competitors suggests that the costs and operational delays of self-provisioning switching do not preclude requesting carriers from serving certain customer classes in certain geographic markets."[32] It thus concluded that at least some limitation on the switching UNE was appropriate.[33] The Commission remained concerned, however, that deployment was not yet ubiquitous and cost-effective for some mass-market customers because, during the early stages of entry into the market, CLECs were not able to capture sufficient market share necessary to achieve economies of scale, and there remained some question about the ability of ILECs to provide collocation and hot cuts.[34] Today, a review of the marketplace and the deployment of switched services by CLECs demonstrates that there is no longer *any* basis to find that CLECs would be impaired without access to unbundled switching under section 251.

a) CLECs Are Self-Provisioning Switches Throughout the Country.

Recent deployment of CLEC switching facilities, as well as alternative technologies that supplant the need for circuit switches altogether, demonstrate that CLECs no longer depend on unbundled ILEC switches in order to compete in the local exchange market. Since the Commission last examined whether ILECs should be required to provide unbundled switching in 1999, the number of switches deployed by CLECs has almost doubled to 1300 and the number of lines CLECs serve using their own switches has multiplied by several factors to between 16 and 22 million.[35]

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32 *UNE Remand Order* ¶ 255.

33 *Id.* ¶ 278.

34 *See id.* ¶¶ 259, 260.

35 *See UNE Remand Order* ¶ 254 (competitors had deployed approximately 700 self-provisioned local circuit switches serving about 6 million lines); *UNE Fact Report* at II-1

CLEC switches serve wide geographic areas, sometimes even serving multiple states, and enable CLECs to provide ubiquitous service throughout most BOC service regions if they so choose.[36] Today, CLECs use their own switches to serve BOC wire centers containing approximately 86 percent of BOC switched access lines.[37] In particular, CLECs serve customers using their own switches in Qwest wire centers that have 85 percent of the switched access lines in Qwest's region.[38] Examination of the rate exchange areas served by CLECs confirms that CLEC-owned switches have been widely deployed in the BOCs' regions, serving more than 43 percent of Qwest rate exchange areas in particular.[39] CLECs also have now expanded their deployment of such services to truly serve mass-market customers. In particular, CLECs are employing their own switches to serve the very residential and small business customers about which the Commission voiced concern in the *UNE Remand Order*.[40] As of the end of last year, CLECs were serving approximately 3 million residential customers over their own switches, and millions more small businesses.[41]

(competitors now operate an estimated 1,300 local circuit switches serving between 16 and 23 million local lines).

36 *See UNE Fact Report* at II-5 to II-10.

37 *Id.* at II-1, II-6. As explained in the *UNE Fact Report*, these calculations are quite conservative since the data excludes CLEC services offered over alternatives such as packet switches and PBX systems that may displace use of ILEC circuit switches, and does not account for potential and likely CLEC expansion of existing facilities. *See id.* at II-7 to II-10.

38 *Id.* at II-6.

39 *Id.* at II-6, Table 4.

40 *See UNE Remand Order* ¶ 255.

41 *UNE Fact Report* at I-5, II-4. As noted, this is a highly conservative estimate. *See supra* note 37.

These developments demonstrate that CLECs have moved past the "early stages of entry" identified by the Commission in the *UNE Remand Order* as prohibitive to serving profitably the mass-market.[42] CLECs have achieved their own economies of scale in providing services over self-provisioned switches, allowing them to extend their self-provisioned service beyond large businesses into the mass-market. Once a CLEC has made the significant initial investment in a switch — which many CLECs have done — that one switch can be expanded with modular additions to serve many times more the initial number of customers served.[43] Although the Commission recognized in the *UNE Remand Order* that CLECs could expand their switches in this manner to serve larger areas, it was not satisfied that this potential would sufficiently offset entry-stage costs.[44] Today, however, CLECs in fact *have* successfully used their initial investment in large business customers as a launching pad to expand into the mass-market, serving additional customers off the same facilities initially deployed for large business customers.[45] Cavalier Telephone, for example, states that it "targets business and residential customers . . . [and] [i]t generally markets residential services to employees of the various businesses it serves.[46]

This strategy has allowed CLECs to serve residential and small business customers, maximizing utilization levels of existing switches. CLECs can readily and efficiently add additional customers to existing self-provisioned switches that have been placed in wire centers

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42 *UNE Remand Order* ¶ 259.

43 *See UNE Fact Report* at II-9.

44 *See UNE Remand Order* ¶ 261.

45 *See UNE Fact Report* at II-10 to II-11, II-17 to II-19.

46 *Id.* at II-12, Table 8.

serving large numbers of residential and small business customers. While CLECs might target customers with significant telecommunications needs to offset the initial cost of switches, they can then make relatively less expensive investments to serve new customers. The capabilities of existing CLEC switches are significant and thus should permit the expansion of service to many more customers.[47]

On these facts, the Commission's suggestion in the *Notice* that it might be appropriate to limit extension of the *UNE Remand Order's* "carve-out" of the unbundled switching obligation to *business customers* of CLECs — but not to residential customers [48] — is wholly unjustified as a matter of law and policy. CLECs use their switches to serve *all* types of customers today, and the investments they have *already* made would enable them to expand their existing services to serve additional and different *types* of customers. Since CLECs are already providing service in wire centers that contain the vast majority of residential lines[49] and have the potential to serve *all* types of customers at an incrementally lower cost, there is no basis for determining that their ability to serve residential customers would be any more impaired without access to unbundled switching than their ability to serve any other customer. The critical issue with respect to the "necessary and impair" analysis is whether there exists any meaningful constraint on the ability of CLECs during the relevant future time period to add or expand their service to additional or

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47 *See id.* at II-9 (noting that today's digital switches can be expanded easily and have maximum capacities of approximately 600,000 lines).

48 *See Notice* ¶ 59.

49 *See UNE Fact Report* at II-6, Table 5. Indeed, most wire centers serve a roughly equal number of business and residential customers.

different customers, without reliance on the ILECs. And *that* analysis demonstrates that a rule that distinguishes between residential and business customers is entirely artificial and out of touch with the CLECs' actual deployment capabilities.

The marketplace evidence demonstrates unequivocally that CLECs' ability to compete in the provision of switched telecommunications service would not be impaired if ILECs were no longer required to provide the switching UNE.[50] Indeed, Qwest has no plans to utilize the ILEC switching UNE (either alone or as part of the UNE-platform) in its out-of-region CLEC operations. Instead, if it were to provide out-of-region, switch-based services to residential or small business customers, Qwest would use its own switching facilities. Similarly, aside from AT&T and WorldCom, 15 of the largest CLECs simply do not use unbundled switching at all, either as an independent UNE or as part of the UNE-platform.[51]

b) Hot-Cuts and Collocation Do Not Impair CLECs' Ability to Provide Service.

The existence and deployment of alternatives to unbundled switching from the ILECs' network is virtually indisputable. Real competition can and does occur in this portion of the network, offering choices to business and residential customers alike. Nevertheless, the Commission expressed concern in the *UNE Remand Order* that the performance quality and cost of hot-cuts were impediments to CLECs' ability to compete in the mass market with self-provisioned switches.[52] On that basis, the Commission crafted an exceptionally narrow carve out for unbundled switching. Since that time, however, ILECs and CLECs have gained

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50 Of course, ILECs would continue to be obligated under Section 271's competitive checklist to offer unbundled switching at market rates.

51 *UNE Fact Report* at II-1.

52 *See UNE Remand Order* ¶ 266; *see also Notice* ¶ 59.

considerable experience in accomplishing hot cuts, and the Commission's earlier concern is no longer a valid basis to retain unbundled switching. Since 1999, the performance quality of hot cuts has improved markedly as the industry has gained experience in provisioning them. Starting with approval of Verizon's New York Section 271 application in 1999, the Commission has found hot-cut performance to be satisfactory in the ten states where it has granted Section 271 approval. As the Commission noted in approving the New York 271 application, the evidence demonstrated that Verizon was provisioning "hot cuts in sufficient quantities, at an acceptable level of quality, and with a minimum of service disruption, thereby offering competitors a meaningful opportunity to compete in the local exchange market."[53] And since that 1999 application, the Commission has never found a Section 271 applicant's hot-cut performance to be unsatisfactory. Indeed, in recent Section 271 proceedings, overall ILEC hot-cut conversion performance has not even been challenged.[54] Clearly, ILECs are providing hot-cuts with

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[53] Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 291 (1999), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) ("*New York 271 Order*").

[54] See *Memorandum Opinion and Order, Application by Verizon New England Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Company, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Rhode Island*, 17 FCC Rcd 3300 ¶ 83 (2002) ("*Rhode Island 271 Order*"); Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419 ¶ 86 (2001) ("*Pennsylvania 271 Order*"); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719 ¶ 102 (2001) ("*Arkansas/Missouri 271 Order*"); Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Company (D/B/A Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988 ¶ 160 (2001) ("*Massachusetts 271 Order*").

sufficient quality so as to not cause delays, degradation, or interruptions in customer service as a result of the use of CLEC switches.[55]

Although Qwest has not yet applied to the Commission for Section 271 authority, its record of hot-cut performance has improved significantly and would in no way interfere with a CLEC's service quality. By the second half of 2001, Qwest was consistently performing hot-cuts on time consistently over 95 percent of the time, and was at 100 percent on-time performance in five states.[56] In the first two months of 2002, Qwest's on-time performance has improved to greater than 98% region-wide.

The Commission's previously expressed concerns regarding the costs of collocation[57] also do not suggest that a CLEC would be "impaired" without access to the switching UNE. Since the *UNE Remand Order*, the Commission has found on a number of occasions that ILECs' collocation prices are consistent with the Commission's pricing rules.[58] Moreover, those costs

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[55] The price charged to CLECs for hot cuts likewise does not impair their ability to use alternative sources of switching in combination with an ILEC's loop. Prices for hot cuts have been rapidly declining and will remain subject to the Act and the Commission's pricing rules.

[56] *See UNE Fact Report* at II-16 to II-18, Appendix H at H-7 to H-8.

[57] *UNE Remand Order* ¶¶ 263-64.

[58] *See* Commission Order, *In the Matter of U S WEST Communications, Inc. Statement of Generally Available Terms and Conditions*, Docket No. 99A-177T, Decision No. C01-1302, at 90-104 (Colo. Pub. Utils. Comm'n adopted Nov. 13, 2001) (finding Qwest's collocation rates, with certain adjustments, to be reasonable); *Arkansas/Missouri 271 Order* ¶¶ 92-96 (finding SBC's collocation rates to be reasonable); Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354 ¶¶ 82-85 (2000) (same); *New York 271 Order* ¶¶ 78-80 (finding Bell Atlantic's collocation rates to be reasonable); *see also UNE Fact Report* at II-15 (noting that "[c]oncerns about collocation . . . performance have been fully addressed since the time of the last UNE review").

have declined significantly with the availability of shared and cageless collocation arrangements. In addition, CLECs can bypass ILEC central offices altogether by instead collocating in third-party providers' "collocation hotels," which provide space outside but nearby ILEC central offices. Currently, such companies are located in 48 of the top 50 MSAs, and there are two or more such providers in 42 of the top 50 MSAs.[59] Moreover, since the *UNE Remand Order*, CLEC collocation has expanded dramatically. For example, Qwest has provisioned collocation arrangements in its 14-state in-region territory in approximately 473 central offices. These central offices serve approximately 90 percent of Qwest's business access lines and 84 percent of its residential access lines.[60]

To the extent a CLEC still needs collocation, it can acquire it from ILECs on much shorter average intervals than at the time of the *UNE Remand Order*. In that order, the Commission noted CLEC claims that a single collocation arrangement could take six to twelve months to provision.[61] Since that time, the Commission has adopted national standards that, subject to certain exceptions, require the provision of physical collocation within 90 days of an application for collocation.[62]

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59 *UNE Fact Report* Appendix G.

60 *UNE Fact Report* at II-16.

61 *UNE Remand Order* ¶ 362.

62 Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 17806 (2000).

2. In Addition to the Absence of Impairment, the Substantial Deployment of Alternative Technologies and the Goal of Encouraging Facilities-Based Competition Support Elimination of the Unbundling Requirement for Circuit Switching.

Continued unbundling of circuit switching is also unwarranted due to the significant development of alternative technologies to the traditional circuit switch that have continued to develop since the Commission last examined unbundled network elements. Packet switching, which has been widely deployed by CLECs and cable operators in particular,[63] allows a carrier to bypass completely the traditional circuit switch. While packet technology was originally used exclusively for the provision of high-speed data services, CLEC packet switches now have voice capabilities that seek to compete directly with ILEC circuit switches for the provision of traditional voice service.[64] Indeed, at least eight major CLECs are now operating or will soon operate packet switches to provide voice services.[65] The installed base of CLEC packet switches has almost doubled to 1700.[66]

The latest offspring of packet technology, the "softswitch," offers even more speed, efficiency, and flexibility, and has been strongly embraced by CLECs.[67] Indeed, Qwest's out-of-region CLEC's vision is premised on the use of packet technology to provide both data and voice services. Cable operators, which have plans to expand their IP telephony services to truly compete with traditional circuit-switched voice service, likewise have migrated to packet

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63 *See generally UNE Fact Report* at II-20 to II-33.

64 *See id.* at II-28 to II-33.

65 *See id.* at II-30.

66 *Id.* at II-23.

67 *Id.* at II-33.

switching.[68] Indeed, IP telephony and packet services are often less costly to deploy and operate than circuit switches.[69] It is widely anticipated that this technology will completely overtake traditional circuit switching.[70]

Wireless switches are also increasingly offering an alternative for some CLECs[71] and in any event are providing intermodal competition to traditional circuit-switched services. Wireless carriers not affiliated with Bell companies have deployed more than 950 circuit switches nationwide, finding it cost-efficient to use the same type of switching technology that traditionally has been used for wireline services.[72] As the Commission well knows, wireless service has rapidly expanded — there are an estimated 130 million wireless subscribers nationwide, and wireless calls at the end of 2001 accounted for approximately 12 percent of all calls.[73] These services compete directly with wireline services, especially in the case of long distance, since many wireless plans do not charge additional amounts for long-distance calling.[74]

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68 *Id.* at II-30 to II-33.

69 *See id.*

70 *See, e.g.,* Annie Lindstrom, *Talkin' 'Bout Next-Generation (Telcos)*, Business Communications Review, May 1, 2001, at 14-16 (noting that CLECs are investing primarily in softswitches, which allow converged service over a single platform); Lucent Technologies, *Circuit to Packet: Extending the Value of Class 4 and 5 Network Infrastructure in Metro/Edge Networks* at 1,2 (May 2001) <http://www.lucent.com/businesspartners/clp/stories/circuit-to-packet.pdf> ("The migration from circuit to packet is underway. . . . Voice traffic is beginning to move from circuit-switched networks to data networks.").

71 *UNE Fact Report* at II-33 to II-37.

72 *Id.* at II-34.

73 *Id.* at II-34 to II-35.

74 For example, Leap Wireless, which operates extensively in Qwest's service territory, reports that about 7 percent of its customers no longer use wireline connections and 61 percent use their cell phone as their primary phone. Haring & Shooshan at 20.

The widespread deployment of these and other alternative technologies is significant. These technologies compete directly with traditional circuit-switched wireline services, demonstrating that viable alternatives to the ILEC circuit switch exist for CLECs to compete with ILEC switched services. Indeed, these alternatives constitute the technologies of the future that are predicted to eventually overtake traditional ILEC networks.[75] Continuing to require ILECs to provide unbundled switching at or below TELRIC prices would only distort the economic decisions toward the old circuit switching technology rather than encouraging the deployment of new technologies.

Ultimately, there is no evidence that elimination of the switching UNE would preclude competition in the local exchange service market. The specific concerns that led the Commission to require the provision of unbundled switching are no longer present — CLECs have ubiquitously deployed switches that serve mass-market customers, have overcome cost barriers and achieved economies of scale, and have satisfactorily and consistently provisioned hot-cut conversions. The advent of alternative technologies such as packet switching and wireless services, some of which completely bypass and are well on their way to replacing the circuit switch, affirm that CLECs are more than able to compete in the market for local telephone service without access to unbundled switches.[76]

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[75] *See generally UNE Fact Report* at II-29, n.111 (noting that Level 3 "[d]esigned its entire long distance network" based on packet, rather than circuit, switches); *see also id.* at II-33 to II-37.

[76] If the Commission eliminates the obligation to unbundle switching under section 251, as it plainly should, the obligation to provide shared transport as a UNE should end as well since shared transport comes into play only to the extent that CLECs are obtaining unbundled switching from an ILEC. *See UNE Remand Order* ¶ 369 n.731.

B. The Commission Should Not Require the Unbundling of Dedicated Interoffice Transport in Markets That Meet the Commission's Test for Pricing Flexibility.

In the *UNE Remand Order*, the Commission required ILECs to provide unbundled access to their interoffice transmission facilities, based on its finding that neither self-provisioning nor obtaining these facilities from third-party sources was an adequate alternative to an ILEC's "ubiquitous" unbundled transport facilities. Now, nearly three years after the *UNE Remand Order*, CLECs possess adequate alternatives to the ILECs' unbundled facilities to justify removal of this unbundling requirement in many markets. In its *Pricing Flexibility Order*[77] the Commission formulated a test to identify markets in which price cap LECs such as BOCs face sufficient competition to warrant increased pricing flexibility for their special access services. The Commission should apply the same test here: that is, an ILEC should not be required to provide unbundled dedicated transport in market in which the Commission has found that it has met the criteria for attaining pricing flexibility. As discussed below, because the pricing flexibility test requires a showing of collocated CLECs that rely on non-incumbent transport facilities, CLECs would not be impaired by the unavailability of dedicated transport as a UNE under section 251 in markets that meet that test. In addition, even if the Commission concluded, contrary to the evidence, that CLECs would be impaired without access to unbundled transport from ILECs in such markets, continuing to require such access would conflict with Congress' objective of promoting facilities-based competition.

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[77] Fifth Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, 14 FCC Rcd 14221 (1999) *aff'd sub nom.* WorldCom, Inc. v. FCC, 238 F.3d 449 (D.C. Cir. 2001) ("*Pricing Flexibility Order*").

1. CLECs Have Proven Capable of Providing Service Without Relying on Unbundled Dedicated Transport from ILECs in a Wide Variety of Markets.

As the information provided in the *UNE Fact Report* shows, where the CLECs are generally providing service, it is economically and operationally feasible for them to fulfill their transport needs through self-provisioning or third-party suppliers. Deployment of alternative transport facilities has increased dramatically since the *UNE Remand Order*, both in terms of volume and geographic distribution. Since the time of the *UNE Remand Order*, the number of CLEC fiber networks in the 150 largest MSAs — which contain 70 percent of the U.S. population — has grown from approximately 1,100 to nearly 1,800.[78] Today, 91 of the top 100 MSAs are served by at least three CLEC networks; 77 are served by at least seven; and 59 are served by at least ten.[79] Moreover, as of year-end 2001, one or more CLECs had obtained fiber-based collocation in 13 percent of the central offices served by the BOCs, which contain 54 percent of the business lines and 44 percent of all access lines served by those carriers.[80] This growth in CLEC fiber networks has not been limited to dense urban areas. This information shows that, where they operate, CLECs frequently have found it cost-effective to self-provision their own local fiber, rather than use the ILEC's unbundled interoffice transmission facilities — even though the latter are priced at TELRIC (or below) and reflect any purported economies of scale and scope possessed by the ILEC.

In addition to building their own fiber transport, CLECs can also turn to the growing number of wholesale providers of local fiber. Over the past few years, these wholesalers have

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78 *UNE Fact Report* at III-7.

79 *Id.*

80 *Id.* at III-2.

made substantial capital investments in order to provide fiber-based transport services and dark fiber to CLECs collocated in LEC central offices.[81] Given the nature of their businesses, these carriers can use their networks to serve multiple carriers at once, significantly improving the economics of deploying fiber.[82] In addition, many utility companies, as well as some of the largest long-haul fiber providers, are now supplying local fiber to CLECs.[83] Thus, any analysis of deployment that is to be relevant for the period during which the rules established in this proceeding will be in effect must take into account not only deployment to date, but the opportunities for deployment through self-provisioning or third-party sources that are likely to continue or grow in the foreseeable future.

In addition to self-provisioning and third-party transport, CLECs can also fulfill their transport needs through use of ILEC special access facilities. While the Commission has previously assigned little or no weight in its impairment analysis to the existence of such facilities,[84] that was prior to its implementation of the *Pricing Flexibility Order*. The ILECs' special access services provide an additional competitive alternative for CLECs, particularly to fill in gaps in their own transport network or for transitional needs until they can acquire alternative facilities through self-provisioning or third parties. These special access alternatives present further evidence that the CLECs would not be impaired without access to unbundled dedicated transport under section 251.

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81 *See id.* at III-8 to III-14.

82 *See id.* at III-9 to III-10.

83 *Id.* at III-10.

84 *UNE Remand Order* ¶¶ 67, 354.

In the *UNE Remand Order*, the Commission declined to consider the existence of ILEC tariffed services in its "impairment" analysis, for fear that doing so would allow ILECs to avoid section 251 unbundling obligations by offering unbundled elements to end users as retail services.[85] That concern is not implicated here. Among other things, the existence of special access services as an alternative to unbundled facilities would not be the sole, or even primary, basis for finding a lack of impairment in this context. Moreover, these services are subject to substantial competition, thus constraining the terms and prices under which they are offered.

2. CLECs Are Not Impaired in Their Ability To Provide Service Without Access to Unbundled Dedicated Transport in Those Markets That Satisfy the Pricing Flexibility Test.

In its *Pricing Flexibility Order*, the Commission determined that price cap carriers were entitled to Phase I pricing flexibility for dedicated transport in each MSA in which the ILEC could show that competitors have collocated facilities in either (1) at least 15 percent of the wire centers or (2) in wire centers accounting for at least 30 percent of the revenues for the service for which the ILEC was seeking price flexibility and that at least one such collocator in each wire center is using transport facilities owned by a provider other than the carrier seeking relief.[86] The Commission found that collocation generally indicates the existence of competitive transport facilities that provide an alternative to those of the price cap carrier.[87] In addition, the Commission observed that a "collocation-based trigger provides an administratively simple and

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85 *See id.* ¶ 67 (citing First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15643-44 ¶¶ 286-87 (1996)).

86 47 C.F.R. § 69.709(b). To obtain Phase II relief, an ILEC must show that competitors have collocated facilities in either (1) at least 50 percent of the wire centers or (2) in wire centers accounting for at least 65 percent of the revenues. *Id.* § 69.709(c).

87 *Pricing Flexibility Order* ¶¶ 81-86.

readily verifiable mechanism for determining whether competitive conditions warrant the grant of pricing flexibility."[88]

The same considerations should lead the Commission to adopt its pricing flexibility test for determining when to eliminate the requirement for ILECs to unbundle dedicated transport under section 251. As in the context of pricing flexibility, the presence of collocated competitors demonstrates that non-ILEC carriers have found it economically and operationally viable to deploy their own fiber facilities in these MSAs, which in turn suggests that other carriers can do so as well. Furthermore, a collocation-based trigger at an MSA level is a reasonably objective and operational rule that should not create greater uncertainty and litigation.

3. The Factors That Led the Commission To Require Unbundling of Dedicated Transport in the *UNE Remand Order* Are Not Applicable to Markets Meeting the Commission's Pricing Flexibility Test.

In the *UNE Remand Order*, the Commission required the unbundling of dedicated transport, in part, because "replicating the incumbent's vast and ubiquitous transport network would be prohibitively expensive [for a CLEC], and [would] delay competitive entry."[89] But it is not necessary for a CLEC to replicate an ILEC's network; a CLEC needs facilities only in the areas in which it is providing service. While competition has been particularly intense in more densely populated areas of the country, this is exactly where a larger percentage of competitive fiber deployment has occurred and where the pricing flexibility test is more likely to be met.

CLECs do not need, nor do they generally desire, the same scale and scope for transport deployment as an ILEC typically does. Rather they require transport only from the ILEC central offices that serve the customers they are trying to win. Thus, CLECs have chosen to self-

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88 *Id.* ¶ 84.

89 *UNE Remand Order* ¶ 355.

provision transport facilities where wholesale opportunities are most prevalent. Specifically, such alternatives to the ILECs' transport facilities are more common in denser areas, given that many CLECs have initially chosen to focus on higher margin customers, which typically are also less expensive to serve.[90] Below-cost retail rates for residential and more rural customers provide further incentives for CLECs to concentrate on medium and large business customers in more densely populated areas.[91]

Thus, CLECs' current deployment is not the result of impairment, but of need and business plan selection. The last several years have shown that a CLEC does not need to replicate the scale and scope of their ILEC competitors in order to succeed. To the contrary, some of the most successful CLECs have begun with targeted rollouts to the most profitable customers and then gradually extended their reach to additional customers and geographic areas. By focusing on the customers that are most profitable to serve, facilities-based CLECs have turned the ILECs' larger scale and scope to their own advantage.[92]

Given the rapid growth in CLEC and third-party provided fiber,[93] competitors apparently have found that it is cost effective to deploy such facilities. The presence of competitive transport alternatives, whether self-provisioned or from third parties, in many geographic locations demonstrates that the success of such alternatives is possible in other comparable

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90 *UNE Fact Report* at I-13, V-4 to V-6 (noting the general CLEC strategy of initially targeting high-margin customers in dense areas); Haring & Shooshan at 17 (same); *see also UNE Fact Report* at III-2 to III-3 (noting higher levels of fiber-based collocation in large metropolitan areas); *id.* at III-8 (noting that special access revenues "are highly concentrated in a relatively small number of wire centers" and account for a large share of all transport revenues).

91 *See generally* Haring & Shooshan at 7, 17, 29-31; *UNE Fact Report* at V-12 to V-13.

92 *See UNE Fact Report* at V-3 to V6.

93 *Id.* at III-6 to III-11.

markets as well. Evidence of actual deployment by competitors obviously presents the best evidence whether such deployment is economically feasible and is more meaningful than trying to estimate the cost of deployment and then speculate whether such costs are economically feasible for a CLEC. Moreover, if unbundled ILEC transport were priced correctly,[94] one would expect even more competitive local fiber deployment. In the alternative, a CLEC can choose to lease capacity from a fiber wholesaler on an as needed basis and thereby forego any risk associated with deploying its own facilities.

It is clearly economical for competitors to deploy transport in a large fraction of wire centers. Some 30 percent of all central offices contain 5,000 or more business lines, and those central offices contain 84 percent of all business lines. Such concentration of customers would typically justify deployment of fiber-optic transport.[95] Even in smaller wire centers, dramatic increases in Internet traffic can generate enough traffic to justify transport.[96]

With regard to providing access to rights-of-way, Qwest recognizes the competitive impact of these issues and has fought hard to eliminate anticompetitive franchise requirements. While Qwest has made some progress in this area,[97] further leadership from the Commission is warranted.[98] Fortunately, the excessive delays of the type cited in the *UNE Remand Order* are

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94 *See infra* Section IV.

95 *UNE Fact Report* at III-3.

96 *Id.* at III-1.

97 *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 809 (2002).

98 *See, e.g.*, *AT&T v. City of Eugene*, 35 P.3d 1029, 1043-48 (Or. Ct. App. 2001) (holding that a municipal ordinance requiring carriers to demonstrate their financial, legal, and technical qualifications before placing cables in public rights of way did not amount to an impermissible barrier to entry in violation of section 253 of the Act).

rare, and CLECs in the meantime can take advantage of capacity provided by fiber wholesalers. In addition, as discussed above, the ILECs' special access services also provide a ready alternative, for either long-term or transitional needs. In the *UNE Remand Order*, the Commission concluded that "requiring requesting carriers to utilize a patchwork of competitive alternatives" to the ILECs' transport network would impair CLECs' ability to provide their desired services. However, given the scope of alternative providers' networks that has developed since then,[99] a CLEC today may very well be able to use a single provider's network in a given market or set of markets. Moreover, even if a CLEC were to use multiple providers, there is no evidence that this would somehow be unmanageable.

Given all these facts, it is clear that alternatives to the ILECs' unbundled dedicated transport facilities are sufficiently widespread, such that lack of access to those facilities — particularly in areas where the pricing flexibility test has been satisfied — would not materially diminish a requesting carrier's ability to provide the services it seeks to offer.

4. In No Case Should the Commission Extend Unbundling Requirements for Transport to Facilities Provided to CMRS Providers.

As the Commission notes, some CMRS providers have attempted to use the Commission's unbundling rules to convert customized special access circuits to UNEs. While the Commission should eliminate the unbundling requirements for dedicated transport as described above, it should in no event allow the CMRS providers to subvert the Commission's rules in this manner.

The Commission should reject the CMRS providers' arguments for at least four reasons. First, facilities connecting a CMRS base station do not meet the Commission's definition of

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[99] *UNE Fact Report* at III-6 to III-11.

dedicated transport, because the base station is not a "wire center" or a "switch."[100] Second, at least in the case of Qwest, the circuits at issue were often constructed to specification on behalf of the CMRS providers. Qwest agreed to undertake this construction only because the CMRS providers promised to compensate Qwest the tariffed price for these circuits. Qwest would not have constructed, nor would it have been obligated under the Commission's rules to construct,[101] the circuits at the non-compensatory rates demanded by the CMRS providers. Third, and most importantly, the CMRS providers cannot show that their inability to convert these existing circuits to UNEs "would impair [their] ability . . . to provide the service that [they] seek[] to offer."[102] Indeed, the CMRS providers have profitably offered their services using these tariff-priced circuits for years. Fourth, CMRS providers have comparable scale and scope to the ILECs. These facilities-based competitors should not be allowed to distort their make/buy decisions when they clearly have the resources to construct their own facilities. The CMRS providers' current market position thus belies the foundations of their claims. As a result, section 251 does not allow the CMRS providers to take advantage of the Commission's unbundling rules to reduce the price they pay for existing circuits.

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100 47 C.F.R. § 51.319(d)(1)(i).

101 First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ¶ 451 (1996) ("*Local Competition Order*"); *UNE Remand Order* ¶ 324.

102 *See* 47 U.S.C. § 251(d)(2)(B).