loop and transport facilities – just as the Commission found in the *UNE Remand Order*.[25] As explained in the accompanying Fea-Taggart declaration, competitive LECs face numerous obstacles in deploying ubiquitous transport and loop facilities, and in fact competitive LECs use alternative facilities in only a small minority of cases. These facts confirm that the broad assertions of the USTA Report are false.

An examination of the economics of building alternative facilities also confirms what the Commission found in the *UNE Remand Order*: ubiquitous alternatives to the incumbent LECs' high-capacity loop and transport facilities simply do not exist, and competitive LECs are thus impaired in their ability to offer service without access to unbundled loops and transport. To begin with, in the overwhelming majority of the LSOs where AT&T purchases special access, AT&T does not have sufficient demand to fill a high-capacity facility. Fea-Taggart Dec. ¶ 7. Therefore, for the vast majority of offices, a facilities build is not economically justified, and without access to UNEs, AT&T has no choice but to use the incumbent LECs' substantially overpriced tariffed special access services. *See, e.g.*, WorldCom at 20-22. This cost disparity places AT&T at a significant market disadvantage compared to the incumbent.

With respect to the small minority of remaining LSOs where AT&T's traffic volumes may potentially justify a facilities build, there are numerous other costs and obstacles that must overcome before AT&T can actually establish its own facilities. Building alternative transport facilities is an expensive and time-consuming undertaking that is justified in only

[25] As ALTS explains in its comprehensive study, this is also the experience of competitive LECs generally. *See Local Competition Policy & The New Economy* (Feb. 2, 2001) (available at http://www.alts.org).

limited circumstances. Building alternative loop facilities is exponentially more difficult and costly and is only rarely justified.

For example, deploying transport facilities requires negotiating rights-of-way with municipalities, which often demand exorbitant fees and other onerous conditions. Fea-Taggart Dec. ¶¶ 10, 11. Occasionally, such negotiations also require participation from the incumbent LEC or other third parties. *Id.* ¶ 12. In AT&T's experience, such negotiations almost always take at least four to six months to complete, although AT&T has been involved in negotiations (and resulting litigation) that have lasted for years. *Id.* ¶ 10. In some of these instances, negotiations have broken down and AT&T has been forced to abandon its construction plans altogether. *Id.* ¶ 18. And deploying alternative transport also requires AT&T to obtain collocations from the incumbent LEC, another costly process fraught with uncertainties, lengthy order processing times, and space exhaustion issues. Fea-Taggart Dec. ¶¶ 7, 14-15.

Actual deployment of transport facilities is very expensive. As the Commission correctly found in the *UNE Remand Order* (¶ 356), "[s]elf-provisioning dedicated transport requires competitive LECs to incur significant direct and other costs, including the cost of fiber, the cost of deploying fiber in public rights-of-way, trenching and the cost of purchasing and collocating the necessary transmission equipment." Based on the extensive record developed in that proceeding, the Commission correctly found that "replicating the incumbent's ubiquitous transport network would be prohibitively expensive, and delay competitive entry." *Id.* ¶ 355. *See also* Fea-Taggart ¶¶ 8-31.

Deploying transport is further complicated by the fact that there must be diverse routing to ensure acceptable service quality. AT&T (and competitive LECs generally) use a "SONET ring" architecture when self-provisioning transport. As Messrs. Fea and Taggart

explain (¶ 13), "a 'SONET ring' is a form of 'self-healing' network architecture that provides unique reliability for customers because it employs diverse routing to ensure continued service even when particular segments of the ring are accidentally cut or experience other technical difficulties." To achieve this reliability, however, the competitive LEC must construct "two separate physical fiber paths in a closed chain or 'ring.'" *Id.* Therefore, competitive LECs must generally obtain multiple rights-of-way. *Id.*

Competitive LECs are even more impaired in their ability to self-provide alternative high-capacity loop facilities. Loops generally serve only one or a few customers, and in the vast majority of cases, there is not enough traffic to justify the expense of deploying loop facilities. *Id.* ¶ 16. Assuming that the customer has enough traffic to justify a build, the competitive LECs must not only negotiate rights-of-way with municipalities (as in the case of transport), but they must also negotiate with a landlord for entry into the customer's building. Landlords often demand exorbitant payments or seek to impose other onerous terms of entry.[26] Moreover, AT&T is limited to a "fiber to the floor" arrangement in **[proprietary begin]** ** ***** **[proprietary end]** of the buildings in which it has facilities, which only allows AT&T to route its fiber to a specific customer. Such arrangements therefore prevent a competitive LEC from offering facilities-based service to other customers in the building. *Id.* ¶ 30.

[26] ALTS has extensively detailed the difficulties in obtaining rights-of-way from municipalities and landlords. For example, "some public entities have begun to see their authority over the public rights-of-way not as something which can be fairly and equitably applied to encourage investment in their communities, but rather as a revenue source which can be auctioned off to the highest bidders." *Local Competition Policy & The New Economy* at 9. Indeed, "municipalities have moved away from cost-based fees" and as a result, "many of today's rights-of-way and franchise fees are indistinguishable from taxes." *Id.* at 10. Building owners also have an economic interest to refuse competitive LECs' requests for access and instead frequently give exclusive access to companies that they own. *Id.* at 6.

As Messrs. Fea and Taggart note (¶ 18), this process of deploying loop facilities typically takes at least a year and sometimes much longer. This lag time creates enormous uncertainty because, contrary to the incumbent LECs' claims, competitive LECs are not in a situation of "build it and they will come." *See* Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport, CC Docket No. 96-98, at 12 (filed Apr. 5, 2001) ("the fiber market is an inverse Field of Dreams"). The reality is quite the opposite. "The most important factor [in the decision to build], and the most difficult to judge, is the revenue potential of a particular LSO, or even a particular customer location." Fea-Taggart Dec. ¶ 24. A competitive LEC such as AT&T cannot make costly investments in loop facilities without some prospect that it will have a customer at the other end. Customers, however, usually do not approach competitive LECs until they need the additional capacity on short notice, and they generally are unwilling to wait for the competitive LEC to complete the arduous process of building facilities, especially when the incumbent is usually available to meet the customers' needs immediately with its existing, ubiquitous network. Fea-*Id.* ¶¶ 16, 20. The "need for service immediately often trumps" the customer's desire to use an alternative provider, and in those situations AT&T obviously does not even get the opportunity to use its own facilities to serve the customer. *Id.* ¶ 20.

And once the service is provided using incumbent LEC facilities, the competitive LEC is often presented with two other substantial problems. First, it may be too costly to rearrange service from the incumbent LEC to self-provided facilities. This is almost always the case when less than a DS3 is involved. Second, even if facilities rearrangement is not prohibitively costly, approximately **[proprietary begin]** ******* **[proprietary end]** of customers refuse to permit AT&T to "roll" their service to AT&T facilities, even when AT&T

offers them financial incentive, because they do not want to risk the possibility of any service disruptions. Fea-Taggart Dec. ¶ 28. Competitive LECs face the reality that no one has ever been fired for buying access from the incumbent LEC, and many customers are unwilling to take the (perceived) risk of using competitive LEC facilities, even when they offer generally superior performance and lower price. *Id.* This customer perception has been exacerbated by the recent spate of public announcements of competitive LEC bankruptcies. *Id.* ¶ 37.[27]

Any suggestion that competitive LECs can easily turn to third party suppliers for transport or loop capacity is also wrong. Most fundamentally, the incumbent LEC is still the only carrier with facilities in the vast majority of cases. There usually is no third party supplier available. *Id.* ¶¶ 32-37. And even where there is a third party supplier, it often covers the same geographic areas as AT&T. *Id.* 32.

Moreover, the ability to use a third party's facilities, when they do exist and do not traverse the same routes as AT&T's facilities, is subject to severe limitations. Some alternative suppliers cannot (or will not) commit to standard quality performance measures. *Id.* ¶¶ 33-34. Others do not meet AT&T's standards for ordering, provisioning, and billing. *Id.* A number of third party suppliers merely resell capacity from vendors with whom AT&T already has a contract or who do not meet AT&T's standards. *Id.* ¶ 35. Many third party suppliers have an extremely limited network footprint, which makes it costly for AT&T to deal with them. *Id.* ¶ 36. In addition, third party suppliers often seek payment arrangements that are impractical

[27] Another practical constraint on AT&T's ability to deploy facilities is the availability of internal capital. As Messrs. Fea and Taggart explain (¶¶ 21-23), even in the best of times capital is difficult to obtain, and competitive LECs often defer the use of capital for construction projects in favor of other projects with higher expected returns or lower risk. AT&T's planned local construction program has always exceeded the available capital. *Id.* ¶ 22.

(*e.g.*, pre-payments to reserve capacity, minimum revenue requirements). *Id.* Moreover, many alternate suppliers have recently failed or gone bankrupt, which makes AT&T and other competitive LECs far more wary of purchasing alternative suppliers' services. *See id.* ¶ 37 ("two of AT&T's pre-qualified vendors have filed for bankruptcy, and a third was acquired by a carrier unwilling to honor the terms of AT&T's contract"). Finally, as discussed above, even when facilities are newly provided or expanded in a building, a substantial proportion of customers will not agree to the service interruptions necessary to roll the service from the incumbent LEC facility to the alternative provider's facility.

As a result of all of these obstacles, AT&T reaches very few customers with its own fiber and must generally rely on the incumbent LEC to provide access. Overall, for the "backbone" portion of AT&T's local network, AT&T almost never self-provides DS1 transport and self-provides DS3 transport only a small proportion **[proprietary begin]** ******* **[proprietary end]** of the time. *Id.* ¶ 6. For the "tail" portion of the network, AT&T provides a very small fraction **[proprietary begin]** ******* **[proprietary end]** of its own DS1s facilities.[28] *Id.* The remaining service is provided almost entirely by utilizing the facilities of the incumbent LECs.[29] *Id.*

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[28] AT&T provides **[proprietary begin]** ******* **[proprietary end]** of its DS3 tails, but these facilities constitute a very small percentage of the total tails. *Id.*

[29] Specifically, incumbent LECs provide more than **[proprietary begin]** ********* **[proprietary end]** of AT&T's DS0 tails, more than **[proprietary begin]** ********* **[proprietary end]** of AT&T's DS1 tails and about **[proprietary begin]** ******* **[proprietary end]** of AT&T's DS3 tails. *Id.* Moreover, AT&T uses incumbent LEC facilities for more than **[proprietary begin]** ******* **[proprietary end]** of AT&T's DS1 and more than **[proprietary begin]** ******* **[proprietary end]** of AT&T's DS3 backbone transport. *Id.*

AT&T's has even less ability to self-provision access to buildings. Of the 3,000,000 commercial buildings nationwide, AT&T has obtained non-ILEC facilities to only about **[proprietary begin] **** [proprietary end]** of those buildings. *Id.* ¶ 30. Moreover, AT&T can use its own facilities to serve all customers in a building in about **[proprietary begin] **** [proprietary end]** cases. The rest of the buildings to which AT&T has access are limited to "fiber to the floor" arrangements that only enable AT&T to serve a single customer. *Id.* Therefore, AT&T can access only a tiny fraction of all commercial buildings through a truly "on-net" arrangement for the entire building using its own facilities. *Id.* [30]

Moreover, because of the continuing (and worsening) economic constraints on deploying facilities, AT&T cannot use its own facilities to penetrate rapidly this market. As noted above, last year AT&T was only able to complete construction of facilities to a small fraction of the buildings where it could be economic to self-provide loops. *Id.* ¶ 31.

In sum, despite the fact that AT&T has invested billions of dollars in attempting to enter local telephone markets, it still obtains the overwhelming majority of its access facilities from incumbent LECs, because the competitive situation has not changed since the Commission concluded the *UNE Remand* proceeding in 1999. Thus, AT&T's experience confirms the Commission's findings in that proceeding and refutes any claim that competitive carriers are not impaired without access to incumbents' high-capacity loop and transport facilities.

[30] This is consistent with the level of building penetration reported by the Smart Buildings Policy Project. According to that group, "less than 5% of commercial tenants, and less than 1% of residential tenants have access to competitive high-speed telecommunications services." *Local Competition Policy & The New Economy* at 7.

II. THE COMMENTS DEMONSTRATE THAT ELIMINATION OF USE RESTRICTIONS IS CONSISTENT WITH, AND REQUIRED BY, COMMISSION POLICIES.

The commenters also demonstrate that elimination of the interim use restrictions would be fully consistent with – and indeed required by – other Commission policies, including its policies on universal service and access reform. In fact, use restrictions are actively impeding competitive entry and effective access reform, and they do nothing but protect the incumbent LECs' monopoly profits.

First, the comments confirm AT&T's view (at 13-14) that the use restrictions do not serve any legitimate purpose relating to universal service. As CompTel correctly notes (at 7), "there are no universal service subsidies built into the rates for special access (or even switched)." Indeed, the Commission has recognized since 1991 that special access services do not contribute to universal service. *See* Global Crossing at 7 (citing Notice of Proposed Rulemaking and Notice of Inquiry, *Expanded Interconnection for Local Telephone Company Facilities*, 6 FCC Rcd. 3259, ¶ 15 (1991)). The Commission's policy on special access has always "been to reduce special access rates closer to cost, not to keep them artificially high." CompTel at 7; *see also* Global Crossing at 2, 7 ("ILECs have consistently downplayed the contribution that special access services have made toward universal service funding, particularly when seeking pricing flexibility for such services"). Similarly, many commenters note that the Commission removed all universal service subsidies from switched access services in the *CALLS Order*. *See* CompTel at 7-8; EPN at 14; WorldCom at 33. Thus, there is no longer "even theoretical validity" to the concern that "EELs might undermine universal service support built

into switched access rates by creating incentives for carriers to migrate from switched access configurations to EELs." CompTel at 8; Focal at 7.[31]

The commenters also agree with AT&T (at 14-15) that full availability of unbundled network elements is necessary to implement access reform. As EPN states (at 14-15), the Commission adopted a "market-based" approach to access reform, in which the Commission relies on competition – including competitive entry using unbundled network elements – to drive the rates for access services to economic cost. *See* First Report and Order, *Access Charge Reform*, 12 FCC Rcd. 15982, ¶ 32 (1996) ("*Access Reform Order*"). The Commission's interim use restrictions are obviously "inconsistent" with that Commission policy. *See, e.g.*, EPN at 15; *see id.* at 14 ("By allowing competitors in the access market to compete with the ILECs using UNEs, the Commission will further its stated goal of driving access charges closer to cost"). Rather than promoting competition, continuance of the interim use restrictions merely protect the incumbent LECs' monopoly revenues, which is wholly inconsistent with the Act and the Commission's objectives. *See, e.g.*, WorldCom at 32 (safeguarding incumbent LEC revenues is not a legitimate consideration under Section 251, and indeed, is at odds with competition goals of the Act); CompTel at 9 ("protection of ILECs' revenues is not a legitimate policy objective under the 1996 Act"; goal of agency is to protect competition, not competitors).

[31] The price cap LECs provide the vast preponderance of special access service, and as AT&T noted (at 14 n.13), adoption of the Rural Task Force ("RTF") plan would moot any possible universal service objections to eliminating use restrictions as they apply to smaller LECs. In all events, the Commission can defer elimination of the use restrictions for smaller LECs if necessary; in no event, however, should the Commission delay elimination of use restrictions for the price cap LECs.

Moreover, as the Commission has repeatedly found and most commenters reiterate, the availability of UNEs will *promote*, not deter, facilities-based entry. As WorldCom explains, the Commission has consistently held that "unbundled elements allow CLECs to acquire sufficient customers and the necessary market information to justify the construction of new facilities." WorldCom at 30. In the case of enhanced extended loops ("EELs"), "EELs would allow CLECs to aggregate traffic at a single 'hub' wire center which would then have sufficient traffic to support efficient construction of competitive transport facilities." *Id.*[32] As CompTel confirms (at 11), "obtaining EELs at cost-based rates can hardly deter *efficient* entry and investment." (Emphasis added). Indeed, the notion that withholding UNEs that meet the impairment standard would promote facilities-based entry is "inherently illogical," because if the impairment standard is satisfied, no rational competitive LEC would build its own facilities whether UNEs are available or not. WorldCom at 30-31.

Several commenters further show that the Commission's interim use restrictions simply encourage uneconomic investment. These restrictions force competitive LECs often must choose between investing in unnecessary facilities or reselling the incumbent LEC's overpriced special access services. *See, e.g.*, CompTel at 15; WorldCom at 26, 30-32. And critically, the inability to obtain unbundled loop/transport combinations consigns most customers to competition solely from resale of the incumbent's services, which places competitors at a significant economic disadvantage to the incumbents. This, in turn, actually deters investment in

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[32] *See* AT&T at 16-17; Broadriver at 6 ("the sustainable long-term strategy was for facilities-based providers to obtain market entry using EELs, then add collocation sites as the economics . . . warranted. EELs . . . can best be viewed as a temporary measure to 'jump-start' a CLEC in a given market, allowing it to overcome the disadvantages of the ILECs['] scale until the CLEC obtains adequate scale of its own"); *see also* EPN at 3, 10-11.

other parts of competitors' networks that could be used in conjunction with EELs, such as switching, that would permit a competitive LEC to differentiate its services. *See* WorldCom at 31.

Far from promoting facilities-based entry, the Commission's use restrictions do nothing but protect the incumbent LECs' monopoly profits. There is no legitimate basis to permit this to continue. *See, e.g.*, CompTel at 8-12; EPN at 6; Sprint at 8; WorldCom at 32-34. Indeed, allowing incumbents to continue to earn monopoly profits is a direct violation of the "competition trilogy" the Commission recognized almost five years ago. *See Local Competition Order* ¶¶ 6-9.

Ironically, the incumbent LECs' recent makeshift pleas that their monopoly profits must be protected to support their investments in broadband services and other innovations actually undermine their case. *See* SBC/Verizon at 10. If the special access market were truly competitive and alternative supply were ubiquitously available, as the incumbent LECs claim, then the incumbents could not possibly have excess profits from those services to fund other investments. Moreover, any Commission policy to preserve such monopoly profits for those purposes would violate the express terms of Section 254(k). *See supra*, Part II.B. Thus, the incumbents' concession that their special access rates are far above economic cost merely confirms the appropriateness of the Commission's previous conclusions that competitive LECs are impaired without access to the unbundled loop and transport elements.

In sum, elimination of the use restrictions is long overdue. As CompTel observes (at 9), "[t]he ILECs have already had over five years since passage of the 1996 Act – and 18 months since the *UNE Remand Order* – to adjust" to the availability of EELs. The *CALLS Order* has removed whatever concern that may have existed with respect to universal service, and the

time has come to complete the Commission's "market-based" access reform by permitting competitive LECs to compete with the incumbents using unbundled network elements. *See, e.g., Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522, 530 (D.C. Cir. 1996).[33]

III. THE COMMENTS DEMONSTRATE THAT THE EXISTING "SAFE HARBORS" PREVENT CONVERSION OF FACILITIES THAT CARRY SUBSTANTIAL LOCAL TRAFFIC.

The comments also confirm AT&T's showing (at 18-23) that the Commission's interim use restrictions and "safe harbors" are essentially unworkable and only protect the incumbents' monopoly profits. As numerous commenters demonstrates, the use restrictions are inherently inefficient because they force carriers to make business decisions based purely on the artificial regulatory box in which the Commission has placed a service, rather than real-world business and engineering considerations. *See, e.g.*, Global Crossing at 11; EPN at 15-16. Moreover, the Commission's attempts to "clarify" its use restrictions have only "led to even

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[33] As demonstrated herein, competitive LECs have typically purchased special access rather than UNE combinations under duress, because that has been the only option available to them. Consequently, competitive LECs should be provided a "fresh look" to convert their special access services to UNE combinations, without any of the termination liabilities that incumbents have unilaterally imposed in special access contracts and tariffs. *See Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, Docket No. 2000-257-C, Order No. 20001-079, at 16 (S. Car. PSC Jan. 30, 2001) ("The Commission concludes that AT&T should not be subject to termination penalties for converting special access purchased under tariffed services pursuant to contracts to network elements. In reaching this decision, the Commission notes that the loop/transport combination sought by AT&T would continue to serve the same purpose, have the same features, perform the same functions, and service the exact same customer"). At the very least, the Commission should recognize that when competitive LECs convert special access services to UNE combinations they are not taking business away from the incumbents; rather, they are only paying rates that more closely resemble those they should have been paying for use of those same facilities for many years. Accordingly, any termination liabilities should, at a minimum, be reduced proportionately to reflect the fact that CLECs will continue to be using the incumbents' facilities.

more disputes" and "done nothing but generate confusion, delay, and uncertainty." CompTel at 15; *see also id.* ("the current 'interim' restrictions are so complex that by comparison the Internal Revenue Code looks simple"). As CompTel notes (at 2), the "result has been that EELs have been largely unavailable to competing local carriers for *any* services," including local service. *See also* ALTS at 2-4 ("since the Commission's orders on EELs have been issued, CLECs have attempted, in vain, to convert special access circuits to EELs").

To begin with, the Commission's "safe harbors" depend on a burdensome, circuit-by-circuit certification process that is hopelessly complex and unworkable. *See, e.g.*, WorldCom at 27 ("any effort to distinguish between local exchange service and other services will inevitably result in a rule that is too complex to provide market certainty or be administratively practical"). As WorldCom notes (at 27), the Commission expressly found in the *UNE Remand Order* that applying the unbundling rules on a wire-center-by-wire-center basis is inconsistent with the pro-competitive purposes of the Act. *Cf. UNE Remand Order* ¶ 142. The Commission's safe harbors are even more strikingly at odds with those goals, however, because they "must be applied on a circuit-by-circuit basis and [are] littered with arbitrary conditions and traffic thresholds." WorldCom at 27; *see also* CompTel at 16 ("[e]ven today the parties cannot agree on the precise meaning of any of the three options").

Equally important, CompTel shows (at 16) that "all three [of the safe harbor] options focus on factors that are beyond the ability of the CLEC (and for some options, even the customer) to control or to know." As AT&T explained in detail, competitive LECs' networks and systems are not designed to monitor the mix of services being provided over a particular circuit in the manner envisioned by the safe harbor provisions, nor is it economically feasible to modify those systems to do so. *See* AT&T at 20 & Carroll-Rhodes Declaration at 11, 13, 18-21.

As a result, the only way to determine whether any particular circuit qualifies for conversion is to obtain the information from the customer, *see* CompTel at 16 (the competitive LEC must "add a series of questions to the list that sales personnel must ask potential subscribers"), but such information is sensitive and customers typically would prefer not to disclose such information to a carrier, especially a new one. And as EPN explains (at 16), the Commission's safe harbors are especially untenable in a packet-switched world, because "EPN has no ability to differentiate that traffic according to its regulatory classification. In other words, to EPN, a bit is a bit."[34]

The comments also confirm that the incumbent LECs have effectively thwarted conversion of *any* circuits to UNEs by routinely insisting on "pre-auditing" all competitive LEC conversion orders. As Focal describes (at 4), the incumbent LECs "currently pre-audit or 'scrub' CLEC EEL conversion orders to insure that the lists contain only circuits with 'significantly local traffic'" and "also 'scrub' orders to ensure that CLECs are not attempting to co-mingle EELs with special access circuits." As a result, the incumbent LECs "have engaged in lots of 'scrubbing' but very little converting." *Id.*; *see also* ALTS at 10. The hopeless complexity of the safe harbor tests makes it almost impossible for competitive LECs to survive such "pre-audits." Therefore competitive LEC commenters report that incumbent LECs have converted almost no circuits to UNEs, even those used to provide a significant amount of local traffic. *See*

[34] ALTS proposes an alternative procedure for self-certification that would be far superior to the Commission's interim rules. *See* ALTS at 11-14. The ALTS proposal, however, does not require incumbent LECs to change the circuit ID as part of the conversion process so that carriers can distinguish UNE transport from transport billed under special access tariffs. Carriers require the ability to separately identify UNE-billed transport so that they can monitor progress toward conversion to UNE transport, verify incumbent LEC billing and maintain internal records.

id. ("Focal has not yet been able to convert a single order"); *see also* WorldCom at 37; CompTel at 14-17; Global Crossing at 13.[35]

Not only is the Commission's scheme of self-certification and safe harbors unworkable, the commenters confirm AT&T's demonstration (at 21-23) that the prohibition on "co-mingling" is an independent bar to conversion. As CompTel explains (at 33), the ban on co-mingling is "used by ILECs to force their competitors to operate two separate networks – one for UNE traffic and another for other traffic – even when it is significantly more efficient from both an economic and an engineering standpoint to route all traffic over a single integrated network." Specifically, incumbents force competitive LECs to "create multiple machinations and inefficiencies to ensure that tariffed special access circuits are not connected to the same DS3s as EELs," Focal at 10-11, and to that end they require "CLECs to purchase additional DS-3s specifically for EELs where the CLECs already have purchased DS-3s to carry special access circuits," ALTS at 9. This has allowed incumbents to build a three-tiered wall that no competitive LEC can scale. First, to purchase EELs, incumbents force competitive LECs to "establish and pay the ILEC for more DS3s than they may actually need." Focal at 11. Second, the process of disconnecting DS1s and reconnecting them to the new (unnecessary) DS3 "threatens [CLEC] service quality." *Id.* Third, incumbent LECs "extract substantial 'circuit move charges' and charges to set up additional DS3s." *Id.* at 10-11; WorldCom at 34.

[35] The arbitrariness of the safe harbors is compounded by the fact that, at least in theory, individual circuits can drift in and out of compliance with the safe harbor tests over time (by virtue of changes in customer calling patterns, over which the carrier has no control), which would subject the competitive LEC to the possibility of penalties "in the form of back-billed special access rates" or even "interruption of service." CompTel at 16.

There is no policy justification whatsoever for these practices. As Global Crossing bluntly puts it (at 13), "ILECs' networks – like those of their competitors – are mixed use networks." Incumbents and competitive LECs alike seek to engineer their networks to carry both local and exchange access traffic on the same facilities in the most efficient manner possible. *See id.* at 12; AT&T at 21-22. The prohibition on co-mingling UNE and tariffed traffic on the same facility, however, forces competitive LECs to build duplicative networks in defiance of all economic and engineering rationality. As ALTS states (at 9), under this system, "[t]he ILEC has the advantage of configuring its circuits in any manner while at the same time . . . [it can effectively] dictate CLEC business practices."[36] The Commission's interim rules amount to "blatant discrimination that fails to promote competition or any other discernible public policy." CompTel at 33.

Nor is there any technical or legal basis for banning co-mingling. *See* Focal at 11; AT&T at 22. Such co-mingling is obviously technically feasible – virtually all unbundled elements involve the same sort of "co-mingling" of UNE and non-UNE traffic in the ILEC network. The statute defines a "network element" as the "features, functions and capabilities" provided by means of the incumbent's facilities or equipment. *See* 47 U.S.C. § 153(29); *Southwestern Bell Tel Co. v. FCC*, 153 F.3d 597, 603 (8th Cir. 1998). On that basis, the Eighth Circuit upheld the Commission's designation of shared transport as an unbundled element,

[36] SBC and Verizon's suggestion that the prohibition on co-mingling is not discriminatory because incumbent LECs "do not combine unbundled elements and services" within their own networks is specious. SBC/Verizon at 30-31. As they expressly concede (at 31), incumbents "may use the same interoffice facilities to carry both local and access traffic," and for that reason the ban on co-mingling is discriminatory because it prevents the competitive LECs from doing the same.

because it is a "feature, function, [or] capability" provided by means of the facilities and equipment in the incumbent's interoffice transport network. *Southwestern Bell*, 153 F.3d at 603-04. Indeed, the Commission expressly rejected incumbent LEC arguments that shared transport could not be made available as an unbundled element because it involved UNE traffic "co-mingled" with other, non-UNE traffic in the LEC network. *See, e.g.*, Third Order on Reconsideration, *Implementation of the Local Competition Provisions in the Telecommunications Act of* 1996, 12 FCC Rcd. 12460 ¶ 41 (1997) ("we reject Ameritech's contention that, by definition, network elements must be partly or wholly dedicated to a customer," citing the examples of signaling, call-related databases and switching as elements that are necessarily shared among the incumbent and other carriers).[37] The Commission's only stated basis for the co-mingling restriction was to protect the incumbent LECs' special access revenues, *see Supplemental Order Clarification* ¶ 28, but as explained above, there is no conceivable reason to maintain such a policy today.

In sum, although the Commission apparently intended the interim use restrictions as a temporary shield for the incumbent's special access revenues, the incumbent LECs have in fact used them as a sword to prevent the conversion of *any* special access circuits to UNEs, even when they are in fact used to provide local service. The sole beneficiaries of this unworkable scheme have been the incumbent LECs, "whose supra-competitive special access prices and

[37] The incumbents' arguments to the contrary are baseless. For example, the *Notice* expressly seeks comment on whether the Commission should eliminate the ban on co-mingling UNE and non-UNE traffic on the loop and transport facilities used to provide EELs (*Notice* at 3). Therefore SBC and Verizon's contention (at 29) that the Commission has not provided adequate notice for such a rule change is meritless. Similarly, the Eighth Circuit has squarely rejected SBC and Verizon's further argument that the co-mingling would undermine the distinction between UNEs and services. *See Southwestern Bell*, 153 F.3d at 603-05.

monopoly profit stream have been shielded by a Commission umbrella from competitive forces and market entry for more than five years," and "[t]he losers under these rules are consumers, many of whom are still waiting to se any benefits from . . . the Telecommunications Act of 1996." CompTel at 2. There is no legal or policy basis to retain the interim use restrictions and co-mingling prohibition, and they should be eliminated immediately.

CONCLUSION

The time for action on this issue is long past due. For the foregoing reasons, the Commission should eliminate the interim use restrictions on UNEs and prohibit incumbent LECs from limiting requesting carriers' ability to "co-mingle" UNEs and other traffic. Failure to act immediately will only prolong and strengthen the incumbent LECs' existing monopolies and further postpone achievement of the pro-competitive objectives of the 1996 Act.

Respectfully submitted,

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