

transport and high-capacity loops. Non-ILEC alternatives to these elements are available in areas accounting for the vast majority of demand for services using these facilities. Moreover, in those and other areas, CLECs (and wholesalers catering to CLECs) face no competitively significant barriers to deploying their own facilities.

IV. THE FACT REPORT AND CRANDALL DECLARATION DEMONSTRATE THAT ALTERNATIVE DEDICATED TRANSPORT AND HIGH-CAPACITY LOOP FACILITIES ARE AVAILABLE TODAY AND CAN BE ECONOMICALLY DEPLOYED.

The Fact Report provides extensive evidence that the deployment of alternatives to ILEC dedicated transport and high-capacity loop UNEs has increased markedly in the past two years, to a point where such alternatives are widely available. The Crandall Declaration demonstrates that CLECs can profitably extend their facilities to serve the vast majority of businesses that are likely to utilize services based on these UNEs. While our opponents mount a furious attack on both of these documents, their arguments do not undermine these facts and conclusions. Not only have they failed to carry their burden of showing impairment, they likewise have failed to cast doubt on our compelling showing to the contrary.

A. The Fact Report Provides the Best Information Available and Its Conclusions Are Valid.

Several CLECs contest the veracity of the Fact Report, claiming that it overstates CLEC special access market share, local fiber miles, fiber networks, and buildings

the ability to gain a sufficient volume of business to justify economical deployment of their own facilities.”).

served.⁵⁵ Most of their claims are simply wrong, and the few that may have some validity do not alter the overall showing that competition for special access service, dedicated transport, and high-capacity loops is widespread and rapidly growing.

Market share. The Fact Report estimates that CLECs enjoy a 36% market share in the provision of special access services. AT&T is the only party to make a concerted effort to attack that figure, and even AT&T concedes that CLEC market share is at least 22% -- still more than enough to justify a conclusion that special access competition is alive and well and will remain so without mandatory unbundling of dedicated transport and high capacity loops.⁵⁶ In reality, moreover, CLEC special access market share is roughly at the level cited in the Fact Report, and AT&T's arguments to the contrary are baseless. Its jabs at the New Paradigm survey (from which many of the numbers in the Fact Report are taken) should be given little credence. This same survey is routinely relied on by a principal CLEC trade association (ALTS), and it has been cited repeatedly by AT&T and WorldCom when it suits their purposes.⁵⁷ In addition, the 36% figure is validated by a Legg Mason Wood Walker report on special access competition.⁵⁸

⁵⁵ See, e.g., AT&T Pfau Decl. (attached to AT&T's April 30 reply comments in CC Docket No. 96-98) (cited to by a multitude of CLECs); WorldCom Att. A; MPower Ankum Decl.

⁵⁶ In other contexts, AT&T has described this level of competition as "thriving" and "well beyond ... 'effective competition.'" Comments of AT&T at 1-2, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 00-132 (filed Sept. 8, 2000) (quoting 47 U.S.C. § 543(l)(1)(B)).

⁵⁷ See, e.g., ALTS, "The State of Local Competition 2001" at 9, 11, 24-26 (Feb. 2001); ex parte filing of AT&T, CC Docket No. 98-24, filed June 5, 1998; Comments of MCI WorldCom, CC Docket No. 96-98, filed May 26, 1999, at 60, 61.

⁵⁸ See M.J. Balhoff, Legg Mason Wood Walker, Investext Report No. 2022195, "Telecom Services: Industry Update" (Dec. 6, 1999).

AT&T's claim that the Local Competition Report proves otherwise is unavailing. That Report does not address special access competition separately, and deriving a relevant figure for such competition requires significant adjustments to the data. While AT&T pretends to remedy the situation, it does not go nearly far enough – for example, it ignores self-supply of special access by all IXCs other than AT&T and WorldCom and excludes resale by IXCs of CLEC or ILEC special access services. Finally, the result is not significantly affected by any supposed double-counting. Taken as a whole, both the 36% figure and an increase in CLEC special access market share of 6% between 1999 and 2000 are valid.⁵⁹

Fiber miles. The Fact Report estimates that CLECs have at least 218,000 fiber miles already in place as of year-end 2000, an increase from 160,000 in mid-1999. AT&T and others claim that this number is inflated, but even accepting their arguments at face value, the extent and growth of CLEC fiber miles compellingly demonstrates that alternatives to ILEC dedicated transport and high-capacity loops are widespread. First, the 218,000 number is conservative, since it does not include several prominent CLECs (such as Allegiance), several major fiber wholesalers (such as FiberWorks), and local fiber from several IXCs (such as Williams, Sprint, and Qwest) and electric utilities. Second, while the 218,000 figure includes some long-haul fiber present in metro areas, that fiber accounts for only about 20 percent of the overall number. (And, that fiber should not be excluded entirely, because it is capable of being used for local and access services.) Third, while AT&T asserts that the Fact Report includes fiber miles from entities that do not offer special access, at least six of the nine carriers identified by

⁵⁹ A more detailed refutation can be found in the Rebuttal Fact Report at 2-10 & n.48.

AT&T state that they do provide such services. Fourth, the most recent figures indicate that several CLECs have deployed even more local fiber than the Fact Report stated. Accordingly, there is ample support for concluding that the total amount of local CLEC fiber is at least as high as the figure cited in the Fact Report.⁶⁰

Fiber networks. The Fact Report listed 635 CLEC fiber networks in the top 150 MSAs at year-end 2000, compared to 486 in mid-1999. The CLECs argue that this figure double-counts networks that are either leased from wholesalers or other CLECs or serve the same immediate geographic area. They also contend that the number is suspect because it includes networks from carriers that have since entered bankruptcy. Neither objection is meritorious. The fact that some CLECs lease facilities from other CLECs or wholesalers demonstrates only that there is a wholesale market for dedicated transport and high-capacity loops – a fact that effectively precludes a finding of impairment, as some CLECs previously have acknowledged.⁶¹ In addition, these leases normally are long-term (20 years or more), making them tantamount to ownership. And, even where CLECs serve close-by areas using the same or parallel facilities, it is extremely likely that the buildings and offices they target will not overlap completely. As a result, it is fair to assert that these are discrete networks, each of which contributes to the overall competitive picture.⁶²

Buildings served. The Fact Report stated that CLECs serve at least 25% of the nation's 705,000 commercial office buildings. Once again, this figure is conservative,

⁶⁰ Rebuttal Fact Report at 11-15.

⁶¹ UNE Remand Order, ¶ 56.

⁶² Rebuttal Fact Report at 15-16.

since it does not include all CLECs or wholesalers, does not account for the fact that CLECs are likely to serve a far higher portion of the market based on revenues (since they will target the largest buildings first), and has not been updated to reflect CLECs' continuing extensions of their networks to new end users. AT&T questions both the number of buildings served by CLECs and the total number of commercial office buildings. By its own admission, however,⁶³ CLECs already serve buildings housing one-third of the 60 million business access lines in the country.⁶⁴ Thus, regardless of the actual count of buildings served and commercial office buildings, a significant and growing portion of business end users is touched directly by CLEC fiber.

Although AT&T quibbles with the figures in the Fact Report, any over-counts of individual CLEC's buildings served are minimal, as is the impact of double counting (that is, counting as two buildings a single building served by two CLECs).⁶⁵ Similarly, AT&T's effort to inflate the number of office buildings likely to house businesses with demand for high-capacity or special access service is belied both by its own concession that there are roughly 760,000 commercial office buildings (quite close to our own estimate) and by the fact that it wants to count a wide variety of facilities (such as houses of worship, automobile dealers, liquor stores, garden supply centers, and nursing homes)

⁶³ See Rebuttal Fact Report at 11 (citing the web site of the Smart Buildings Policy Project, a coalition that includes AT&T, WorldCom, CompTel, ALTS, and other CLECs).

⁶⁴ There is no validity to the claim that, even where a CLEC serves a building, it may be able to reach only a single customer or floor. If the ILEC owns or controls risers and conduits in that building, it must make them available to the CLEC. And, if such facilities are owned or controlled by the landlord, the ILEC and the CLEC are in the same competitive situation, precluding any finding of impairment.

⁶⁵ See Rebuttal Fact Report at 16-17.

that are unlikely to demand such services.⁶⁶ CLECs today serve hundreds of thousands of buildings accounting for a large portion of demand for the relevant services, and they routinely extend their reach to additional locations.

In short, the assaults on the Fact Report in no way undermine its fundamental demonstration that there are widespread alternatives to special access service, dedicated transport, and high-capacity loops. Whatever the state of competition for these services and facilities may have been when the UNE remand record was compiled, much has changed since then. Rather than alternatives being available only on limited, point-to-point routes (as the Commission asserted in the UNE Remand Order), alternatives today either are available or readily can be deployed wherever there is likely to be significant demand for special access and high-capacity services.

B. Dr. Crandall's Declaration Soundly Concludes that CLECs Can Extend their Networks to the Vast Majority of Customers Likely To Demand Special Access and High-Capacity Services.

AT&T's and WorldCom's attacks on Dr. Crandall's Declaration are without substance. First of all, Dr. Crandall's work is far from a theoretical succession of models.⁶⁷ It is firmly grounded in real-world evidence of collocation arrangements and CLEC fiber deployment – precisely the type of data that AT&T urges the Commission to examine but then fails to supply. Contrary to AT&T's claims, “[t]here is nothing theoretical about this empirical market evidence of *actual* competition,”⁶⁸ such as the detailed fiber maps. Those maps present unrefuted documentation that competition in the

⁶⁶ Rebuttal Fact Report at 17-20.

⁶⁷ See AT&T Economic Attachment, at 2.

provision of special access services, dedicated transport, and high-capacity loops is *today* alive and well in six representative cities, and the collocation data (along with the representative nature of these cities) make clear that the same holds true wherever there is demand for these services and facilities.⁶⁹

None of the CLECs' objections to the maps has any merit. Contrary to their claims, the maps do not include long-haul fiber.⁷⁰ Moreover, in the one instance where a CLEC referenced in the maps has entered bankruptcy proceedings, that company apparently continues to provide service – and even if it ceased operations, its facilities would remain in place and undoubtedly would be snapped up by another competitor. Nor has any CLEC demonstrated that the maps are inaccurate; only WorldCom makes a half-hearted effort to do so, but it offers no substantiation for its claim.⁷¹

Our opponents also are wrong in contending that the six-city results are not representative of the general addressability of customers for these services. While WorldCom faults the analysis for not examining larger cities, doing so would only increase addressability and produce an even brighter picture of potential competition.⁷²

The only part of Dr. Crandall's Declaration that relies on economic analysis rather than simple observation of existing facts is his extrapolation from the maps to reach a conclusion about *potential* competition. The Commission should dismiss arguments that

⁶⁸ Crandall Rebuttal Decl., ¶ 7.

⁶⁹ AT&T (AT&T Pfau Decl. ¶ 37) is flatly wrong in alleging that the collocation figures in the Fact Report include DSL providers. *See* Rebuttal Fact Report at 20.

⁷⁰ *See* Crandall Rebuttal Decl., section I.A.1.

⁷¹ *See* Crandall Rebuttal Decl., section I.A.3.

⁷² Crandall Rebuttal Decl., section I.B.

the use of a model to examine potential competition is inconsistent with the UNE Remand Order; in that decision the Commission at least twice referred to models submitted by WorldCom as a basis for its conclusions.⁷³

The specific criticisms of Dr. Crandall's analysis are unfounded. AT&T confuses the cutoff probability (that is, the tool for determining which customers should be considered potential users of special access) and the degree of addressability. Raising the cutoff probability, as AT&T urges, would increase the degree of addressability and produce results even less favorable to AT&T.⁷⁴ Sprint asserts that the model rules out relevant customers, but that is not the case; Sprint's claim rests on the mistaken assumption that special access customers are not distinct from the general local exchange customer base.⁷⁵

AT&T and WorldCom are on no firmer ground in challenging the measure used to portray potential competition. Contrary to their assertions, the CSMG model⁷⁶ in fact assumes that costs are incurred before customers are acquired and contains a customer care cost component. In addition, the model accurately states the costs of extending a CLEC's network to new customers. It assumes a realistic profit margin,⁷⁷ properly focuses on the costs directly attributable to extending a CLEC's network,⁷⁸ contains

⁷³ UNE Remand Order, ¶¶ 82-83, 263.

⁷⁴ Crandall Rebuttal Decl., section II.A.1.

⁷⁵ *Id.*, section II.A.3.

⁷⁶ Notably, CSMG has designed the business plans of more than 50 "real-world" CLECs. *See* Crandall Rebuttal Decl., ¶ 27.

⁷⁷ *Id.*, section II.B.1.a

⁷⁸ *Id.*

reasonable trenching costs,⁷⁹ and produces overall capital expenditures squarely within the range experienced by CLECs, as confirmed by the comments of several competitors.⁸⁰ Indeed, the model employs conservative cost assumptions in several respects. Most importantly, it considers each building as a stand-alone investment rather than estimating efficiencies from extending a network to several buildings in the same area.⁸¹ It also assumes no use of ILEC ducts or conduits, ignoring potential cost savings from avoiding trenching. And, it assumes almost all fiber will be placed underground, although CLECs often use cheaper aerial alternatives.⁸²

Nor does the model overstate revenues that a CLEC could expect to capture from extending its network to new buildings. AT&T errs in claiming that the model assumes that the CLEC would capture an unrealistic amount of total revenues; rather, the model conservatively projects that revenues will remain constant for the first five years instead of growing (as could rationally be expected). Moreover, the model does not assume that

⁷⁹ *Id.*, section II.B.1.b.

⁸⁰ *Id.*, section II.B.1.d. The model assumes total capex requirements per mile of between \$113,000 and 199,000. This is consistent with the vast majority of CLECs addressing the cost issue. *See, e.g.*, XO Burns Decl. ¶ 6 (\$30/foot or roughly \$160,000/mile); TDS Metrocom 5 (up to \$150,000/mile); AES 12 (citing the *City Lights Investor's Guide*, which quotes costs of \$100,000 to \$300,000/mile for underground facilities, \$50,000/mile for aerial facilities, and \$10,000 to \$60,000/mile for fiber placed in pipelines); Conversent 8 (\$ 49,843/mile to pull fiber in Verizon conduit in Massachusetts). The far higher numbers offered by Sprint (anecdotally relating a quote of \$1 million per mile from a "major vendor," which Sprint did not identify) cannot be credited.

⁸¹ As Dr. Crandall notes, "suppose that five buildings were arrayed along a side street and that each of the buildings was above the breakeven frontier. In my model, the CLEC would have paid five sets of permitting fees, and would have paid the fixed costs of trenching five times over. Clearly, this overstates the costs that a CLEC would incur to serve those five customers with a single lateral route." Crandall Rebuttal Decl., note 70.

⁸² Crandall Rebuttal Decl., section II.B.2.b.

CLECs will capture all revenues in a building; it excludes switched local service, for example.⁸³

In short, Dr. Crandall's Declaration compels the conclusion, based on the substantial existing competition and the concentration and nature of demand for the relevant services, that CLECs are able economically to extend their networks to serve buildings accounting for the vast majority of demand for those services. In the terms used by Section 251(d)(2), CLECs are not impaired in competing by using their own or a third party's dedicated transport and high-capacity loops.

V. CLEC CLAIMS OF IMPAIRMENT ARE UNPERSUASIVE.

Our opponents allege they would be impaired without access to ILEC dedicated transport and high-capacity loop UNEs because alternatives are not ubiquitously available, it is costly to self-supply or obtain facilities from third parties, they cannot do so in a timely manner, and procuring from a source other than the ILEC raises quality issues. Their ubiquity arguments are dealt with in Sections III and IV, *supra*. Their other arguments are equally meritless, as discussed below.

A. CLECs May Cost-Effectively Deploy or Obtain from Third Parties Alternative Dedicated Transport Facilities and High-Capacity Loops.

The CLECs assert that there are economic barriers to deploying or procuring alternative dedicated transport and loop facilities, complaining that fiber construction

⁸³ Crandall Rebuttal Declaration, section II.B.2.b. Notably, CLECs can still profitably extend their networks to buildings accounting for between 63.5 and 83.5 percent (depending on the city) of projected special access revenues if one assumes that the CLEC will capture 50 percent of the included categories of telecommunications expenditures. *See* Crandall Rebuttal Decl., ¶ 37.

costs are high, franchise fees are excessive, building owners are extortionate, ILECs charge too much for collocation-related costs such as space preparation, power delivery, and contract work, and ILECs increase costs by refusing to grant central office access to competitive fiber providers.⁸⁴ In an effort to make their case, several CLECs allege that providing service using special access services would be far more expensive than doing so using UNEs.⁸⁵ There are two general and several specific responses to these arguments, which demonstrate that these purported economic barriers do not amount to impairment.

First, the Fact Report and Crandall Declaration dispose of claims that fiber deployment and related costs render it uneconomic to build out competing networks. CLECs already have deployed hundreds of fiber networks and have extended those networks to commercial office buildings accounting for roughly one-third of all business access lines, precluding any argument that such deployment is uneconomic as a general matter. The only thing that can stop them from expanding their facilities to additional customers is an overbroad unbundling requirement that creates artificial incentives to continue relying on the ILEC's network even though competitive facilities investment would be profitable.

Second, the Supreme Court's decision renders a CLEC's profit margin irrelevant to the impairment analysis. While it might cost CLECs more in many cases to serve customers using their own facilities or an ILEC's special access services instead of

⁸⁴ See AT&T Fea/Taggart Decl.; WorldCom 9-13, 19-22; XO 21-22; Coalition of Competitive Fiber Providers.

⁸⁵ See, e.g., WorldCom 11, 21, Att. G; AES 7; Conversent 5; Covad Shipley/Chang Decl. Table 2; VoiceStream 15-16.

UNEs, a mere increase in costs is not tantamount to impairment. All that matters is whether CLECs can economically serve customers without reliance on UNEs, which they can.⁸⁶ If a CLEC can compete other than through the use of UNEs, it does not matter whether it is “‘impaired’ in its ability to amass earnings.”⁸⁷

Indeed, the fact that there is a cost difference between using UNEs and self-supplying or procuring dedicated transport and high-capacity loops from a third party confirms that TELRIC-based UNE rates are arbitrary and unreasonable.⁸⁸ The FCC has said that its TELRIC model is supposed to reflect the costs of building a hypothetical, maximally efficient network from scratch. That is precisely what CLECs supposedly do when they deploy metropolitan fiber networks. Consequently, if dedicated transport and high-capacity loop UNEs are priced below the costs faced by CLECs, the fault lies with the TELRIC model itself. Reaching a different conclusion would require the Commission to assume that the ILEC network is a natural monopoly – but Congress rejected that assumption in passing the 1996 Act.

In any event, the CLECs’ specific cost claims do not come close to demonstrating impairment. First, franchise fees by law must be applied on a nondiscriminatory basis to

⁸⁶ Likewise, the availability of special access at competitively disciplined prices by itself should preclude a finding of impairment. *See* Reply Comments of SBC and Verizon, CC Docket No. 96-98, filed April 30, 2001, at 17-18.

⁸⁷ *Iowa Util. Bd.*, 525 U.S. at 390; *see also* *GTE Service Corp. v. FCC*, 205 F.3d at 424.

⁸⁸ *See* Crandall Rebuttal Decl., section III.E (citing WorldCom’s claim (WorldCom 11) that it will not serve a “typical building” because DS-1 UNE loops are available for \$60-\$100 per month and noting that “WorldCom essentially admits that the UNE rate, which is intended to serve as a proxy for the long-run incremental cost of providing the service for an efficient firm, is set too low!”).

ILECs and CLECs alike.⁸⁹ In addition, the vast majority of municipalities impose fees that are rationally based on the extent of fiber deployment rather than revenues, and those local governments that impose excessive fees based on revenues do so on ILECs as well as CLECs. In fact, ILECs have been at the forefront in challenging over-reaching franchise fees.⁹⁰

The same holds true for the minority of building owners that seek unreasonable payments for building access. As an initial matter, the marketplace appears to be changing, with fewer building owners demanding unreasonable compensation.⁹¹ In addition, the Commission has banned exclusive access arrangements in commercial buildings, and as long as the ILEC is in a building, a CLEC has the right to use the ILEC's in-building risers and conduits to reach its customers. Of course, if an ILEC is not in a building, there can be no impairment vis-à-vis the incumbent. Moreover, several studies submitted in the Competitive Networks docket suggest that whatever fees are being charged by building owners are not appreciably deterring entry. In a Building Owners and Managers Association (BOMA) survey covering roughly 2100 buildings, 80 percent of the respondents said they had more than one telecommunications service provider, and almost 60 percent offer their tenants a choice of three or more providers.⁹² In Washington, D.C., one of the largest landlords has indicated that it has granted access

⁸⁹ See 47 U.S.C. § 253.

⁹⁰ See ex parte filing of Qwest, WT Docket No. 99-217, filed March 26, 2001, at 4-5.

⁹¹ See Crandall Rebuttal Decl. at note 75.

⁹² Ex parte filing of the Real Access Alliance, WT Docket No. 99-217, filed June 16, 2000, Attachment ("Critical Connections") at ix. The survey was limited to commercial office buildings. See *id.* at viii ("The owner sample represents just less than 400 million square feet of office space ... this is the largest telecom related study of office tenants conducted to date.").

to an average of 6.5 CLECs in its buildings. Forty percent of that landlord's properties are served by at least 8 CLECs.⁹³ Earlier this year, the Real Access Alliance submitted a study of tenants in multi-tenant buildings that found 91% of tenants were aware that they can choose alternative telecommunications providers and nearly one in four has placed at least one order with a provider other than the local ILEC. The study also found that less than 1% of tenants reported that building management had ever denied a request to obtain service from a telecommunications provider not already servicing the building.⁹⁴ Thus, while abuses may remain, the problem of excessive building access fees or other access barriers is not nearly so prevalent as AT&T and others would have the Commission believe.

The collocation-related claims are likewise unavailing. Collocation fees are closely regulated by the state commissions, which review collocation tariffs, SGATs, and interconnection agreements. In addition, the RBOCs must demonstrate that they offer collocation in accordance with the Commission's rules in order to gain authority to provide interLATA services under Section 271. Disputes between ILECs and AT&T regarding the level and appropriateness of certain collocation charges are being handled through the arbitration process and generic proceedings, as the Act contemplates. Given the tens of thousands of existing collocation arrangements, CLECs evidently are collocating on a cost-effective basis.⁹⁵

⁹³ *Id.*, Declaration of Barry M. Krell (CarrAmerica).

⁹⁴ *See* Further Reply Comments of the Real Access Alliance, WT Docket No. 99-217, CC Docket Nos. 96-98 and 88-75, Exhibit C, filed Feb. 21, 2001.

⁹⁵ In Verizon's territory, there are a total of 14,060 completed collocation arrangements. SBC has 13,381 existing collocation arrangements, and BellSouth has 4672.

Finally, claims regarding access to the central office by competitive fiber providers are off the mark. Mandating such access would violate Section 251(c)(6) of the Act, as each of the Joint Petitioners has explained in opposing the filing by the Coalition of Competitive Fiber Providers.⁹⁶ Moreover, the lack of such access does not create substantial cost penalties. CLECs are free to interconnect with competitive fiber providers immediately outside the central office or in a collocation hotel, and they do so, as is evident from the competitive fiber providers' growth. In addition, competitive fiber providers are free to collocate if they wish to interconnect with the ILEC or access ILEC UNEs, as required by Section 251(c)(6).

In short, the CLECs' cost-related claims do not demonstrate impairment and are grossly exaggerated. As long as they can serve customers economically without using dedicated transport and high-capacity loop UNEs, there is no impairment – even if they could earn a larger profit by using UNEs.

B. CLECs Can Compete in a Timely Manner without Using Dedicated Transport and High-Capacity Loop UNEs.

Several CLECs claim that there is an inherent delay in using non-ILEC facilities, which prevents them from competing effectively. Specifically, they allege that it can take several months to negotiate municipal franchises and building access agreements, come to terms with the ILEC on using the ILEC's rights-of-way, and obtain collocation

⁹⁶ See Comments and Reply Comments of BellSouth, SBC, and Verizon in CC Docket No. 01-77. The Coalition's petition seeks a declaratory ruling that competitive fiber providers have a right to access the central office under Section 224 of the Act. Section 224 cannot lawfully be read to grant such a right, as made clear in the referenced filings.

space. They also state that some municipalities have imposed moratoria or restrictions on new builds.⁹⁷

These are essentially the same arguments that these parties raised during the UNE remand proceeding, yet in the intervening two years there has been a substantial increase in the deployment of alternative transport and loop facilities. Plainly, then, the asserted delays have not been as difficult to overcome as AT&T and others claim – and those delays should continue to decline as CLEC networks become even more pervasive.⁹⁸

In addition, the delays are overstated and do not amount to impairment in any event. For example, AT&T suggests that it takes 12 months or longer until a new facility is “revenue-ready,”⁹⁹ but this statement is called into question by the fact that obtaining a permit and access rights generally takes only a few months.¹⁰⁰ This is particularly true since CLECs can use the ILEC’s rights-of-way to deploy their competing facilities, substantially streamlining the process. Even where a CLEC cannot or does not want to use the ILECs’ right-of-way, AT&T overstates the time to deploy facilities because it ignores the fact that, once a CLEC has a franchise in a municipality, it need not go through the franchise approval process again – it only has to secure the necessary right-of-way permit. While a few municipalities have imposed moratoria on new construction, those restrictions apply equally to ILECs. And, even when a moratorium has been instituted, the CLEC remains free to use the ILEC’s ducts, conduits, and rights-of-way – which, as the CLECs repeatedly point out, reach every subscriber.

⁹⁷ See generally AT&T Fea/Taggart Decl., Sprint 4-5.

⁹⁸ See Crandall Rebuttal Decl., section III.D.

⁹⁹ AT&T Fea/Taggart Decl. ¶ 18.

Nor is there any basis for crediting claims of egregious collocation-related delays. Collocation requests can be processed concurrently with the permitting and construction process, so they introduce no additional delay. Moreover, ILECs must implement collocation arrangements within strict deadlines or face severe penalties. The sheer number of collocation arrangements lays to rest any allegation that the time required to implement such arrangements is a barrier to competition.

Finally, the CLECs create a strawman in arguing that they cannot begin deploying facilities to a new building unless they have a customer, but customers do not want to wait several months for service. Customers in existing buildings have service with the ILEC (or another CLEC) already, and CLECs routinely sign up those customers and switch them over to their own facilities once they are in place. In addition, if a CLEC wants to begin serving the customer immediately, it can resell ILEC special access services until its own facility has been deployed. For customers in new buildings, arrangements for telecommunications can be timed so that the CLEC's facility is ready when the building becomes available for occupancy. In neither case is the CLEC impaired.

C. There Are no Legitimate Quality Concerns in Using Facilities other than Unbundled Dedicated Transport and High-Capacity Loops.

As with cost considerations, any quality concerns from using alternative facilities would be cognizable only if, in the Commission's formulation, they "materially diminished" CLECs' ability to provide service – a mere decrease in quality is not

¹⁰⁰ See TDS Telecom 4-6 (three to four months).

sufficient to mandate continued unbundling.¹⁰¹ The quality issues raised in the comments do not come close to doing so.

AT&T claims, for example, that it prefers to deal with carriers having a nationwide presence rather than a limited footprint and that many CLECs are unwilling to commit to AT&T's "Direct Measures of Quality." These are problems of AT&T's own making. Other CLECs have not found it problematic to coordinate several sources of supply,¹⁰² and if CLECs operating in a competitive marketplace find the DMOQs unacceptable, that suggests that the fault lies with AT&T's expectations, not the CLECs' performance. Indeed, AT&T asserts that CLECs generally perform better than ILECs.¹⁰³

* * *

None of the factors considered by the Commission in its impairment analysis supports continuing to compel unbundling of dedicated transport and high-capacity loops. Under Section 251(d)(2), the Commission must remove these UNEs from the "list."

VI. CONSOLIDATION AMONG CLECS IS IRRELEVANT TO THE IMPAIRMENT ANALYSIS.

Commenters claim that the devaluation and consolidation of many CLECs shows that there will be fewer networks available, these entities are not reliable sources of supply, and the Commission cannot assume that planned investments in new facilities

¹⁰¹ Iowa Util. Bd., 525 U.S. at 390.

¹⁰² Joint Petition at 28.

¹⁰³ There is likewise no merit to AT&T's suggestion that users will be reluctant to purchase CLEC services, as is made clear by the fact that CLECs have captured more than 20% of business lines in many areas. *See also* Crandall Rebuttal Decl., Section III.C (refuting AT&T's arguments about customer perceptions of CLEC quality).

will be made.¹⁰⁴ The travails of certain CLECs are typical of the early stages of a new industry and reflect a redirection of capital to companies possessing sound business plans and management teams. Until recently, the market made capital indiscriminately available.¹⁰⁵ Whatever the causes of this market upheaval, however, the current dislocations among CLECs, no matter how severe they may seem, are irrelevant to the issues in this proceeding.

It is nonsensical to suggest that, once a CLEC enters bankruptcy, its facilities will be withdrawn from the market. Most CLECs in bankruptcy are in Chapter 11 reorganization proceedings, not Chapter 7 liquidation. They continue to operate and may emerge from bankruptcy strengthened (and relieved of much of their debt load).¹⁰⁶ Even if some CLECs discontinue operations, their facilities will not disappear with them. Rather, they will be purchased by existing or new competitors,¹⁰⁷ quite possibly at fire sale prices.

In addition, while the availability of capital may be more restricted than it was a year ago – particularly for companies without a sound business plan – it is patently

¹⁰⁴ See, e.g., MPower Ankum Decl. 18-26; Sprint 5; ATG 4; Yipes 12.

¹⁰⁵ See generally *Bad Business Plans*, *supra*.

¹⁰⁶ For example, Teligent's May 21, 2001 press release announcing its Chapter 11 filing stated, "Teligent expects to continue its day-to-day operations while it uses the reorganization process to regain the financial strength to compete effectively The demand for last-mile broadband access remains insatiable. ... Our goal is to emerge from this reorganization with the appropriate cost framework to allow us to maximize the value of our nationwide network, positioning the company for significant future growth." <http://www.teligent.com/docs/reorg.html>.

¹⁰⁷ For example, Time Warner Telecom purchased the assets of bankrupt CLEC GST, enabling it to expand into 15 new territories. M. Popper, "StreetWise – Why Time Warner's CLEC Could Click," *Business Week Online*, May 23, 2001 ("Time Warner's CLEC") http://biz.yahoo.com/bizwk/010523/ykk2uws4jyj_epwsgozxgw.html.

incorrect to claim either that CLECs as a whole are an endangered species or that the flow of capital (and resulting facilities investment) has shut off. Notably, many of the leading CLECs continue to enjoy valuations per access line two to three times those of the RBOCs – a particularly telling statistic, since the RBOCs’ total valuations includes additional services such as wireless and foreign holdings.¹⁰⁸ Moreover, many CLECs enjoy massive capital resources, notwithstanding their currently depressed stock prices. Companies like AT&T, Worldcom, Allegiance, Time Warner Telecom, and the various telecom affiliates of incumbent energy utilities¹⁰⁹ are in business for the long haul. These and other CLECs continue to attract capital and continue to make investments in their networks.¹¹⁰ In fact, a June 5, 2001 report from Credit Suisse First Boston estimates that CLECs will make capital expenditures of \$ 6.801 billion in 2001 – down approximately \$ 5.9 billion from 2000, but still an increase of roughly \$ 800 million from 1999 levels.¹¹¹

Indeed, the developments in the capital market underscore the need for sound policies that allow facilities-based carriers to make the most of the limited capital available. Until mid-2000, any company with “telecom” in its business plan enjoyed a seemingly unlimited flow of funding. As a result, companies tapping the capital markets

¹⁰⁸ See Crandall Rebuttal Decl. at note 84.

¹⁰⁹ See Dynege Global Communications 1 (corporate parent had \$29 billion in revenues in 2000); AES Communications 1 (parent is “the leading global power company”); Enron Broadband Services (parent is one of the nation’s leading energy utilities).

¹¹⁰ XO Communications just received a \$250 million investment. See “XO Communications Closes \$250 Million Investment from Forstmann Little,” <http://biz.yahoo.com/bw/010607/2256.html>. NewSouth received \$85 million in financing in March 2001. See Press Release, May 29, 2001, “NewSouth Communications Exceeds 100,000 Installed Lines,” <http://biz.yahoo.com/prnews/010529/chtu008.html>. Time Warner is fully funded for the life of its business plan, according to its CFO. See Time Warner’s CLEC, *supra*.

¹¹¹ CSFB CLEC Report, *supra*, at 25.

did not have to demonstrate that they had rigorous, well-conceived business plans. Now, however, artificial incentives to forego economical facilities investment in favor of resale have a more pernicious effect than in the past.¹¹² Specifically, the continuing availability of UNEs at TELRIC rates – where competitors are able to compete without them – creates unnecessary risks for facilities-based competitors and artificially restricts their access to capital.¹¹³ The most appropriate policy response to current market conditions therefore is to eliminate such uneconomic arbitrage opportunities – not, as our opponents would have it, to maintain rules that divert capital away from sustainable investments.¹¹⁴

VII. ELIMINATING OVERBROAD UNBUNDLING REQUIREMENTS WILL PROMOTE, NOT DETER, INVESTMENT.

A wide range of informed observers – including Chairman Powell, Justice Breyer, and George Gilder, among others – has cautioned that compelling access to ILEC facilities where not economically required will diminish competition, sap investment, and

¹¹² Our opponents therefore are wrong to suggest that we are inconsistent in arguing both that there has been substantial deployment of competitive transport and high-capacity loop facilities and that continued unbundling of those UNEs would deter future investment. *See, e.g.*, WorldCom 22-24. There certainly has been sufficient deployment of alternative transport and high-capacity loops to demonstrate that competing carriers would not be impaired if mandatory unbundling of those facilities were discontinued. That does not mean, however, that the competitive picture would not have been even brighter without compulsory unbundling.

¹¹³ Overbroad unbundling requirements diminish investment and innovation by requiring ILECs to assume all the risks associated with deploying new technologies and services while sharing the benefits with their competitors. This recognition motivated the Commission to limit unbundled access to ILEC packet switches. Overbroad unbundling harms CLECs as well, since competitors that plan to deploy their own facilities will be dissuaded from doing so if mandatory access to UNEs threatens to undermine their investment.

¹¹⁴ The extent of this opportunity is exacerbated by TELRIC pricing, which as noted above bears no relation to the true cost of constructing and operating transport and high-capacity loop networks.

stymie innovation.¹¹⁵ As Justice Breyer noted, “[I]ncreased sharing by itself does not automatically mean increased competition. It is in the *unshared*, not the shared, portions of the enterprise that meaningful competition would likely emerge.”¹¹⁶

Our opponents disagree. Citing experience in the provision of DSL services, they claim that ILECs have a history of warning that intrusive regulation would deter investment but then turning around and making the investments just the same.¹¹⁷ They are wrong.

The ILECs are not crying wolf. AT&T’s own CEO has made our case for us: “No company will invest billions of dollars to become a facilities-based ... provider” if other companies “that have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others.”¹¹⁸ Likewise, no ILEC would willingly undertake the risks of deploying broadband facilities to new areas if it must bear those risks in their entirety while giving competitors a free ride. The DSL experience is hardly to the contrary; indeed, it also proves our case for us. The Commission chose *not to require* unbundling of ILEC packet switches and DSLAMs, thereby eliminating one serious impediment to deployment – and the substantial growth in ILEC DSL subscribers has come almost entirely following that decision. Even so, ILECs remain new entrants in the DSL market, far behind the cable incumbents (led, of

¹¹⁵ Joint Petition at 29-32.

¹¹⁶ Concurring Opinion of Justice Breyer, *Iowa Util. Bd.*, 525 U.S. at 429 (emphasis in original).

¹¹⁷ *See, e.g.*, XO 9-12.

¹¹⁸ Remarks of C. Michael Armstrong before the Washington Metropolitan Cable Club, “Telecom and Cable TV: Shared Prospects for the Communications Future” (delivered Nov. 2, 1998).

course, by AT&T). Consequently, subjecting the ILECs' DSL services to more burdensome regulations than apply to the cable operators undoubtedly has depressed investment, as shown by SBC's suspension of further Project Pronto deployment in Illinois.

Overbroad unbundling invites investment of the wrong kind, since it motivates companies to follow the easy (but unsustainable) course of using their capital to exploit opportunities for uneconomic arbitrage. Such unbundling deters investment of the right kind, since it penalizes companies that forego quick profits in pursuit of business models that are viable in the long term. The Commission should have no compunctions about reforming its regulations to place more emphasis on facilities-based competition and less on arbitrage. Doing so is not only consistent with sound economic and regulatory policy, but necessary to advance and achieve Congress's vision of competition from multiple providers of broadband facilities and services.

VIII. UNBUNDLING OF UNDERLYING TRANSPORT AND HIGH-CAPACITY LOOPS CANNOT RATIONALLY BE REQUIRED IN THE FACE OF PRICING FLEXIBILITY FOR SPECIAL ACCESS SERVICES.

Several CLECs claim that the grant of special access pricing flexibility is irrelevant to the impairment analysis for dedicated transport and high-capacity loops.¹¹⁹ As we pointed out in the Joint Petition, however, the grant of such flexibility in diverse geographic markets should alone be sufficient to show that carriers are not impaired, not just in those wire centers, but for the entire service. Put another way, if special access services are competitively disciplined by facilities-based CLECs (as the Commission has

¹¹⁹ See, e.g., Coalition of Competitive Fiber Providers 9-10; Allegiance/Focal 22-23; XO 28-29; WorldCom 18.

found), and if CLECs can obtain those services from ILECs and other CLECs (as they can), it is irrational to conclude that they would be competitively impaired without access to the underlying network elements. Again, as long as the CLEC can profitably provide service, it is not impaired – regardless of whether it could earn a greater profit if TELRIC-priced UNEs remained available.¹²⁰

IX. THERE IS NO BASIS FOR ADOPTING FEDERAL “UNBUNDLING GUIDELINES” OR TAKING ENFORCEMENT ACTION AGAINST ILECS.

Presumably on the theory that the best defense is a good offense, a handful of CLECs complain that ILECs are not complying with existing requirements,¹²¹ and one even asks for new federal UNE provisioning intervals, pricing levels, a performance assurance plan, and a compliance/audit review team.¹²² There is no basis for granting any such relief.

The discontent expressed by these CLECs relates primarily to the local competition “safe harbors” under which existing special access circuits can be converted to combinations of UNEs. As explained in the special access conversion proceeding, those allegations lack merit. ILECs have not been forcing CLECs to undergo pre-audits or denying legitimate requests for conversion. The safe harbors are there for a reason, however, and requests that patently do not qualify for conversion are and should be denied.

¹²⁰ Joint Petition at 19.

¹²¹ See XO 24-28; AT&T 10-11.

¹²² See Cbeyond et al. 38.

In a twist on this theme, certain wireless carriers allege that ILECs have been unlawfully declining to convert special access circuits into dedicated transport UNEs. While acknowledging that they do not meet the safe harbors, they claim that they are not subject to them in the first place.¹²³ Regardless of the applicability of the safe harbors to CMRS providers, though (and there is no reason to believe they do not or should not apply), the CMRS providers cannot obtain UNEs that do not exist. CMRS providers have not legitimately sought dedicated transport UNEs because the facilities at issue do not meet the definition of that element. They connect CMRS mobile switching centers to CMRS base stations – neither end of these circuits interconnects with the ILEC’s network.¹²⁴

XO’s recitation of fines levied against various RBOCs is of no moment. As the Commission is aware, RBOCs meet the vast majority of their wholesale performance obligations. RBOCs are subject, however, to pervasive performance measures, reporting requirements, and “performance assurance plans” (that is, penalties). Consequently, the inevitable slips – no carrier could possibly meet all of the thousands of measures each and every month – result in fines. Regardless of the merits of this approach, the existence of fines does not mean that CLECs would be impaired without access to unbundled dedicated transport and high-capacity loops; it has no bearing on that determination whatsoever.

¹²³ See *Voice Stream*; *NexTel*.

¹²⁴ See 47 C.F.R. § 51.319(d)(1)(i) (dedicated transport means ILEC transmission facilities “dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.”).