different markets, still must acknowledge that "the ILEC remains the only source for transport" in many instances due in part to the expense of self-provisioning.[296]

Similarly, it remains the case that sufficiently substitutable non-ILEC dedicated transport UNE alternatives are generally not available from third parties. Despite "the prevalence of competitive transport providers" presumed by the Commission,[297] which must include MFN, the competitive transport market has not sufficiently developed over the past two years in a manner that would relieve CLEC impairment in the absence of ILEC UNEs. As several CLEC Coalition members demonstrated last summer, although they would prefer to obtain transport from non-ILEC third-parties, such alternatives generally are not available. Indeed, "there is no one provider – in any market – that can offer ubiquitous alternatives to ILEC UNE transport[.]"[298] Moreover, as TDS Metrocom, NuVox and e.spire report, third-party transport UNE alternatives are limited-to-non-existent in the tier-two and tier-three markets they serve.[299] And it is too early to expect CLECs to be able to rely on fellow CLECs for use of alleged spare capacity: most CLECs, such as KMC, do not have the luxury of excess capacity, but rather must scale their facilities to their own needs and use them as efficiently as possible.[300]

With respect to the development of third-party alternatives, the Commission needs to be mindful that such providers have typically been hit as hard by the current capital crunch as the CLECs that would very much like to buy from them. Making a wholesale business out of

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296 Duke Aff., ¶ 15.

297 *See NPRM*, ¶ 62.

298 *Id.* at 35.

299 Jackson Aff., ¶ 4 (TDS); Cadieux Aff., ¶ 10-11 (NuVox); Powell Aff., ¶ 5 (e.spire). *See also* Duke Aff., ¶ 14 (KMC) (regarding high-capacity loops).

300 Duke Aff., ¶ 12 (KMC) ("KMC operates it transport at a very high fill rate. The transport facilities that it has provisioned are thus nearly at capacity, which does not permit other CLECs to buy capacity on our

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deployed assets requires a capital commitment few competitors are currently in a position to make. Notably, the Commission was correct in rejecting past ILEC attempts to refute CLEC impairment vis-à-vis dedicated transport UNEs through general, inapposite statements, such as that CLECs are collocated in 183 of 320 top MSAs.[301] Such counting exercises shed little or no light on the actual availability of sufficiently substitutable third-party UNE alternatives or CLEC impairment.[302] As the Commission explained, even where CLECs have deployed fiber on a competitive basis, it found that "these facilities are not available, as a practical, economic, and operational matter," such that a carrier is not impaired without access to ILEC transport.[303] The CLEC Coalition is unaware of any evidence that would dissuade the Commission from this conclusion.

In the past two years and even since last summer, the financial markets have tightened alarmingly, leaving CLECs with severely restrained access to capital, if any. Thus, there are no "changed circumstances" that would support a finding that transport should no longer be available on an unbundled basis.[304] To the contrary, there is considerable evidence demonstrating that CLEC Coalition members would be impaired without access to dedicated transport UNEs. Although members of the CLEC Coalition try, wherever possible, to obtain transport from third parties or to self-provision facilities, they cannot obtain sufficient substitutes for ILEC dedicated transport UNEs with any degree of predictability or ubiquity – even in the densest markets.

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lines."). In addition, the CLEC community has not developed the back-office systems necessary to run as a wholesale enterprise. *See id.*, ¶ 13.

301 Joint BOC Petition at 19.

302 *UNE Remand Order*, 15FCC Rcd. at 3847-3848, ¶¶ 334-337.

303 *Id.*, 15 FCC Rcd. at 3846, ¶ 333.

304 *See NPRM*, ¶ 61.

1. High-capacity dedicated transport is required for competitive services and is not available "as a practical, economic or operational matter" from non-ILEC sources

Notably, almost all dedicated transport UNEs ordered by CLECs are "high-capacity" transport UNEs. Thus, when the ILECs scheme to relieve themselves of the obligation to unbundle high-capacity transport UNEs, they essentially seek an exception that would swallow the entire transport rule.[305] Based on the foregoing impairment analysis, the Commission should make clear that ILECs must continue to make available high-capacity transport UNEs at all capacity levels and in SONET and dark fiber form.[306] CLECs must continue to have a choice in dedicated transport UNE capacity levels, in order to engineer their networks in an efficient manner that allows them to compete and to deliver the robust array of services they generally offer.[307] Moreover, high-capacity transport UNEs remain an essential component of EELs. As the Commission recognized in its *UNE Remand Order*, EELs alleviate the need for CLEC dependence on intrusive and expensive collocation and provide competitors with a cost-efficient means of extending the reach of their networks and service offerings (including broadband).[308]

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305 *See generally* Joint BOC Petition (requesting removal of dedicated transport and high-capacity loops).

306 *See NPRM*, ¶ 62 (seeking comment on whether it should analyze transport according to "certain capacity levels").

307 NuVox, for example, is very precise with respect to the levels of transport capacity – DS1 versus DS3 – that it plans for specific parts of its network. *See* Cadieux Aff., ¶¶ 9 (NuVox).

308 *UNE Remand Order*, 15 FCC Rcd. at 3828, ¶ 288 ("We agree with ALTS that, if requesting carriers can obtain nondiscriminatory, cost-based access to the enhanced extended link, their collocation costs would decrease, and they would need to collocate in as few as one incumbent LEC central office in an MSA to provide service."); *id.* at 3831, ¶ 298 ("Moreover, the availability of the EEL substantially reduces the delay a requesting carrier would experience before it is able to actually provide service."); *id.* at 3919 n.1018 ("The EEL allows new entrants to serve customers without having to collocate in every central office in the incumbent's territory.").

High-capacity transport UNEs also remain critically important to CLECs' ability to deliver broadband services.[309] Without such UNEs switch-based CLECs would be unable to aggregate traffic in a manner that makes a broad-based offering of integrated T1,[310] DSL and other broadband services in an economically feasible manner (in order to offer consumers a competitive or otherwise attractive rate).[311] Thus, high-capacity dedicated transport UNEs are crucial to making the Commission's goal of significant broadband deployment a reality.[312]

For the same reasons, the CLEC Coalition also asks that the Commission affirm and clarify the ILECs' obligation to unbundle SONET ring transport. As explained in the *NPRM,* the Commission concluded, in its *UNE Remand Order,* "that ring architecture transport was included within the definition of unbundled transport and that incumbent LECs must provide it on an unbundled basis."[313] In the *UNE Remand Order,* the Commission also determined that ILECs did not have to provide SONET capabilities to requesting carriers where the ILEC did not already have SONET capabilities in place.[314] As the Commission observed in the *NPRM,* some parties have interpreted its *UNE Remand* language to mean that there is no requirement to

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309 CLEC Coalition members rely on unbundled high-capacity transport to provide broadband services. Polito Aff., ¶ 8 (SNiP LiNK); Cadieux Aff., ¶ 16 (NuVox) (NuVox and an increasing number of CLECs are combining ILEC HiCap Loop and dedicated transport facilities to provide bundled voice and broadband data services.").

310 The CLEC industry has virtually pioneered the integrated T1 product. Only when CLECs began winning customers through their integrated T1 offerings did the Bells reluctantly follow suit. As the Yankee Group has concluded, "[t]he ability of the CLECs to effectively sell and take market share away from the RBOCs in the business market has not gone unnoticed. Recently, Verizon has entered the market with the FlexGrow product (using Alcatel equipment) and VINA technologies has announced a contract with BellSouth." The Yankee Group Research Notes at *15 (Mar. 12, 2002) (provided as an attachment to Cadieux Affidavit (NuVox)).

311 Every member of the CLEC Coalition provides advanced services in competition with the ILECs. Powell Aff., ¶ 3 (e.spire); Cadieux Aff., ¶ 3 (NuVox); Duke Aff., ¶ 3 (KMC); Polito Aff., ¶ 3 (SNiP LiNK); Riordan Aff., ¶ 3 (MFN). See also member profiles.

312 *See, e.g., NPRM,* ¶ 4.

313 *NPRM,* ¶ 63 (citing *UNE Remand Order,* 15 FCC Rcd 3843, ¶ 324).

314 *UNE Remand Order,* 15 FCC Rcd 3843, ¶ 324.

unbundle SONET rings.[315] Having now made clear its intentions – and in light of the fact that CLECs today are no more able to self-provision new SONET ring facilities or obtain them readily from third-parties in most instances, – the Commission should affirmatively find that ILECs have a continuing obligation to provide unbundled access to SONET rings that are already in place, as well as those that ILECs install in the future. In light of the Commission's knowledge that ILECs have in the past refused to provide unbundled access to SONET ring architecture, the Commission should expressly allow for conversion of special access SONET rings to UNE SONET rings without penalty. Since CLECs have been forced to order SONET capabilities as special access, the imposition of penalties would only result in an additional windfall for the ILECs. Past non-compliance should not be so rewarded.

2. The Commission should require ILECs to make dark fiber transport facilities, and information about the location of those facilities, available on an unbundled basis

The Commission should reaffirm its *UNE Remand* conclusion that dark fiber transport must also be unbundled under the "impair" standard of Section 251. Dark fiber retains all the features and functionalities of dedicated transport, differing from other transport only in the sense that it is not "lit".[316] The Commission found in the *UNE Remand Order* that because dedicated transport is not available "on a ubiquitous basis," carriers cannot "practically and effectively substitute transport services provided by other competitive carriers for unbundled transport."[317] It further found that "lack of access to ubiquitous transport alternatives, which allow competitive LECs to interconnect their networks with all the central offices serving their

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315 *Id.*

316 *Id.*, 15 FCC Rcd. at 385, ¶ 352.

317 *Id.* at 3853, ¶ 350.

customers, will impair these carriers' ability to provide the services they seek to offer."[318] Therefore, the Commission held that carriers are impaired without access to ILEC dark fiber on an unbundled basis.[319]

Two-years' experience has demonstrated that access to dark fiber UNE transport has been elusive. There are several measures the Commission can and should take to ensure that the benefits of dark fiber unbundling are achieved. First, the Commission should require ILECs to make available to CLECs information that allows CLECs to determine where that dark fiber resides and to allow CLECs the ability to access it effectively. Presumably, all ILECs have records of where dark fiber has been installed and have included that information in similar databases. The Commission should require ILECs to provide such information during the preordering phase, as it presently requires in a similar fashion for xDSL-capable loops.[320] Simply put, the rules of the copper world should apply to the fiber world. Without non discriminatory access to such information, CLECs can never predict and have difficulty learning where dark fiber transport may be available. The ILECs have been allowed to "hide the ball" for too long. Dark fiber carries the same unbundling mandate as lit fiber transport – CLECs must have access to information necessary to obtain it.

In addition, and as is the case with dark fiber loops, requesting carriers must be permitted to install and use facilities in ILEC COs that they need in order to access dark fiber effectively. As described above in Section IV.A.1.b., Verizon, in Massachusetts has developed a cross-connect/fiber panel interconnection offering that provides an efficient method for accessing both

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318 *Id.* at 3853, ¶ 350.

319 *Id.*

320 *See UNE Remand Order*, 15 FCC Rcd. at 3885-86, ¶¶ 427-428; *see also* Section IV.D., *infra* (discussing OSS).

ILEC dark fiber UNEs and CLEC dark fiber alternatives. This "best practice" should be adopted as a Commission benchmark.

To encourage the development of a competitive market for alternatives to ILEC dark fiber and transport, the Commission also should take steps to ensure that alternative transport providers such as MFN are allowed to collocate in ILEC central offices in order to provide other CLECs with efficient access to non-ILEC dark fiber alternatives. As explained in the attached affidavit of Robert Riordan, Director of LEC Relations, Verizon presently allows CLECs to make such arrangements through its "Competitive Alternate Transport Terminal ("CATT"), which enables the CLEC to route multiple dark fiber trunks directly into the same central office.[321] In this arrangement, MFN pulls in and terminates up to 432 dark fibers into a CO, to which its CLEC customers may easily interconnect and avail themselves of "virtually unlimited bandwidth."[322] As a result, CLECs are able to obtain access to alternative dark fiber facilities efficiently and without depletion of scarce collocation facilities.

Thus, with its reiteration that ILECs must provide dark fiber transport on an unbundled basis, the Commission should expressly state that the ILECs also must provide information about the capacity and location of dark fiber, where available, and must permit the necessary collocation and interconnection arrangements to enable its use and to facilitate the development of competitive alternatives.

3. The Commission must make clear that unbundled dedicated transport must be provided at cost-based rates

Finally, the Commission should expressly reaffirm that the requirement to unbundle dedicated transport, both lit and dark and in all its capacities and forms, includes the requirement

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[321] Riordan Aff., ¶ 6 (MFN); MFN High-Cap Reply Comments at 7.

that dedicated transport UNEs be priced at cost-based rates.[323] Although this conclusion necessarily follows from the notion of unbundling,[324] CLECs have been required to pay above-cost access rates for transport, rather than the appropriate UNE rate, to the extent that dedicated transport is used as interconnection trunks for the purpose of exchanging local, as well as other types of traffic.[325] This policy is unlawful, as it squarely violates the cost-based interconnection and unbundling requirements of Section 251 and the Commission's rules.[326] There are no local-only use restrictions on local dedicated transport,[327] nor can it be seriously alleged that the provision of transport is more expensive for ILECs when it is used for interconnection trunks carrying local and interexchange services. Thus, the Commission must expressly prohibit current unlawful and anticompetitive ILEC practices that impose unlawful use restrictions on dedicated transport UNEs and deny cost-based access to such elements when they are used for interconnection trunks.

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322 *Id.*

323 Betsy Powell, e.spire, explains the importance of cost-based transport pricing in order to avoid "high tariffed special access rates" that "directly affect[] our margins and makes e.spire less competitive." Powell Aff., ¶ 8 (e.spire).

324 *Local Competition First Report and Order*, 11 FCC Rcd. at 15812, ¶ 618.

325 BellSouth regularly denies CLECs cost-based access to interconnection and UNEs, as it attempts to charge access rates for interconnection trunks. Recently BellSouth has moderated its position (but not its violation of the Act) by seeking to apply both cost-based UNE rates and access rates to interconnection trunks via the application of jurisdictional reporting factors and ratcheting. Tellingly, "co-mingling" poses no problems for BellSouth in that circumstance.

326 47 U.S.C. § 251(d)(1); 47 C.F.R. §§ 51.503, 51.503. *See also Local Competition First Report and Order*, 11 FCC Rcd. at 15816, ¶ 628 (stating that all UNEs, as well as interconnection and collocation, must be governed by cost-based pricing principles); *id.* at 15844, ¶ 672 (adopting the TELRIC pricing methodology for collocation and UNEs).

327 *Id.*, 11 FCC Rcd. at 15681, ¶ 360. To the extent that the Commission had ever authorized the assessment of access charges on dedicated transport UNE interconnection trunks by requiring IXCs to continue to pay per-line access charges pending amendment of universal service mechanism, that transitional scheme has expired. *Local Competition First Report and Order*, 11 FCC Rcd. at 15864, *aff'd*, *Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1075 (8th Cir. 1997) (affirming scheme as a transitional measure "to maintain universal service").

C. CLEC Are Impaired Without Cost-Based Unbundled Access to EELs

As discussed in Section II.C above, the Commission immediately should lift the "co-mingling" restriction and "significantly local" use restrictions it has imposed on conversions of special access circuits to EELs. In addition, the CLEC Coalition requests that the Commission conduct an impairment analysis with respect to the functionality provided by EELs. Such analysis should confirm that a CLEC's ability to offer voice and broadband services to customers served via ILEC COs in which they are not collocated is impaired without unbundled access to the functionality provided by EELs.

The Commission already has recognized that EELs are instrumental in providing facilities-based competitors with a means of reaching additional end users and providing broadband services in a cost-effective and efficient manner.[328] Significantly, EELs reduce competitors' reliance on collocation which correspondingly reduce the burdens that collocation imposes on ILECs.[329] Thus, the Commission requires access to EEL UNE combinations pursuant to Rule 315(b) and in conjunction with the exemption it has created for circuit switching.[330]

In the *NPRM,* the Commission inquires whether its "safe harbor" EEL conversion rules "appropriately target competitive LEC impairment to local exchange service."[331] In response, the CLEC Coalition respectfully offers the following observations. First, it is significant that the

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328 *UNE Remand Order*, 15 FCC Rcd. at 3828, ¶ 288, 3831, ¶ 298.

329 *See UNE Remand Order,* 15 FCC Rcd. at 3828, ¶¶ 288-89 ("if requesting carriers can obtain nondiscriminatory, cost-base access to the enhanced extended link, their collocation costs would decrease").

330 To the extent that the Commission is inclined to retain a circuit switching unbundling exception, CLEC Coalition members fully support retention of the requirement that ILECs make new EELs available on an unrestricted unbundled basis as a condition precedent.

Commission acknowledges that impairment exists with respect to EELs. Since impairment exists with respect to the loop and transport components that comprise an EEL, and in light of the Commission's acknowledgement of the expense and delay associated with collocation that otherwise would be necessary to combine these network element components,[332] it follows that impairment exists with respect to the composite functionality provided via an EEL.

Second, the CLEC Coalition respectfully submits that the "safe harbor" rules unlawfully restrict and otherwise inhibit access to UNEs and thus target nothing appropriately. As set forth above, the ill-conceived parameters which form the safe harbors have been used to stymie competitors' access to EELs and have proven most useful in preserving ILEC special access profits. NuVox reports that ILECs are still not prepared to perform EEL conversions,[333] which is presently the only manner in which federal law allows them to be provisioned. As a result, these ILECs have for practical purposes excused themselves from providing EEL combinations. Strangely, this form of regulatory arbitrage that favors the incumbents has been deemed by the Commission to be worthy of protection. The passage of time, however, lends no legitimacy to this Commission policy.

Finally, it is notable that the Commission's inquiry presumes impairment with respect to the provision of local services. As set forth in Section III.A above, the statutory unbundling

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331 *NPRM*, ¶ 71.

332 The Commission has found repeatedly that collocation imposes significant costs and delays on competitive carriers. *UNE Remand Order*, 15 FCC Rcd. at 3737, ¶ ("If the competitor must collocate its own switches in multiple central offices throughout the MSA … the costs associated with collocation may impair the competitor's ability to provide the services it seeks to offer[.]"); id. at 3818, ¶ 269 ("We are troubled by anecdotal evidence that collocation imposes a delay of six, nine or twelve months of the provision of ubiquitous service."); *id.* at 3819, ¶ 270 (stating that "collocation, examined from the time a requesting carrier initiates the collocation process until a collocation arrangement is delivered, generally imposes a delay of approximately six months on the provision of service.").

333 Cadieux Aff., ¶ 15 (NuVox) (discussing Ameritech's failure to develop internal ordering systems to support conversions and multiple EEL outages in Ohio).

standard does not contain nor permit a distinction based on the type of service a requesting carrier seeks to provide via UNEs.

Indeed, without access to EEL UNEs, CLECs would be impaired in providing all of the services they currently provide their customers and those they seek to provide to new customers – voice and broadband included. As the ILECs themselves have demonstrated, EELs enable the efficient provisioning of switched services without the need to place a switch in each central office. ILECs frequently use such arrangements to deliver data traffic from their own end users to their data switches. Because CLEC network architecture does not and cannot replicate that of the ILECs,[334] EELs are essential to a CLEC's ability to compete effectively on a ubiquitous basis with an ILEC any given market.

Applying the impair standard of Section 251(d)(2)(B), it is quite clear that CLECs' ability to compete is materially diminished without cost-based unbundled access to EELs. As is the case with the loop and other transmission facilities, there is no competitive wholesale market from which CLECs can obtain access to sufficient substitutes for EEL functionality. For the same reasons why self-supply cannot be relied upon to produce sufficient substitutes for loops and transport, self-provisioning also is not a sufficient non-ILEC source for obtaining EEL functionality. Because CLECs cannot in the near term hope to approximate the ubiquity of ILEC loop plant, central offices and transport facilities, CLECs are materially disadvantaged in terms of cost, scope of availability, and time-to-market without unbundled access to EELs. Without such access, CLECs could be forced to collocate in every ILEC end office, if they intend to

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334 Cadieux Aff., ¶¶ 10-11 (NuVox) (third-party vendors "do not provide anything approaching the geographic ubiquitous coverage that NuVox requires" and must obtain from the ILECs); Duke Aff. ¶ 11 (KMC) ("KMC has still not found any third party that can provide it with alternatives to ILEC loops to fit its proposed service plan."); Polito Aff., ¶ 8 ("We have not been able to obtain the ubiquitous network build-out that we require in our markets without ILEC transport.").

compete in a market-wide basis with an ILEC. Otherwise, CLEC services would be restricted to customers served in end offices where CLECs can build or have built a sufficient customer base to justify the large capital expense involved with collocation.

EEL UNEs would help alleviate the competitive disparity created by the ILECs' ubiquitous network infrastructure, by maximizing the number of customers that can be served from a single CLEC point of presence. EEL UNEs substantially can reduce the cost and delays associated with collocation, while at the same time conserving scarce ILEC space for collocation in ILEC end offices. Indeed, in end offices where ILECs have reached space exhaust, extended links may provide new entrants with the only efficient means of competing.

For all these reasons, the Commission should act now to add an extended link UNE to its national minimum unbundling requirements. CLECs are impaired without access to network element functionality that provides connectivity between end users and the CLEC's point of interconnection with the ILEC.[335]

D. CLECs Would Be Impaired Without Cost-Based Unbundled Access to OSS

The Commission seeks comment on whether Operations Support Systems ("OSS") must be available on an unbundled basis.[336] OSS provides the functionalities for pre-ordering (including loop qualification information), ordering, provisioning, maintenance and repair, and billing functions supported by an ILEC's databases and information.[337] OSS includes the manual, computerized, and automated systems, together with associated business processes and updated data maintained in those systems. These functionalities are required for any carrier to

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335 The Commission currently permits CLECs to interconnect at a single point in a LATA in order to interconnect to the ILEC network.

336 *NPRM*, ¶ 64.

access UNEs and network/customer record information and to compete effectively. Thus, OSS easily has met and continues to meet the settled "impair" standard for unbundling.[338]

There can be no serious argument that ILEC OSS need no longer be unbundled. OSS is the lifeblood of network administration, management and interoperability – for all carriers. Unless carriers have the ability to order large volumes of elements in a mechanized fashion, the competitive industry will be hamstrung in trying to meet consumer demand. The ILECs have relied upon OSS for decades to increase provisioning productivity, efficiency and timeliness. For this reason, the Commission found in the *Local Competition Order* that it "is absolutely necessary for competitive carriers to have access to operations support systems functions in order to successfully enter the local service market."[339] The Commission affirmed this holding in the *UNE Remand Order*, finding that "the success of local competition depends on the availability of access to the incumbent LECs' OSS."[340] In fact, these functionalities are directly attributable to the "economies of scale" that Congress mandates that incumbents share with new entrants.[341]

In the *UNE Remand Order,* the Commission further affirmed that there is only one repository of the network information and provisioning functionality that OSS retains: the ILECs.[342] In fact, the Commission has never discussed the viability of self-provisioning with

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337 *Id.*; *see also UNE Remand Order*, 15 FCC Rcd. at 3884-3885, ¶¶ 425-427

338 The Commission has never found that OSS is a proprietary element; the "impair" therefore applies. UNE Remand Order, 15 FCC Rcd. at 3884, ¶ 424; Local Competition First Report and Order, 11 FCC Rcd. at 14766, ¶ 522. The Commission has concluded, however, that even if OSS were proprietary, it would satisfy the "necessary" test. *Local Competition First Report and Order*, 11 FCC Rcd. at 14766, ¶ 521.

339 *Id.*, 11 FCC Rcd. at 14766, ¶ 521.

340 *UNE Remand Order*, 15 FCC Rcd. at 3888, ¶ 434.

341 47 U.S.C. § 259(b)(4) (the Commission must "ensure that such [LEC] makes such infrastructure, technology, information, facilities, or functions available to a qualifying carrier on just and reasonable terms and conditions."); *see also UNE Remand Order*, 15 FCC Rcd. at 3739, ¶ 86.

342 *UNE Remand Order*, 15 FCC Rcd. at 3803, ¶ 434.

respect to OSS,[343] because the point is moot. CLECs' investments in their own OSS facilities do not substitute for ILEC OSS, instead CLEC OSS is designed to work with ILEC OSS and not replace it.

As to procurement of OSS alternatives from third-party providers, the Commission found that "alternative providers do not provide substitutable alternatives to the incumbent LEC's OSS functionality . . . because incumbent LECs have access to exclusive information and functionalities needed to provide service."[344] There are no "changed circumstances" today that change this reality,[345] as there is not one alternative provider that can provide CLECs with crucial information about the ILECs' network or enable CLECs to submit requests for UNEs without accessing ILEC OSS.

The scope and level of OSS unbundling is as important as the core unbundling requirement itself. The Commission has ordered incumbents since 1996 to provide access to all such functionalities on a nondiscriminatory basis, in a manner commensurate with the incumbents' own use of OSS in serving customers.[346] Included within this access requirement are the "internal gateway systems" that an ILEC has developed and used "for its own customers."[347] In the *UNE Remand Order*, the Commission refined its definition of OSS to refer to "the incumbent LEC's electronic interface and gateways to enable the processing of orders

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343 *See UNE Remand Order*, 15 FCC Rcd. at 3887-2889, ¶¶ 433-437 (discussing the scope of OSS access that must be available under the nondiscrimination requirement of Section 251); *Local Competition First Report and Order*, 11 FCC Rcd. at 15763-15768, ¶¶ 516-528 (same discussion); *Line Sharing Order*, ¶¶ 93-130 (discussing upgrades and improvements that must be made to ILEC OSS in order to support line sharing).

344 *UNE Remand Order*, 15 FCC Rcd. at 3888, ¶ 434.

345 *See NPRM*, ¶ 64.

346 *Local Competition First Report and Order*, 11 FCC Rcd. at 14767, ¶ 523. *See also UNE Remand Order*, 15 FCC Rcd. at 3888, ¶ 435.

347 *Local Competition First Report and Order*, 11 FCC Rcd. at 14767, ¶ 523 & n.1274.

without manual intervention."[348] Specifically with respect to loops, the Commission ordered ILECs to provide direct, "unfiltered" access to all information about a loop, including length, composition, and the presence of electronic devices to enhance loop performance.[349]

The Commission further held that, in order to determine the proper benchmark to evaluate OSS access, "the relevant inquiry is not whether the retail arm of the incumbent has access to the . . . information, but rather whether such information exists anywhere within the incumbent's back office and can be accessed by any of the incumbent LEC's personnel."[350] Thus, the Commission determined that an ILEC would violate Section 251 if it has the ability to access loop information automatically, "while competing providers are relegated to a slower and more cumbersome process to obtain that information."[351] This conclusion remains sound and the Commission should continue to apply this standard to OSS access generally, for all UNEs, in order to comport with Congress' nondiscrimination and unbundling mandates.[352] This action will speed the deployment of wireline broadband services, which rely so heavily on fast, accurate and complete information about network facilities.[353]

The CLEC Coalition therefore urges the Commission to retain OSS as an unbundled network element and to continue to enforce its existing nondiscriminatory access standards for OSS. In addition, the Commission should apply its OSS access standards to all elements, in order best to ensure compliance with unbundling obligations and the efficient and full

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348 *UNE Remand Order*, 15 FCC Rcd. at 3885, ¶ 426 (emphasis added).

349 *Id.* at 3885, ¶ 427.

350 *UNE Remand Order*, 15 FCC Rcd. at 3886-3887, ¶ 430.

351 *Advanced Services MO&O*, 13 FCC Rcd. at 24037, ¶ 56.

352 47 U.S.C. § 251 (c)(3); *Advanced Services MO&O*, 13 FCC Rcd. at 24037, ¶ 56.

353 *Advanced Services MO&O*, 13 FCC Rcd. at 24037, ¶ 56; *see also UNE Remand Order*, 15 FCC Rcd. at 3887, ¶ 430 (discriminatory access to OSS "will impede the efficient deployment of advanced services").

development of competitive telecommunications services. In particular, and as explained in Sections IV.A.1.b (dark fiber loops), IV.A.2 (subloops), and IV.B.2 (dark fiber transport) above, the Commission should affirmatively mandate that ILECs must provide nondiscriminatory access to ILEC information and systems that would enable CLECs to determine where dark fiber loops and transport are available in their networks,[354] as well as where RTs are located and the customers that are served from them.

E. CLECs Would Be Impaired Without Cost-Based Unbundled Access to Signaling and Call-Related Databases

The Commission seeks comment as to whether signaling and call-related databases should remain on the national UNE list.[355] Signaling provides automated call routing via signaling links and signaling transfer points ("STPs").[356] Today, most carriers use "SS7" signaling.[357] Call-related databases provide essential information for serving consumers. This UNE includes the Line Information database (LIDB), Toll Free Calling database, Local Number Portability database, Calling Name database (CNAM), 911 database, E911 database, and AIN databases, platform and architecture (subject to an exception for proprietary software). These elements are necessarily "intertwined," because signaling enables the CLEC to access databases.[358] Nothing has transpired in the past two years that would justify removing these UNEs from the Commission's national list.

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354 *See* Riordan Aff., ¶¶ 15-16 (describing Qwest's LFIT database that includes information on dark fiber location).

355 *NPRM*, ¶ 64.

356 *UNE Remand Order*, 15 FCC Rcd. at 3868, ¶ 384.

357 *See UNE Remand Order*, 15 FCC Rcd. at 3869, ¶ 389 (discussing signaling availability solely in the SS7 context); *Local Competition First Report and Order*, 11 FCC Rcd. at 15740, ¶ 483.

358 *UNE Remand Order*, 15 FCC Rcd. at 3879, ¶ 411.

1. Signaling must remain available on an unbundled basis

CLECs would be impaired in providing service to end users if they did not have unbundled access to the signaling functionalities used by incumbents.[359] In the *UNE Remand Order,* the Commission found that "requiring a requesting carrier to obtain signaling from alternative sources would materially diminish its ability to provide the services its seeks to offer, due to the quality differences between signaling networks available from the incumbent LEC and those available from alternative providers of signaling."[360] The Commission based its finding of impairment on its determination that "neither self-provisioning signaling networks, nor obtaining this element from third-party sources, is a sufficient substitute that would justify excluding signaling networks from the incumbent LECs' unbundling obligations under section 251(c)(3)."[361] Further, the Commission held that "unbundling the [ILECs'] signaling networks will promote the development of facilities-based competition and thereby encourage investment and innovation in new technologies and telecommunications services."[362] These rulings remains equally valid today.

No sufficiently substitutable market alternatives have emerged for ILEC signaling during the past two years. Alternative providers continue to be unable to match the service reliability and ubiquity of the signaling UNE. As the Commission found in its *UNE Remand Order*, "[t]he ubiquitous nature of an incumbent LEC's signaling network provides it with advantages that

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359 Signaling is not a proprietary element. Thus, this element, including industry standard SS7 signaling, is subject to the "impair" standard. *UNE Remand Order*, 15 FCC Rcd. at 3868, ¶ 385; *Local Competition First Report and Order*, 11 FCC Rcd. at 14739-40, ¶ 481.

360 *UNE Remand Order*, 15 FCC Rcd. at 3867, ¶ 383.

361 *Id.*

362 *Id.* at 3874, ¶ 399.

competitive LECs cannot achieve through use of alternative signaling networks."[363] This conclusion holds true to this day. Moreover, the cost of alternative signaling remains prohibitively expensive. Significant cost differences – attributable largely to the cost associated with connecting to a single set of or more dispersed sets of STPs – remain a primary reason why CLECs, including KMC and SNiP LiNK, continue to rely on ILEC UNEs for most of their signaling needs.[364]

In light of the foregoing, signaling easily meets the "impair" test under Section 251 and should continue to be unbundled.

2. Call-related databases must continue to be available on an unbundled basis

Call-related databases, including the Line Information database (LIDB), Toll Free Calling database, Local Number Portability database, Calling Name database (CNAM), 911 database, E911 database, and AIN databases, platform and architecture (subject to an exception for proprietary software), also continue to meet the "impair" unbundling standard that the Commission has consistently applied to them.[365]

In the *UNE Remand Order,* the Commission stated that "access to call-related databases, such as the LIDB, Toll Free Calling, CNAM and Number Portability databases … is critical to permitting the seamless routing and completion of traffic both among competitors and between competitors and the incumbent LEC."[366] The Commission also found that "access to call-related

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363 *Id.* at 3872, ¶ 395.

364 *See UNE Remand Order*, 15 FCC Rcd. at 3872, ¶ 393.

365 *UNE Remand Order*, 15 FCC Rcd. at 3877-3878, ¶ 408; *Local Competition First Report and Order*, 11 FCC Rcd. at 14744-45, ¶ 490. With the exception of AIN service software, which is in certain instances considered proprietary, call-related databases are non-proprietary and must be reviewed under the "impair" standard.

366 *UNE Remand Order*, 15 FCC Rcd. at 3879, ¶ 411.

databases, such as the LIDB, Toll Free calling, CNAM and Number Portability databases, encourages efficient network architecture deployment and promotes the ability of new entrants and established competitors to provide service in the local exchange market."[367] With respect to the CNAM database, in particular, the Commission determined that CLECs "must have access to the incumbent LEC's CNAM database."[368] Such access is critical, especially because a majority of calls to a competitor's customers originate from the incumbent."[369] Although some databases may be available from third parties, the Commission has never found that such third-party access is sufficient to overcome the "impair" test.[370] And though replication of the databases is theoretically possible, the Commission nonetheless determined that the failure to obtain unbundled access to databases would impair CLEC service,[371] warranting their inclusion on the UNE list.[372] Each of these conclusions applies as much today as they did then.

Replication of these databases would be a Herculean task. This effort would sap considerable time, money and energy from existing competitors as well as new CLECs that may choose to enter the market, contravening Congress's requirement that new carriers be as unencumbered as possible as they try to enter the local market.[373]

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367 *Id.*

368 *Id.*, 15 FCC Rcd. at 3881, ¶ 416.

369 *Id.*

370 *Id.*, 15 FCC Rcd. at 3880, ¶ 415.

371 *See id.*

372 *Id.*, 15 FCC Rcd. at 3880-2881, ¶ 416.

373 "Congress made unbundled elements available to competitive LECs to avoid the time it would take competitive LECs to duplicate the incumbents' networks, thereby promoting the rapid development of competition for all consumers." *UNE Remand Order*, 15 FCC Rcd. at 3742, ¶ 92.

Accordingly, there continue to be no alternatives of comparable quality and ubiquity available to requesting carriers, as a practical, economic, and operational matter, for the incumbent LECs' call-related databases.

V. IMPLEMENTATION ISSUES: THE COMMISSION SHOULD ENSURE THAT THE REVIEW, IMPLEMENTATION AND MODIFICATION OF ITS UNBUNDLING RULES PROVIDE A STABLE COMPETITIVE ENVIRONMENT

The Commission seeks comment on several issues involving the timing for implementation and review of its unbundling rules.[374] These issues include the standard, or burden of proof, to govern the review of any future request to modify the rules, and how long the period between Commission may last, consistent with the requirements of the 1996 Act. Also open for comment are the questions of how to "avoid a 'flash-cut'" effect in implementing any rule changes.[375] The Commission's overall goal in deciding these issues should be to further its stated policy objective of bringing certainty and stability to the competitive marketplace. All transitions must be given an appropriate time to take effect, in order to permit CLECs to alter their service plans accordingly. The Commission should also ensure against any efforts to manufacture uncertainty through the filing of untimely petitions for rule changes. Only by creating a framework for rule stability will the Commission bring the benefits of competition – including broadband deployment – to consumers.

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374 *See NPRM*, ¶¶ 77-80.

375 *Id.*, ¶ 79.

A. The Commission Should Retain The Current Three-Year Review Cycle, With a Prohibition on the Filing of Any Petition or Motion Until the Initiation of a Full Review Period

The Commission seeks comment on whether the current three-year review period provides the appropriate schedule for revisiting its unbundling rules.[376] A three-year review period is the minimum period required to allow for the stability and certainty that is necessary for the development of sustainable competition in the local telecommunications market. As the Commission recognized when first adopting this cycle, "a three-year time frame ... is warranted to provide competitors with reasonable certainty for a period of time that is sufficient time to implement their plans."[377] Perhaps more importantly, a three-year cycle provides some modicum of stability to the competitive landscape which may provide the capital markets with assurance needed to prompt renewed investments in CLECs.[378]

As a practical matter, the Commission has determined that its triennial review actually commences after two years. Regrettably, the Commission's two-year gestation period was disrupted when several Bell companies filed a joint petition to remove high-capacity loops and transport from the Commission's unbundling requirements. That petition, filed in April 2001, was an unwelcome surprise that forced CLECs to expend precious legal and financial resources at a time when the rules should not have been questioned. Although the Joint BOC Petition was poorly supported and legally unsound, it had its intended strategic effect of creating additional market uncertainty for CLECs and further draining their already scarce resources. It is regrettable that the Commission allowed itself and its procedures to be used by the Bells for such anticompetitive gamesmanship.

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376 *Id.*, ¶ 78.

377 *UNE Remand Order*, 54 FCC Rcd. at 3766, ¶ 151.

Nevertheless, in the two years during which the *UNE Remand* unbundling rules have been effective, CLECs had to raise capital, plan their service, devise a network configuration, order the elements to support their services, get them installed properly, attract customers, and establish service. Even at the breakneck speed that the CLEC industry has maintained, a two-year period is almost unreasonably short.

For these reasons, the CLEC Coalition recommends that the Commission retain the current three-year cycle for reviewing its unbundling rules. This cycle reasonably comports with Section 11 of the 1996 Act, because, as has been shown, the Commission actually initiates its review "every two years."[379] As soon as that period begins, even before any formal comment filing date, parties may begin meeting with Commission staff and compiling evidence in support of their position.

Critically, the three-year review period must be governed by a strict "quiet period" that prohibits any party from seeking modification of the rules until the Commission releases a notice initiating its review. The CLEC Coalition therefore urges the Commission not to accept any petition to remove UNEs from or create exceptions to its national unbundling requirements in the two-year period prior to initiation of the formal review process. If the Commission were to receive a petition to remove elements during the two-year quiet period, the Commission should deny it immediately and without releasing a public notice for comment, as the commencement of notice and comment proceedings would unnecessarily drain scarce CLEC resources. At the very least, the Commission should hold that no petition to modify its unbundling rules will be entertained in the two-year quiet period unless the party first makes a *prima facie* showing,

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378 *See UNE Remand Order*, 15 FCC Rcd. at 3766, ¶ 150.

379 47 U.S.C. § 161(a).

supported by complete and verifiable data, that a rule change is warranted and that CLECs no longer would be impaired without unbundled access to a particular element. Absent that showing, a petition should not even be granted the imprimatur of Commission public notice. To act otherwise, as the Commission acknowledged in 1998, "would threaten the certainty that we believe is necessary to bring rapid competition to the greatest number of consumers."[380]

B. The Party Seeking Repeal of An Existing UNE Bears the Burden of Proving that a Competitor Is No Longer Impaired Without Access to that UNE

The Commission seeks comment on another issue fundamental to the framework of this review: the burden of proof for altering existing unbundling rules.[381] This issue largely has been addressed by the Commission's policy in implementing the 1996 Act. The Commission's consistent adherence to national uniformity, regulatory certainty and administrative practicality requires in this context that the party seeking to remove a UNE bears the burden of proof. As the CLEC Coalition has stated with regard to the three-year review cycle, the party seeking rule modification should also be required to submit with its Petition compelling, relevant and verified evidence of changed circumstances that would warrant Commission consideration and notice and comment proceedings. Petitions such as the Joint BOC Petition of last April – which have no hope of passing reasoned review – should be summarily denied, without notice and comment, as they effectively and anticompetitively drain rivals' resources and raise their costs. The Commission should not permit this to happen, as the resulting resource drain and uncertainty diminish CLECs' ability to bring the benefits of competition and choice to consumers.

The reasons for requiring a strong *prima facie* case are evident in the Commission's existing policy. First, the Commission consistently has recognized the need to have clear

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380 *UNE Remand Order*, 15 FCC Rcd. at 3766, ¶ 150.

unbundling rules for the competitive market.[382] Lack of regulatory certainty has, and will continue to, "frustrat[e] the potential entrants' ability to raise capital."[383] Secondly, the Commission's championing of uniformity of rules[384] requires that changes to the unbundling rules be made only for a compelling reason. Finally, concerns of administrative practicality require that the Commission make clear that it will only entertain petitions to amend or relax its unbundling rules upon a clear and convincing showing that competitors would not be impaired without access to a particular element. The Commission already has invoked administrative practicality as a reason of adoption of a "quiet period" on local competition petitions.[385] This concern should apply equally to the Commission's review of a subsequent petition, placing the burden of proof and of presenting a substantial *prima facie* case squarely on the party seeking a rule amendment.

C. Upon Any Modification of the National UNE List Reducing the Unbundling Obligations of ILECs, the Commission Should Adopt an Explicit Transitional Schedule and Grandfathering Rules to Avoid "Flash-Cut" Changes in ILEC Provisioning

The Commission also seeks comment on the effect of rule transitions on competitors and how to ameliorate any "flash-cut" effect through adoption of a transitional scheme.[386] This issue should be decided with the same policy goals in mind as the review period and burden of proof issues: the need for regulatory and market stability. Should the Commission amend the current unbundling rules in a manner that reduces ILEC unbundling obligations, carriers must be

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381 *NPRM*, ¶ 77.

382 *UNE Remand Order*, 15 FCC Rcd. at 3716, ¶ 18; *Local Competition First Report and Order*, 11 FCC Rcd. at 15559, ¶ 114 (unclear unbundling and/or pricing rules will cause "great uncertainty for the industry, capital markets, regulators and courts").

383 *Local Competition First Report and Order*, 11 FCC Rcd. at 15559, ¶ 114.

384 *Id.*, 11 FCC Rcd. at 15624, ¶ 241-242 (explaining need for national unbundling rules).

385 *NPRM*, ¶ 77.

allowed time under a "grandfathering" rule to reevaluate their business and network plans to adjust for any possible effect that the changes may have.

If the Commission removes a UNE from the list, it must make clear that such a rule change would not permit ILECs to take back or disconnect UNEs already in use. Absent an express prohibition, they will – and customer service problems and litigation will ensue.[387] To avoid this result, the Commission should "grandfather" all existing UNEs. This rule would prohibit ILECs from disconnecting UNEs that are already in place or from refusing to fill UNE orders completed prior to release of the forthcoming order. This framework will not only protect CLECs, but it will protect current CLEC customers from losing service or suffering service interruptions and price increases.

What is implicit in this requirement, but bears express statement, is that these UNEs must remain available at cost-based pricing. Cost-based pricing is a chief component of the entire unbundling concept.[388] Thus, ILECs must not be permitted to change the prices of UNEs that are installed or ordered to general "access" rates. The CLEC Coalition urges the Commission to state this requirement expressly in order to avoid any confusion.

In addition, the Commission should provide that all rule changes in this proceeding are effective as to each ILEC only upon state commission approval of alternate tariffs that make delisted network components available on just, reasonable and nondiscriminatory terms.[389]

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386 *NPRM*, ¶ 79.

387 CLEC-to-CLEC cross-connects are a prime example of this phenomenon. As soon as the D.C. Circuit held that these cross-connects are not required by Section 251, *GTE Service Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000), ILECs began ripping them out in many COs. Covad High-Cap Loop Comments at 12.

388 *E.g., Local Competition First Report and Order*, 11 FCC Rcd. at 15816, ¶ 628 (stating that all UNEs, as well as interconnection and collocation, must be governed by cost-based pricing principles).

389 States may also elect to continue to require unbundling of the particular element on an individual state basis, provided that their framework for decision comports "with the standards articulated in this [UNE Remand] Order." *UNE Remand Order*, 15 FCC Rcd. at 3768, ¶ 156 ("[S]ection 251(d)(3)(A) allows state

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