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January 15, 2003

EX PARTE – Via Electronic Filing

Ms. Marlene Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

On January 14, 2003, Rob Curtis and Tom Koutsky of Z-Tel and Tim Simeone and I met with Chairman Powell, Chris Libertelli, and John Rogovin. We distributed and discussed the attached document at the meetings, along with Z-Tel's December 20, 2002, *ex parte* letter that was previously filed in these dockets.

Our discussion focused on the importance of section 271 in establishing that BOCs must unbundle loops, transport, switching, and signaling at cost-based rates. We pointed out that the most straightforward reading of the statute is that Congress intended the pricing rule it adopted in 1996 specifically for network elements (section 252(d)(1)) to govern the price of network elements. Indeed, section 252(c)(2) directs state commissions arbitrating interconnection agreements to "establish any rates for ... network elements according to subsection (d)." A faithful reading of the statute therefore requires network elements to be provided at cost-based rates.

We acknowledged that in 1999 the Commission concluded that the "just, reasonable, and nondiscriminatory" standard of sections 201(b) and 202(a) applied to network elements required to be unbundled pursuant to section 271. We pointed out, however, that the general pricing authority in those 1934 Act provisions extends to interstate and foreign communications only. Although the final sentence of section 201(b) grants the Commission rulemaking authority with respect to all provisions of the Communications Act, as amended, the pricing authority in the 1934 Act provisions cannot be construed to provide pricing authority with respect to intrastate communications. Accordingly, if the standard of sections 201(b) and 202(a) applies, the Commission has pricing authority only with respect to the interstate portion of network elements. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986).

We also stated that we do not believe the Commission has inherent authority under section 271 (presumably pursuant to section 4(i)) to develop a pricing rule for network elements that differs from either of the pricing rules set forth in the Communications Act. In addition, we stated that, while we do not believe the Commission's TELRIC regulations interpreting the cost-based rate requirement of section 252(d)(1) require reconsideration, to the extent the Commission is dissatisfied with its pricing rules the appropriate course is to amend those rules rather than attempt to construe the statute so that they do not apply.

Finally, we noted that, although the BOCs continue to speak of unbundling in "physical" terms, the Supreme Court squarely rejected that argument. The BOCs argued, as they continue to argue, "that the phrase 'on an unbundled basis' in § 251(c)(3) means 'physically separated.'" *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721, 737 (1999). The Court disagreed: "The dictionary definition of 'unbundled' (and the only definition given, we might add) matches the FCC's interpretation of the word: 'to give separate prices for equipment and supporting services.'" *Id.* Therefore, the unbundling requirements of section 271 require BOCs providing long-distance service to provide separate cost-based rates for loops, transport, switching, and signaling. But they do not permit the BOCs to "sabotage network elements" by providing them in physically separate pieces, a practice condemned by the Court. *Id.*

In accordance with FCC rules, a copy of this letter is being filed in the above-captioned dockets.

Sincerely,

/s/
Christopher J. Wright
Counsel to Z-Tel Communications, Inc.

cc: John Rogovin
Chris Libertelli

(B) FAILURE TO REQUEST ACCESS.—A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f). For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) SPECIFIC INTERCONNECTION REQUIREMENTS.—

(A) AGREEMENT REQUIRED.—A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) COMPETITIVE CHECKLIST.—Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1).

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to—

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3).

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2).

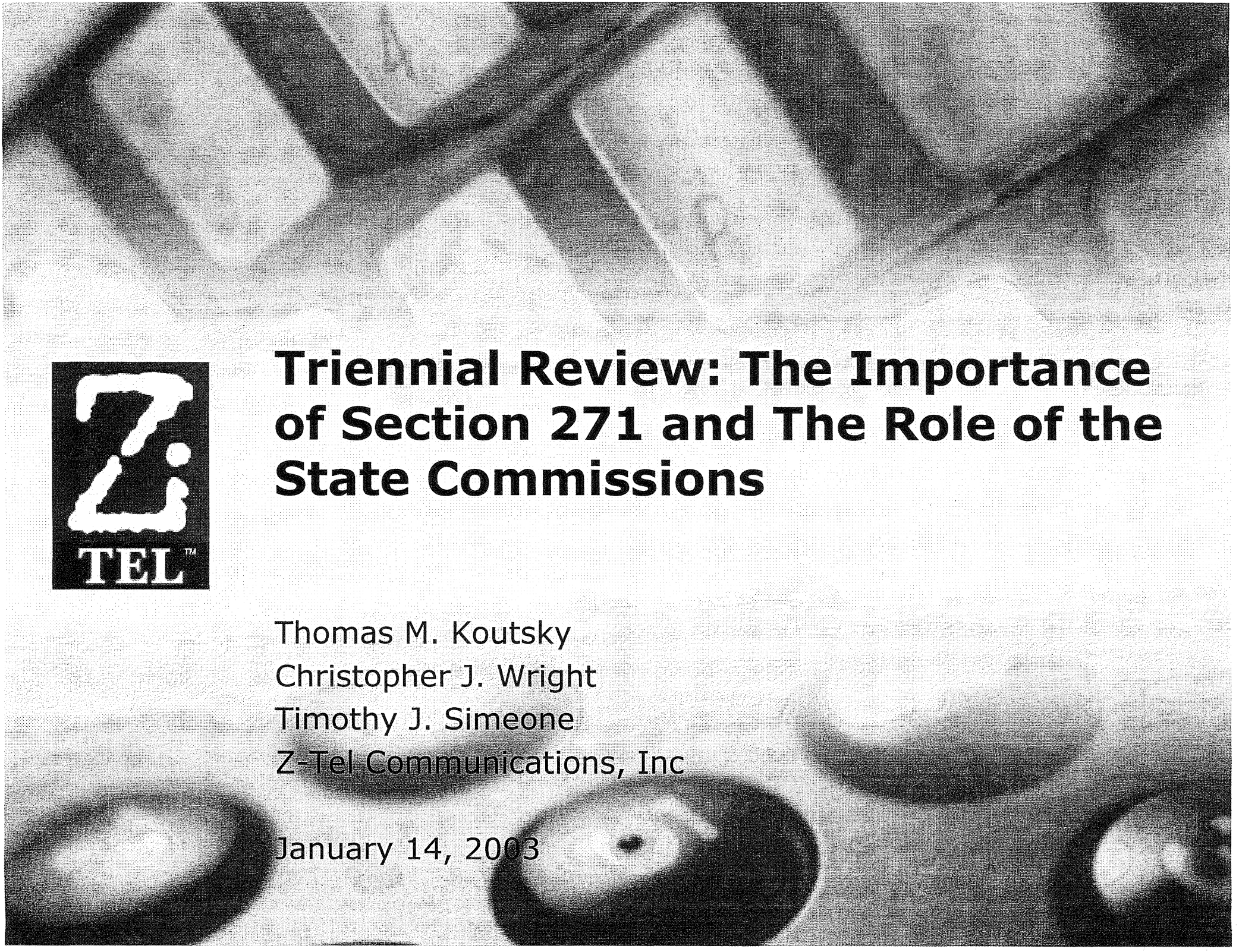
(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).

(d) ADMINISTRATIVE PROVISIONS.—

(1) APPLICATION TO COMMISSION.—On and after the date of enactment of the Telecommunications Act of 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) CONSULTATION.—

(A) CONSULTATION WITH THE ATTORNEY GENERAL.—The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial



Triennial Review: The Importance of Section 271 and The Role of the State Commissions

Thomas M. Koutsky
Christopher J. Wright
Timothy J. Simeone
Z-Tel Communications, Inc

January 14, 2003

Agenda

- Section 271 requires the BOCs to unbundle the network elements comprising the platform at cost-based rates.
- The States have an important role to play in making unbundling and pricing decisions.
- Carriers seeking to serve mass-market customers are impaired without switching.
- The Commission's goal should be to foster the development of wholesale markets.
  - Z-Tel has presented a five-step plan.

Section 271 Requires the Bells to Provide UNE-P

- Regardless of the results of the impairment analysis, the BOCs must provide access to the network elements comprising the platform.
  - The section 271 checklist specifically requires BOCs to unbundle loops, switching, transport, and signaling.
  - The legislative history says the checklist sets forth what a BOC must provide "at a minimum … in any interconnection agreement approved under section 251."
  - The FCC previously concluded that BOCs must provide access to unbundled switching even in circumstances where it need not be offered under section 251.
- Verizon recognized that section 271 means what it says by filing a forbearance petition.
  - But the record in that separate proceeding shows that sections 251(c)(3) and 271 have not been "fully implemented" and won't be until wholesale markets exist.

The FCC Cannot Mandate "Market-Based" Rates for Elements Provided by BOCs

- FCC erroneously concluded that BOCs need not provide network elements at cost-based rates.
  - Congress intended the cost-based pricing rule it established in 1996 for network elements to be applied to network elements.
  - Checklist item 2 says network elements must be provided at cost-based rates.

- Congress did not intend that the Commission instead to use a 1934 provision governing interstate rates.
  - Under *Louisiana Public Service Commission,* the Commission lacks authority under those provisions to set intrastate rates.

As A Practical Matter, State Commissions Must Play a Role

Section 251(d)(2)

- The ***USTA*** and ***CompTel*** decisions: Section 251(d)(2) requires granular analyses beyond the capabilities of the FCC.
  - ***USTA*:** FCC erred by adopting rules of "unvarying scope" that were "detached from any specific markets or market categories."
  - ***CompTel***: Section 251(d)(2) "invite[s] an inquiry that is specific to particular carriers and services."
  - Under those decisions, the question will be whether, with respect to network element X (from NIDs to OSS), carrier A (from AT&T to Z-Tel), seeking to provide service B (from POTS to broadband) is impaired in geographic market C (from Alaska to Manhattan) to serve different types of end-users (from mass-market consumers to large, data-intensive businesses).
- States can **help** FCC write rules that pass legal muster by doing fact-finding to determine whether impairments continue to exist – with particular focus upon whether reduction in output would occur in their states

As A Legal Matter, State Commissions Must Play A Role

Section 252

- The State Commissions arbitrate interconnection agreements, which set forth a list of network elements and the price for leasing those elements.
- No "delegation" issue: Congress told the state commissions to play a role.

Section 251(d)(3)

- Regardless of the section 251(d)(2) analysis, Congress preserved the states' right to establish additional unbundling obligations.
- *Iowa Utilities Board*: In a portion of its opinion that was not overturned, the Eighth Circuit held that the FCC could not preempt state unbundling rules merely because they differ from FCC rules

Section 252(e)(3)

- Provides that state commissions may "establish[] or enforc[e] other requirements of state law" when arbitrating interconnection agreements.

Z-Tel Is Impaired Without Access To Unbundled Switching.

- Z-Tel showed in comments that it is impaired in providing mass-market services without ULS *even if switches are free*
  - Operational and economic bottlenecks caused Z-Tel to scrap NYC UNEP-to-UNE loop switch deployment plan (Rubino Affidavit)
  - Incumbents have not rebutted this analysis
- Cost of hot cuts is relevant under *USTA:* these are manual provisioning costs incurred by entrants that ILECs do not incur (mechanized provisioning)
- Economic and Operational "impairment" are intrinsically tied (as *USTA* notes)
  - Does perfect hot-cut performance matter if hot-cuts are priced at $185 each?
  - FCC cannot blind itself to economic cost disparities
- In considering access, FCC cannot treat all entrants the same
  - Small Business Act restricts FCC's ability to place regulatory requirements (like switch deployment) upon small businesses (and Z-Tel is a "small business")
  - Supreme Court in *Verizon*: cannot treat fledgling entrants (like Z-Tel) same as AT&T
- 271 legislative history relied on by the Supreme Court shows that Congress intended to require parity in entry to local and interexchange markets.

Tying It Together: Michigan 271 Recommendation Emphasizes That Competitors Are Impaired Without UNE-P.

January 13 letter from the Michigan Commission to the FCC:

"We do issue one caveat, the Michigan competitive market is significantly dependent on availability of the Unbundled Network Element-Platform (UNE-P). We believe that the elimination or severe curtailment of UNE-P would adversely impact our competitive market. Our recommendation is predicated on the FCC's continuation of policies and rules that allow competitors access to UNE-P for the foreseeable future and throughout an orderly transition to facilities-based competition. In fact, we support UNE-P as consistent with the methods of competition specified in the 1996 Federal Act, including resale, facilities-based and unbundled network elements. that the PSC's 271 support is 'predicated on the continuation of Federal Communications Commission policies and rules issued pursuant to federal law, that allow competitors access to the Unbundled Network Element Platform (UNE-P).'"

A Five Step Plan to Wholesale Alternatives

Step 1. **Resolve loop access impairment**

Step 2. **Competitive transport markets**

Step 3. **Migration by Switch-Based CLECs**

Step 4. **Wholesale competitive analysis**

Step 5. **Transition by all carriers**

- Steps must be taken "in order"
- Focus on mass-market DS0 switching/shared transport
- State commission fact-finds and adjudicates each step
- Avoid pitfalls of 271 process (notice filings, social promotion)
- Establish path to ultimate deregulation

Step 1: Resolve Loop Impairment

- State commission must determine that ILEC can provide DS0 loops in a --
  - Cost-effective
  - Reliable
  - Timely, and
  - Scalable manner
- Wholesale market for mass-market local switching/transport cannot develop unless efficient and effective access to DS0 loops
- Manual process amounts to classic barrier to entry
  - AT&T conservatively estimated $7/mth per line difference
  - Result: 31% diminution of CLEC market share
- Scale matters
  - Volume of hot-cuts not tested in 271 proceedings
  - SBC's "offer" of 1 million hot-cuts per year in Ameritech region would limit CLECs to <8% market share

Step 2: Competitive Transport Markets

- Wholesale providers must not be dependent upon ILEC-provided interoffice transport
- CompTel/ALTS test for competitive alternatives to interoffice transport should be completed by State commission *before* ILEC permitted to proceed to Step 3
- Analysis must be undertaken separately for dedicated and shared transport

Step 3: Switch-Based CLEC Migration

- ILEC makes *prima facie* showing to state commission of satisfaction with Steps 1 and 2 with regard to particular central office
- State commission examines and, after opportunity for discovery and hearings, makes preliminary determination of ILEC compliance – then…
- Entrant that has **already** collocated and deployed in that central office the necessary equipment, software and facilities to switch DS0 circuits should be required, where cost-effective and non-customer effecting, to begin to migrate DS0 UNE-P lines to that switch
- State commission supervises migration – if ILEC fails in provisioning, reversion back to Step 1
- Benefits
  - Ramp up and test ILEC loop provisioning systems in real-world setting
  - Encourage development of non-ILEC sources of supply

Step 4: Wholesale Market Analysis

- Once all Step 3 migrations completed, ILEC may for that central office petition State commission for determination that a vibrant, effective and efficient wholesale alternatives for DS0 switching and transport exists in that office

- State commission competitive analysis:
  - At least ***five*** non-ILEC providers that provide substitutable wholesale service for DS0 switching and transport interconnected with ILEC loops are present
  - The five wholesale providers have sufficient personnel and resources to provide wholesale service and each have done so for at least 100 DS0s in that office
  - Wholesale providers have sufficient capacity to serve retail CLEC demand
  - Transfer to wholesale providers can be accomplished seamlessly and cost-effectively

- Five provider requirements based on game theory, Cournot models of competition, and presence of lack of complete information *ex ante*

Step 5: UNE-P Transition Process

- CLECs file transition plans with State commission within six months of completion of Step 4 in a CO
- State commissions accept plans or grant exceptions
- ILEC obligated to provide UNE-P while transitions in progress
- If during transition ILEC fail to provide seamless, cost-effective cutovers, State commission shall suspend all transition for at least six months
- Three Strikes: third time an ILEC fails in its obligations in any CO for a third time, ILEC immediately reverts back to Step 1 and must provide UNE-P