* 47 U.S.C. § 155(c)(1); 47 C.F.R. § 0.91(m).

[13] *See* Fones4All Petition for Expedited Forbearance, WC Docket No. 05-261, at 1-2 (filed July 1, 2005).

[14] *See, e.g.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 656 & n.1990 (2003) (subsequent history omitted).

[15] Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 FCC Rcd 20179 (2004) ("*Core Forbearance Order*"), *petitions for review pending, Core Communications, Inc. v. FCC*, Nos. 04-1368 *et al.* (D.C. Cir. oral arg. Oct. 27, 2005).

[16] Order, *Federal-State Joint Board on Universal Service; Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(f)*, 20 FCC Rcd 15095 (2005) ("*TracFone Forbearance Order*").

[17] Contrary to XO *et al.*'s claim (at 4 n.11), their reply comments portrayed the *Core Forbearance Order* as "remov[ing] a limit on the general obligation" to pay "reciprocal compensation" — that is, compensation under § 251(b)(5) — for "ISP-bound traffic." XO *et al.* Reply at 9, WC Docket No. 05-170 (Oct. 12, 2005). As Verizon demonstrated, the Commission expressly rejected that view of the order in its brief to the D.C. Circuit. *See* Verizon Ex Parte at 3-4.

For these reasons, and those Verizon has previously set forth, the Commission should deny these petitions.

Please let me know if you have any questions.

Sincerely,

cc: T. Navin
I. Dillner
M. Carey
D. Shaffer
S. Bergmann
S. Deutchman