network elements before providing them to requesting carriers.[1760] At the same time, the Commission recognized and explored significant legal and policy issues surrounding the use of EELs and the Commission's universal service and access charge rules. Shortly after the release of the *UNE Remand Order*, the Commission issued the *Supplemental Order* in which it established an interim usage requirement related to EELs while considering the legal and policy issues implicated by making EELs available. In particular, the Commission determined that competitive LECs must provide a "significant amount of local exchange service" to a particular customer in order to use an EEL.[1761] In the *Supplemental Order Clarification*, the Commission clarified the "significant amount of local usage" requirement and established three safe harbors to define the term.[1762] The Commission also adopted the commingling restriction, which prevented a requesting carrier from connecting a loop or EEL to tariffed access services used as interoffice transmission facilities.[1763] In October 2002, the D.C. Circuit resolved CompTel's appeal of the *Supplemental Order Clarification*. In *CompTel*, the court found that CompTel had not demonstrated that the *Supplemental Order Clarification*'s commingling restriction was arbitrary and capricious.[1764]

571. In the *Notice*, the Commission sought comment on issues related to the EEL, which is a UNE combination consisting of an unbundled loop and dedicated transport and may sometimes include additional electronics (*e.g.*, multiplexing equipment). In particular, the Commission sought comment on whether offering EELs is an appropriate precondition to the switching carve-out adopted in the *UNE Remand Order*, whether the availability of EELs serves to address impairment in the absence of unbundled switching, and whether certain EELs-related issues (*e.g.*, use restrictions, commingling) warrant revision in light of industry developments since the release of the *UNE Remand Order*.[1765] In addition, the Commission incorporated the record related to these issues from earlier proceedings.[1766]

2. Discussion

572. In this section, we address our rules for UNE combinations, specific issues pertaining to EELs, the ability of requesting carriers to commingle UNEs and UNE combinations with other wholesale services, issues surrounding conversions of access services to UNEs.

[1760] The Commission explained that because incumbent LECs may not separate loop and transport elements that are currently combined and purchased through their special access tariffs, competitive LECs are entitled to obtain these existing loop-transport combinations at UNE prices. *UNE Remand Order*, 15 RCC Rcd at 3909, para. 480.

[1761] *Supplemental Order*, 15 FCC Rcd at 1761, para. 4.

[1762] *Supplemental Order Clarification*, 15 FCC Rcd at 9598-9600, para. 22.

[1763] *Id.* at 9598-9600, 9602, paras. 22, 28; *see, e.g.*, *Net2000 Communications, Inc. v. Verizon - Washington, D.C., Inc.*, File No. EB-00-018, Memorandum Opinion and Order, 17 FCC Rcd 1150, 1159, paras. 29-30 (2001).

[1764] *CompTel*, 309 F.3d at 17-18.

[1765] *Triennial Review NPRM*, 16 FCC Rcd at 22807-08, 22814-15, paras. 57, 60, 73.

[1766] *Id.* at 22814, para. 72.

a. New Combinations of Unbundled Network Elements

573. We reaffirm our existing rules regarding UNE combinations.[1767] Our rules require incumbent LECs to provide UNE combinations upon request and prohibit incumbent LECs from separating UNE combinations that are ordinarily combined except upon request. Section 251(c)(3) requires incumbent LECs to "provide unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide" a telecommunications service.[1768] As noted in the Supreme Court's *Verizon* decision, the statute does not specify which party must perform the functions necessary to effectuate UNE combinations.[1769] Based on the nondiscrimination requirements of section 251(c)(3),[1770] and because incumbent LECs are in the best position to perform the functions necessary to provide UNE combinations (and to separate UNE combinations upon request) through their control of the elements of their networks that are unbundled, our rules require incumbent LECs to provide UNE combinations upon request. The record does not indicate that these recently-reinstated rules are problematic.

574. We reiterate the conditions that apply to the duty of incumbent LECs to provide UNE combinations upon request, *i.e.*, that such a combination must be technically feasible and must not undermine the ability of other carriers to access UNEs or interconnect with the incumbent LEC's network.[1771] As noted in the *Verizon* decision, the limitation on technical feasibility is meant to preserve the reliability and security of the incumbent LEC's network, and a UNE combination is "not technically feasible if it impedes an incumbent carrier's ability to retain responsibility for the management, control, and performance of its own network."[1772] Incumbent LECs must prove to state commissions that a request to combine UNEs in a particular manner is not technically feasible or would undermine the ability of other carriers to obtain access to UNEs or to interconnect with the incumbent LEC's network.[1773]

[1767] 47 C.F.R. § 51.315.

[1768] 47 U.S.C. § 251(c)(3); *Local Competition Order*, 11 FCC Rcd at 15646-48, paras. 292-97; *see* LDMI Comments at 11; NewSouth Comments at 42-46; Norlight Comments at 5-7; OpenBand Comments at 10-12; Sprint Comments at 26-27; UNE-P Coalition Comments at 35-38; Letter from Joan Marsh, Director, AT&T Corp. to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2, 6-7 (filed Dec. 23, 2002) (AT&T Dec. 23, 2002 EELs and New Combinations *Ex Parte* Letter).

[1769] *Verizon*, 535 U.S. at 534 (reading section 251(c)(3) as "leaving open who should do the work of combination.").

[1770] *Id.* at 537-38 (noting the statutory requirement of nondiscriminatory access); *Iowa Utils. Bd.*, 525 U.S. at 394-95 (discussing section 251(c)(3) nondiscrimination requirements).

[1771] 47 C.F.R. § 51.315(c).

[1772] *Verizon*, 535 U.S. at 536 (citing *Local Competition Order*, 11 FCC Rcd at 15605-06, para. 203).

[1773] 47 C.F.R. § 51.315(e), (f). We note that our prior rules used the word "impair" in defining an incumbent LEC's obligations to provide UNE combinations upon request. *See* 47 C.F.R. §§ 51.315(c), (f). To avoid confusion between the standard under these rules and the impairment standard in section 251(d)(2)(B) of the Act, we amend these rules to eliminate this use of "impair." *See infra* App. B.

b. EELs

575. As noted above, our rules currently require incumbent LECs to make UNE combinations, including loop-transport combinations, available in all areas where the underlying UNEs are available and in all instances where the requesting carrier meets the eligibility requirements.[1774] We decline to designate EELs as additional UNEs for which an impairment analysis is necessary. Instead, we continue to view EELs as UNE combinations consisting of unbundled loops and unbundled transport (with or without multiplexing capabilities). Pursuant to the statute, requesting carriers are entitled to nondiscriminatory access to UNE combinations on just, reasonable, and nondiscriminatory rates, terms and conditions. Apart from the service eligibility criteria for high-capacity (DS1 or DS3) EELs set forth in Part VII below, our rules do not permit incumbent LECs to impose additional conditions or limitations upon obtaining access to EELs and other UNE combinations, such as requiring a competitive LEC to purchase special access and then convert such facilities to UNEs.[1775] Thus, to the extent DS1 transport facilities are available along a specific route, for example, the incumbent LEC must provide (upon request) a DS1 EEL consisting of unbundled loop and unbundled transport facilities to any requesting carrier that qualifies for access to that combination.[1776] Similarly, if desired, a competitive LEC could obtain access to a DS0 EEL so long as the underlying UNEs are available pursuant to our impairment analysis.[1777]

576. Based on the record before us, we conclude that EELs facilitate the growth of facilities-based competition in the local market.[1778] The availability of EELs extends the geographic reach for competitive LECs because EELs enable requesting carriers to serve

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[1774] *Local Competition Order*, 11 FCC Rcd at 1646-48, paras. 292-97; *Verizon*, 535 U.S. at 531-38 (upholding the Commission's rules on UNE combinations). *See USTA*, 290 F.3d at 428 (concluding that "the Commission has the authority to require [loop-transport] combinations, affirmatively"); *see also* AT&T Reply at 299; XO Reply at 5-7.

[1775] *See* ALTS *et al.* Comments at 102; AT&T Comments at 105-06 (asserting that incumbent LECs require pre-auditing); BrahmaCom Reply at 2 (arguing that incumbent LECs impose a conversion requirement on EELs); Focal Apr. 5, 2001 Comments at 5-6; Letter from Thomas Jones, Counsel for Conversent, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 4 (filed Nov. 5, 2002) (Conversent Nov. 5, 2002 Transport and Loops *Ex Parte* Letter). We therefore grant CompTel's request to clarify that requesting carriers need not purchase special access circuits in order to qualify for EELs. CompTel Feb. 17, 2000 Petition for Reconsideration. We deny, however, CompTel's request to specify the EEL as an additional network element. *Id.* at 13-14. In addition, in light of our determination herein regarding EELs, we dismiss as moot WorldCom's petition for clarification regarding the proper interpretation of section 51.315(b) of the Commission's rules. MCI WorldCom Feb. 17, 2000 Petition for Clarification at 2, 13.

[1776] *See infra* Part V.B.; *see also* BellSouth Reply at 22.

[1777] WorldCom Nov. 13, 2002 *Ex Parte* Letter at 1-3 (describing DS0 EEL arrangements); Letter from William Jordan, Vice President, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Nov. 25, 2002) (BellSouth Nov. 25, 2002 EELs *Ex Parte* Letter) (describing BellSouth's EEL offerings).

[1778] ALTS *et al.* Comments at 76-77; AT&T Comments at 99, 203; Letter from Julia O. Strow, Vice President, Cbeyond, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, 01-318, 01-321 at 1-2 (filed Dec. 16, 2002) (Cbeyond Dec. 16, 2002 EELs *Ex Parte* Letter).

customers by extending a customer's loop from the end office serving that customer to a different end office in which the competitive LEC is already located. In this way, EELs also allow competitive LECs to reduce their collocation costs by aggregating loops at fewer collocation locations and then transporting the customer's traffic to their own switches. Moreover, we find that access to EELs also promotes self-deployment of interoffice transport facilities by competitive LECs because such carriers will eventually self-provision transport facilities to accommodate growing demand.[1779] We further agree that the availability of EELs and other UNE combinations promotes innovation because competitive LECs can provide advanced switching capabilities in conjunction with loop-transport combinations.[1780]

577. As discussed below, a competitive LEC must meet the eligibility criteria in order to obtain a high-capacity EEL on an unbundled basis.[1781] On a going-forward basis, a requesting carrier may obtain a high-capacity EEL any time the underlying network elements are available pursuant to our impairment analysis and the carrier meets the eligibility criteria.[1782] We conclude that pre-audits and requirements to purchase special access and then convert to UNE combinations constitute unjust, unreasonable, and discriminatory terms and conditions for obtaining access to UNE combinations and are prohibited by the Act and our rules.[1783]

[1779] AT&T Reply at 252; NewSouth Comments at 14-15 (explaining practices implemented to make network more efficient).

[1780] Letter from Patrick J. Donovan, Counsel for Cbeyond, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1-2 (filed Dec. 16, 2002) (Cbeyond Dec. 16, 2002 *Ex Parte* Letter); BroadRiver Apr. 5, 2001 Comments at 5 (arguing that EEL availability will "accelerate the rollout of next generation networks"); WorldCom Apr. 5, 2001 Comments at 28-29 (arguing that EEL availability promotes innovation).

[1781] *See infra* Part VII.B.; *see also* AT&T Comments at 104-05; AT&T Reply, Tab F, Declaration of Michael E. Lesher (AT&T Lesher Reply Decl.) at para. 33; CompTel Comments at 90-95; CompTel Apr. 30, 2001 Reply at 2-4. AT&T Apr. 5, 2001 Comment at 20. *But see* SBC Reply at 67-69. *See, e.g.*, Letter from Ann D. Berkowitz, Project Manager, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 13 (filed Oct. 16, 2002) (Verizon Oct. 16, 2002 Section 251 Obligations *Ex Parte* Letter) (arguing that the Commission should limit the use of UNEs to providing local service).

[1782] Thus, a requesting carrier may obtain access to a "new" EEL or other UNE combination. *See* BroadRiver Apr. 5, 2001 Comments at 16-19 (arguing that the Commission should allow competitive LECs to obtain access to new EELs).

[1783] 47 U.S.C. §§ 201-202, 251(c)(3); 47 C.F.R. §§ 51.311-.315. *See* XO Reply at 7 (arguing that competitive LECs may obtain EELs without conversion requirements); Cbeyond Apr. 5, 2001 Comments at 6-9 (arguing that incumbent LECs have required compliance audits before providing access to a UNE combination); Focal Apr. 30, 2001 Reply at 6.

We note that, because the Eighth Circuit had vacated our rules concerning new combinations, competitive LECs could obtain access to EELs through a conversion process under section 51.315(b) of our rules, which prohibited incumbent LECs from separating network elements ordinarily combined. In light of *Verizon*, our new combinations rules were reinstated, and thus, competitive LECs may order new UNE combinations and need not convert special access (or other previously combined network elements) to UNE combinations. *See Verizon*, 535 U.S. at 531-38 (upholding the Commission's rules on UNE combinations).

578. We decline to link the availability of EELs and other UNE combinations to our analysis in the *Pricing Flexibility Order*.[1784] Because the comprehensive impairment analysis we adopt herein addresses the arguments of Qwest and other incumbent LECs concerning the availability of alternative transmission facilities, additional conditions are not necessary to determine the availability of EELs and other UNE combinations.

c. General Commingling Issues for Transmission Facilities

579. We eliminate the commingling restriction that the Commission adopted as part of the temporary constraints in the *Supplemental Order Clarification* and applied to stand-alone loops and EELs. We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (*e.g.*, switched and special access services offered pursuant to tariff), and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request. By commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services. Thus, an incumbent LEC shall permit a requesting telecommunications carrier to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act. In addition, upon request, an incumbent LEC shall perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act. As a result, competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (*e.g.*, switched and special access services offered pursuant to tariff), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services.

580. As explained below, however, we do not require incumbent LECs to "ratchet"[1785] individual facilities. Thus, we do not require incumbent LECs to implement any changes to their billing or other systems necessary to bill a single circuit at multiple rates (*e.g.*, a DS3 circuit at rates based on special access services and UNEs) in order to charge competitive LECs a single, blended rate. Although we do not require ratcheting, we do note that incumbent LECs shall not

[1784] Qwest Reply at 56-57. We note that Qwest later modified its position to support the availability of EELs. *See* Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 15-17 (filed Dec. 17, 2002) (Qwest Dec. 17, 2002 *Ex Parte* Letter).

[1785] Ratcheting is a pricing mechanism that involves billing a single circuit at multiple rates to develop a single, blended rate.

deny access to a UNE on the ground that the UNE or UNE combination shares part of the incumbent LEC's network with access services or other non-qualifying services.[1786]

581. We conclude that the Act does not prohibit the commingling of UNEs and wholesale services and that section 251(c)(3) of the Act grants authority for the Commission to adopt rules to permit the commingling of UNEs and combinations of UNEs with wholesale services, including interstate access services. An incumbent LEC's wholesale services constitute one technically feasible method to provide nondiscriminatory access to UNEs and UNE combinations.[1787] We agree with the Illinois Commission, the New York Department, and others that the commingling restriction puts competitive LECs at an unreasonable competitive disadvantage by forcing them either to operate two functionally equivalent networks – one network dedicated to local services and one dedicated to long distance and other services – or to choose between using UNEs and using more expensive special access services to serve their customers.[1788] Thus, we find that a restriction on commingling would constitute an "unjust and

[1786] More specifically, our approach to ratcheting does not mean that an incumbent LEC can refuse to commingle a UNE with a special access service because the incumbent LEC multiplexes traffic for multiple customers onto one facility within its own network. For example, an incumbent LEC shall not refuse to provide a UNE DS1 transport (where such UNEs are available) on the grounds that the UNE shares a transmission facility with tariffed access services or other wholesale services.

[1787] *See* NewSouth Comments at 42-43 (describing connections and work processes); Qwest Dec. 17, 2002 *Ex Parte* Letter at 15-16 (proposing and describing EEL arrangements); Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 4-6 (filed Dec. 18, 2002) (Qwest Dec. 18, 2002 EELs *Ex Parte* Letter) (describing Qwest's commingling proposal); Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3 (filed Feb. 6, 2003) (Qwest Feb. 6, 2003 EELs *Ex Parte* Letter) (describing Qwest's commingling proposal); AT&T Apr. 5, 2001 Comments at 22. In addition, we find that commingling is a technically feasible practice. *See, e.g.*, AT&T Apr. 30, 2001 Reply, CC Docket No. 96-98, Decl. of Anthony Fea and William J. Taggart III (AT&T Apr. 30, 2001 Fea/Taggart Reply Decl.) at para. 40 (asserting that linking loops or loop-transport combinations with high-capacity special access services is technically feasible). In light of the determinations we make herein, we grant WorldCom's request to clarify that requesting carriers may commingle UNEs with other types of services. MCI WorldCom Feb. 17, 2000 Petition for Clarification at 21-23.

[1788] In the *Local Competition Order*, the Commission concluded that those "terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete." 11 FCC Rcd at 15660, para. 315; *see UNE Remand*, 15 FCC Rcd at 3913-14, paras. 490-91. A number of parties persuade us that a commingling restriction, combined with the reduced unbundling obligations, would raise the costs of competitive LECs. AT&T Comments at 106-107; ALTS *et al.* Comments at 106; CompTel Comments at 97; Illinois Commission Comments at 5; Sprint Comments at 55-57; WorldCom Comments at 55; AT&T Reply at 293 (citing AT&T Lesher Reply Decl. at paras. 34-36); NewSouth Reply at 37; Sprint Reply at 46; NuVox *et al.* Reply at 52; XO Reply at 17; Letter from Ruth Milkman, Counsel for WorldCom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 13 (filed Oct. 7, 2002) (WorldCom Oct. 7, 2002 EELs *Ex Parte* Letter) (asserting that commingling "forces needless inefficiencies on competitors"); Letter from Michael H. Pryor, Counsel for NewSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98 (filed Oct. 18, 2002) (NewSouth Oct. 18, 2002 Loops and Commingling *Ex Parte* Letter); ALTS/CompTel Oct. 28, 2002 *Ex Parte* Letter at 5; Cbeyond Nov. 22, 2002 *Ex Parte* Letter; Letter from Jonathan Askin, General Counsel, ALTS, to William F. Maher, Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 5 (filed Nov. 14, 2002) (ALTS Nov. 14, 2002 Use and Commingling Restrictions *Ex Parte* Letter); WorldCom Nov. 22, 2002 *Ex Parte* Letter at 13-14; AT&T Dec. 23, 2002 *Ex Parte* (continued....)

unreasonable practice" under 201 of the Act, as well as an "undue and unreasonable prejudice or advantage" under section 202 of the Act.[1789] Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirement in section 251(c)(3).[1790] Incumbent LECs place no such restrictions on themselves for providing service to any customers by requiring, for example, two circuits to accommodate telecommunications traffic from a single customer or intermediate connections to network equipment in a collocation space.[1791] For these reasons, we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations.[1792]

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Letter at 8 (arguing that commingling restrictions force competitive LECs into inefficient network architectures); Letter from Ruth Milkman, Counsel for WorldCom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3 (filed Feb. 13, 2003) (WorldCom Feb. 13, 2003 EELs *Ex Parte* Letter); Letter from Patrick Donovan, Counsel for Cbeyond, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338 at 4 (filed Feb. 13, 2003) (Cbeyond Feb. 13, 2003 EELs and Commingling *Ex Parte* Letter). *See* Cbeyond *et al.* Apr. 5, 2001 Comments at 14 (requesting clarification that competitive LECs can purchase access to a DS1 EEL that is "riding on a DS3 circuit with other types of ancillary traffic"); CompTel Apr. 5, 2001 Comments at 33; AT&T Apr. 30, 2001 Fea/Taggart Reply Decl. at paras. 41-42. We therefore disagree with Qwest and the other incumbent LECs who argue that the commingling restriction does not impede competitive LECs from deploying efficient network configurations. *See* SBC Comments at 108 (noting that commingling restriction precludes competitive LECs from obtaining UNEs and access services that share the same facility); BellSouth Reply at 40 (stating that competitive LECs can connect UNEs and access services at collocation arrangements); Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98 at 3 (filed Oct. 28, 2002) (Qwest Oct. 28, 2002 Transport and Commingling *Ex Parte* Letter).

[1789] ALTS *et al.* Comments at 105; ALTS/CompTel Oct. 28, 2002 *Ex Parte* Letter at 5; WorldCom Nov. 18, 2002 *Ex Parte* Letter at 15; Cbeyond Nov. 22, 2002 *Ex Parte* Letter at 13-14.

[1790] AT&T Comments at 107; Illinois Commission Comments at 5; WorldCom Reply at 32; ALTS/CompTel Oct. 28, 2002 *Ex Parte* Letter at 5; AT&T Nov. 23, 2002 *Ex Parte* Letter at 8 (arguing that commingling restriction is discriminatory).

[1791] AT&T Comments at 107 (arguing that "the co-mingling ban deprives CLECs of obtaining the same network efficiencies as the ILEC enjoys because the ILEC can place any traffic on any facility to maximize efficiency"); NewSouth Comments at 42-46; Sprint Reply at 46-48; WorldCom Apr. 30, 2001 Reply at 14; CompTel Apr. 5, 2001 Comments at 33; AT&T Apr. 30, 2001 Fea/Taggart Reply Decl. at paras. 41-42); *see* 47 C.F.R. § 51.315(b) (requiring incumbent LECs to provide access to UNEs on terms and conditions no less favorable to those under which the incumbent LEC provides such UNEs to itself). *But see* SBC Comments at 108 (noting requirement for competitive LECs to collocate in certain circumstances); Verizon Comments at 141 (acknowledging that it combines all telecommunications traffic on the same facilities); BellSouth Reply at 40 (acknowledging collocation requirement); *see* 47 C.F.R. § 51.315(b) (requiring incumbent LECs to provide access to UNEs on terms and conditions no less favorable to those under which the incumbent LECs provides such UNEs to itself).

[1792] We note that sections 202 and 203 of the Act provide specific penalties for noncompliance. *See* 47 U.S.C. §§ 202(c), 203(e). These amounts have been adjusted to $7,600 for each offense and $330 for each day of the continuance of the offense. 47 C.F.R. § 1.80(b)(4). Thus, any incumbent LEC policy or practice that has the effect of prohibiting commingling could subject the incumbent LEC to enforcement action for imposing an "undue or unreasonable prejudice or disadvantage" upon competitive LECs. In addition, the Commission's rules establish a five-year statute of limitations for violations of sections 202 and 203. *Id.* at § 1.80(c)(2).

582. We decline, however, to require "ratcheting," which is a pricing mechanism that involves billing a single circuit at multiple rates to develop a single, blended rate.[1793] The Commission's pricing rules for UNEs already ensure that competitive LECs are paying appropriate rates for UNEs and UNE combinations, and that incumbent LECs are adequately compensated for the use of their networks. To permit ratcheting would be to create an additional series of discounts for situations in which all parties' interests are already protected.[1794] Thus, our rules permit incumbent LECs to assess the rates for UNEs (or UNE combinations) commingled with tariffed access services on an element-by-element and a service-by-service basis.[1795] This ensures that competitive LECs do not obtain an unfair discount off the prices for wholesale services, while at the same time ensuring that competitive LECs do not pay twice for a single facility.[1796]

583. We therefore disagree with SBC, Verizon, and others who argue in favor of adopting a permanent commingling restriction. First, we determine that the eligibility qualifications adopted herein (and applied to all conversions of a special access circuit to a

[1793] CompTel Comments at 97-98 (citing *BellSouth Telecommunications, Inc. Part 69(g)(1) Public Interest Petition to Establish New Rate Elements for Switched Access Versions of BellSouth's SMARTGate Service and BellSouth SPA Managed Shared Network*, Memorandum Opinion and Order, 14 FCC Rcd 1838, 1839, para. 2, n.2 (CCB 1998) (*BellSouth Ratcheting Order*); Sprint Comments at 56, n.48; Sprint Reply at 47. As explained in the *BellSouth Ratcheting Order*, ratcheting allows special access charges to be reduced by 1/24th for each switched access voice-grade circuit on a special access DS1 or 1/672nd for each switched access voice-grade circuit on a special access DS3. *BellSouth Ratcheting Order*, 14 FCC Rcd at 1839 n.2. We note that some parties contend that any Commission rule requiring ratcheting would necessitate substantial modifications to incumbent LEC billing systems and operational procedures. *See* Letter from Glenn T. Reynolds, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Feb. 6, 2003) (BellSouth Feb. 6, 2003 Ratcheting *Ex Parte* Letter). Because we do not require ratcheting, however, we find no need to address these arguments.

[1794] Our decision not to require ratcheting does not affect a competitive LEC's ability to obtain UNEs, UNE combinations, and wholesale services. Thus, an incumbent LEC may not deny access to a UNE or UNE combination on the grounds that such UNE or UNE combination shares part of the incumbent LEC's network with access or other non-UNE services. Some competitive LECs have contended, for example, that incumbent LECs deny access to UNE combinations on the grounds that a UNE and access service share certain multiplexing equipment. *See* Letter from Brad E. Mutschelknaus *et al.*, Counsel for ALTS *et al.*, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, CC Docket No. 96-98 (filed Aug. 1, 2001) (ALTS Aug. 1, 2001 EELs *Ex Parte* Letter), *in* Letter from Steven A. Augustino, Counsel for ALTS *et al.*, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 (filed Aug. 1, 2001). By eliminating the commingling restriction, we will ensure that competitive LECs will be able to obtain all available UNEs, UNE combinations, and wholesale services, albeit at the rates established pursuant to tariffs, interconnection agreements or other contracts.

[1795] *See infra* Part VII.B.

[1796] For example, a competitive LEC connecting a UNE loop to special access interoffice transport facilities would pay UNE rates for the unbundled loops and tariffed rates for the special access service. We recognize that, at some point, competitive LECs may make a business decision to either use UNEs or wholesale services to serve a customer. For example, a competitive LEC buying UNE DS1 transport continues to add UNE DS1 transport facilities to its network. At some point, the competitive LEC will make a business decision to either buy DS3 special access (and convert its traffic onto the larger facility) or to buy UNE DS3 transport, where available and if the competitive LEC meets the service eligibility requirements.

high-capacity EEL; to obtaining a new high-capacity EEL; and to obtaining at UNE pricing part of a high-capacity loop-transport combination) address the universal service and access charge arguments by ensuring competitive LECs purchase UNEs for legitimate competitive purposes.[1797] Second, we conclude that the commingling restriction is no longer necessary to preserve the status quo while the Commission grapples with potential modifications to its universal service and access charge policies.[1798] We recognize that some issues remain outstanding, but we conclude that the remaining issues do not, by themselves, warrant a permanent restriction on commingling UNEs and UNE combinations with wholesale services. Third, we find that commingling does not constitute the creation of a new UNE for which an impairment analysis is required.[1799] Instead, commingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services. Because commingling will not enable a competitive LEC to obtain reduced or discounted prices on tariffed special access services because we are not requiring ratcheting,[1800] our general impairment analysis for individual UNEs is adequate. Fourth, we conclude that permitting commingling is consistent with the D.C. Circuit's *CompTel* decision. Verizon incorrectly characterizes that decision as finding that a commingling restriction is necessary because its absence would allow mass conversions.[1801] Instead, the court concluded that, based on the information submitted by the parties, it could not conclude that the Commission's prior commingling restriction was arbitrary and capricious.[1802] Further, as we explain in detail below, we obviate the risk identified by the court by applying service eligibility criteria to commingled loop-transport combinations. Finally, we conclude that the billing and operational issues raised by Verizon do not warrant a permanent commingling restriction, but instead can be addressed through the same process that applies for other changes in our unbundling requirements adopted

[1797] AT&T Reply at 284; WorldCom Reply at 36. *But see* SBC Comments at 107; NECA Reply at 4-5.

[1798] ALTS *et al.* Comments at 105-06; CompTel Comments at 76-77; NuVox *et al.* Comments at 49-51 (citing *CALLS* and *MAG* Orders); Norlight Comments at 9-10; AT&T Reply at 284, 290; WorldCom Reply at 36; Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 13 (filed Oct. 7, 2002) (AT&T Oct. 7, 2002 Transport and Commingling *Ex Parte* Letter); 13; Nov. 14, 2002 ALTS *Ex Parte* Letter at 3, 5. *But see* NECA Reply at 3; NECA Apr. 5, 2001 Comments at 3-5; TDS Apr. 5, 2001 Comments at 1-7; USTA Apr. 5, 2001 Comments at 9-11.

[1799] Letter from Brad E. Mutschelknaus, Counsel for ALTS, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 at 3-5 (filed Aug. 20, 2001) (ALTS Aug. 20, 2001 EELs *Ex Parte* Letter); SBC/Verizon Apr. 5, 2001 Comments at 30.

[1800] As discussed below, we are not requiring incumbent LECs to blend the rates of a transmission facility according to the amount of UNE usage and access service usage. Thus, competitive LECs that commingle UNEs or UNE combinations with, for example, interstate access services would pay the appropriate rates for each service.

[1801] Verizon Dec. 17, 2002 *Ex Parte* Letter at 5; Letter from Ann D. Berkowitz, Project Manager, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (filed Jan. 30, 2003); Letter from Ann D. Berkowitz, Project Manager, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 2-3 (filed Feb 6, 2003).

[1802] *CompTel*, 309 F.3d at 17-18.

herein, *i.e.*, through change of law provisions in interconnection agreements.[1803] We expect that change of law provisions will afford incumbent LECs sufficient time to complete all actions necessary to permit commingling.[1804]

584. As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act. Section 251(c)(4) places the duty on incumbent LECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on" the resale of telecommunications services provided at retail to customers who are not telecommunications carriers.[1805] Any restriction that prevents commingling of UNEs (or UNE combinations) with resold services constitutes a limitation on both reselling the eligible service and on obtaining access to the UNE or UNE combination. We conclude that a restriction on commingling UNEs and UNE combinations with services eligible for resale is inconsistent with the section 251(c)(4) prohibition on "unreasonable . . . conditions or limitations" because it would impose additional costs on competitive LECs choosing to compete through multiple entry strategies, and because such a restriction could even require a competitive LEC to forego using efficient strategies for serving different customers and markets. We agree with ALTS that an incumbent LEC's obligations under sections 251(c)(3) and 251(c)(4) are not mutually exclusive.[1806] In addition, a restriction on obtaining UNEs and UNE combinations in conjunction with services available for resale would constitute a discriminatory condition on the resale of eligible telecommunications services because incumbent LECs impose no such limitations or restrictions on their ability to combine facilities and services within their network in order to meet customer needs.[1807]

d. Conversions

585. We decline the suggestions of several parties to adopt rules establishing specific procedures and processes that incumbent LECs and competitive LECs must follow to convert wholesale services (*e.g.*, special access services offered pursuant to interstate tariff) to UNEs or UNE combinations, and the reverse, *i.e.*, converting UNEs or UNE combinations to wholesale

[1803] CompTel Comments at 97-98; NewSouth Comments at 41; Sprint Comments at 56; WorldCom Reply at 33-34; Sprint Reply at 47. *But see* Verizon Comments at 140. We note that, taken to its extreme, the incumbent LEC argument would prevent any modification of our UNE rules because billing and operational changes would certainly follow any such change.

[1804] For example, incumbent LECs will have to modify their interstate tariffed offerings to permit commingling of interstate access services with UNEs and UNE combinations.

[1805] 47 U.S.C. § 251(c)(4).

[1806] ALTS *et al.* Comments at 98.

[1807] *See, e.g.*, AT&T Comments at 107; NewSouth Comments at 42-46; Sprint Reply at 46-48.

services.[1808] Because both the incumbent LEC and requesting carriers have an incentive to ensure correct payment for services rendered, and because both parties are bound by duties to negotiate in good faith, we conclude that these carriers can establish any necessary procedures to perform conversions with minimal guidance on our part.

586. We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, so long as the competitive LEC meets the eligibility criteria that may be applicable. To the extent a competitive LEC fails to meet the eligibility criteria for serving a particular customer, the serving incumbent LEC may convert the UNE or UNE combination to the equivalent wholesale service in accordance with the procedures established between the parties. Likewise, to the extent a competitive LEC meets the eligibility requirements and a particular network element is available as a UNE pursuant to our impairment analysis, it may convert the wholesale service used to serve a customer to UNEs or UNE combinations in accordance with the relevant procedures. Converting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality.[1809] We recognize that conversions may increase the risk of service disruptions to competitive LEC customers because they often require a competitive LEC to groom interexchange traffic off circuits and equipment that are already in use in order to comply with the eligibility criteria.[1810] Thus, requesting carriers should establish and abide by any necessary operational procedures to ensure customer service quality is not affected by conversions.

587. We decline to require incumbent LECs provide requesting carriers an opportunity to supersede or dissolve existing contractual arrangements through a conversion request. Thus, to the extent a competitive LEC enters into a long-term contract to receive discounted special access services, such competitive LEC cannot dissolve the long-term contract based on a future decision to convert the relevant circuits to UNE combinations based on changes in customer

[1808] *See* ALTS *et al.* Comments at 101 (arguing that the Commission should establish explicit time period for effectuating conversions); Focal Apr. 30, 2001 Reply at 6-7. We therefore grant in part WorldCom's request to clarify that competitive LECs may convert existing special access services to combinations of loop and transport network elements, but only to the extent such conversions meet the service eligibility criteria for EELs adopted herein. MCI WorldCom Feb. 17, 2000 Petition for Clarification at 24. Furthermore, we dismiss as moot Intermedia's request to issue another supplementary order clarifying that incumbent LECs must make available loop and transport network elements that are currently combined as tariffed special access services. Intermedia Feb. 17, 2000 Petition for Reconsideration at 14-15.

[1809] We note that no party seriously contends that it is technically infeasible to convert UNEs and UNE combinations to wholesale services and vice versa.

[1810] WorldCom explains that the grooming process requires "submission of circuit-level disconnect orders, and circuit-level reconnect orders" during limited periods of time in order to segregate telecommunications traffic onto the redundant facilities required by the commingling restriction. WorldCom Apr. 5, 2001 Comments at 37-38. *See* ALTS *et al.* Comments at 105 (arguing that "force moves" are inefficient and risky); AT&T Comments at 108 (citing AT&T Apr. 5, 2001 Comments at 22); Sprint Reply at 46-48.

usage.[1811] We recognize, however, that once a competitive LEC starts serving a customer, there exists a risk of wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time. We agree that such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an incumbent LEC as a result of converting a UNE or UNE combination to a wholesale service.[1812] Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions.[1813] Moreover, we conclude that such charges are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any person or class of persons (*e.g.*, competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or disadvantage.[1814]

588. We conclude that conversions should be performed in an expeditious manner in order to minimize the risk of incorrect payments. We expect carriers to establish any necessary timeframes to perform conversions in their interconnection agreements or other contracts. We decline to adopt ALTS's suggestion to require the completion of all necessary billing changes within ten days of a request to perform a conversion because such time frames are better established through negotiations between incumbent LECs and requesting carriers.[1815] We recognize, however, that converting between wholesale services and UNEs (or UNE combinations) is largely a billing function. We therefore expect carriers to establish appropriate mechanisms to remit the correct payment after the conversion request, such as providing that any pricing changes start the next billing cycle following the conversion request.

589. As a final matter, we decline to require retroactive billing to any time before the effective date of this Order. The eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past. To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order.

[1811] We would expect competitive LECs to take into account the possibility of future conversions to UNE combinations before entering into a long-term contract (with associated discounts) for wholesale services.

[1812] AT&T Reply at 296-300; AT&T Nov. 23, 2002 *Ex Parte* Letter at 12-13.

[1813] 47 U.S.C. § 251(c)(3).

[1814] *Id.* § 202(a).

[1815] ALTS *et al.* Comments at 101.

B. Service Eligibility to Access UNEs

1. Background

590. A requesting carrier may obtain a UNE where it provides qualifying services over that UNE.[1816] In the *Local Competition Order* and *UNE Remand Order*, the Commission determined not to impose eligibility thresholds for UNE access.[1817] In the *Supplemental Order*, it restricted the ability of competitive carriers to convert special access arrangements to EELs, unless such a carrier provides a "significant amount of local exchange services."[1818] In the *Supplemental Order Clarification*, the Commission clarified what constitutes a "significant amount of local exchange service" by defining three safe harbors for requesting carriers to demonstrate local usage to convert special access arrangements to EELs, two of which specified in detail a variety of local voice traffic requirements by circuit.[1819] In the *Triennial Review NPRM*, the Commission sought comment on several issues relating to the safe harbors, including whether they effectively tailor access to EEL combinations to those requesting carriers seeking to provide "significant local usage" to their end users.[1820] Since the issuance of the *Triennial Review NPRM*, the D.C. Circuit has denied a petition for review of these safe harbors.[1821]

[1816] *See supra* Part V.B.2.c.

[1817] *Local Competition Order*, 11 FCC Rcd at 15679, para. 356; *UNE Remand Order*, 15 FCC Rcd at 3911-12, para. 484.

[1818] *Supplemental Order*, 15 FCC Rcd at 1760, para. 2.

[1819] The safe harbor exceptions require, in relevant part, that:

(1) the requesting carrier certifies it is the exclusive provider of an end user's local exchange service;

(2) the requesting carrier certifies that it provides local exchange and exchange access service to the end-user customer's premises and handles at least one third of the end-user customer's local traffic as measured as a percent of total end-user dialtone lines; for DS1 circuits and above, at least 50 percent of the activated channels on the loop portion of the loop-transport combination have at least 5 percent local voice traffic individually, and the entire loop facility has at least 10 percent local voice traffic; or

(3) the requesting carrier certifies that at least 50 percent of the activated channels on a circuit are used to provide originating and terminating local dialtone service and at least 50 percent of the traffic on each of these channels is local voice traffic and the entire loop facility has at least 33 percent local voice traffic.

Options (1) and (2) also require that the loop-transport combinations in question terminate at the requesting carrier's collocation arrangement in at least one incumbent LEC central office. For DS1 to DS3 multiplexing, each of the individual DS1 circuits must meet these criteria. *Supplemental Order Clarification*, 15 FCC Rcd at 9598-600, para. 22. All three options prohibited commingling EELs with tariffed access services, a restriction which we conclude is no longer necessary. *See supra* Part VII.A.2.

[1820] *Triennial Review NPRM*, 16 FCC Rcd at 22814, para. 74.

[1821] The court denied petitions for review that argued that the safe harbors were arbitrary and capricious. *CompTel*, 309 F.3d at 16-18.

2. Discussion

a. Scope of Eligibility Criteria Limited to High-Capacity EELs

591. As we explain in detail under our service-specific approach, a carrier seeking access to an unbundled element of the incumbent LEC's network must provide qualifying service to a customer in order to obtain access to that facility pursuant to our section 251 unbundling rules.[1822] With respect to combinations of high-capacity (DS1 and DS3) loops and interoffice transport, we adopt additional eligibility criteria that do not apply to other UNEs. Based on the record before us, we find that it is reasonable to adopt such eligibility criteria for these high-capacity circuits due to the potential for "gaming" by non-qualifying providers that is uniquely possible because of the technical characteristics of these facilities. By gaming of our eligibility criteria, we mean the case of a provider of exclusively non-qualifying service obtaining UNE access in order to obtain favorable rates or to otherwise engage in regulatory arbitrage. This includes the intentional circumvention of the intent of our rules to restrict unbundled network access to bona fide providers of qualifying service, such as a national data network provider carrying minimal qualifying service solely to obtain UNE pricing.

592. We do not, however, impose these additional requirements on access to UNEs other than high-capacity EELs. The record does not indicate concern over misuse of voice-grade UNE loops, high-capacity loops, or other UNEs.[1823] By contrast, it discloses significant disagreements between incumbent LECs and competitive LECs over application and administration of use restrictions on high-capacity EELs. Accordingly, although a requesting carrier must provide qualifying services to obtain access to loops, lower-capacity EELs and other UNEs and UNE combinations, we need not provide more detailed rules for application of these requirements to other elements at this time, given the lack of controversy and the greater administrative burdens that enforcing such protections places on requesting carriers, incumbent LECs, and the Commission.[1824] Should there become an apparent need in the future, however, to

[1822] We also conclude in Part V.B.2.c. that a requesting carrier providing qualifying service can also use that UNE to provide multiple services to a customer.

[1823] At least one incumbent LEC indicates that the Commission does not need to apply the same use restrictions to DS0 and other lower-capacity circuits as the Commission should apply to high-capacity circuits. *See* BellSouth Jan. 16, 2003 *Ex Parte* Letter, Attach. at 4 (stating that a simplified use restriction could be implemented so long as the protections for DS1 and higher-capacity circuits are continued and not subject to gaming).

[1824] We conclude that a requesting carrier qualifies for access to loops, transport, subloops, and other stand-alone UNEs, as well as EELs combining lower-capacity loops, so long as that carrier provides a qualifying service to the end-user customer. In contrast to the potential for interexchange carriers to use high-capacity EELs without providing any qualifying services, the record before us does not show such issues exist for transport, loops or other last-mile UNEs. *See, e.g.*, Covad Jan. 21, 2003 *Ex Parte* Letter at 3 (arguing that "a regime of use restrictions on standalone UNE loops, which affects all facilities-based carriers, to avoid speculative concerns about access charge bypass by a few carriers would be a vastly over-inclusive solution in search of a very narrow, speculative problem."). Although BellSouth states that local use restrictions are necessary for stand-alone UNEs, it focuses on the importance of conducting a local service impairment inquiry for all UNEs, and does not identify UNE access by non-local wireline providers as a problem. Letter from Glenn Reynolds, Vice President – Federal Regulatory, BellSouth, to William F. Maher, Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3 (filed (continued....)

guard against access to other parts of the network for the provision of non-qualifying services, we would revisit this decision.

593. To ensure that our rules on service eligibility are not gamed in whole or in part, we make clear that the service eligibility criteria must be satisfied (1) to convert a special access circuit to a high-capacity EEL; (2) to obtain a new high-capacity EEL; or (3) to obtain at UNE pricing part of a high-capacity loop-transport combination (commingled EEL). The *Supplemental Order Clarification* targeted the scope of its restrictions to protect a specific definition of special access service from conversion, namely, a service that "employs dedicated, high-capacity facilities that run directly between an end user, usually a large business customer, and the IXC's point of presence."[1825] Although that order did not rely expressly on the commingling restriction to prevent partial UNE conversions, the D.C. Circuit deduced that a commingling ban would appear to prevent gaming because "commingling will allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops."[1826] Pointing to this pronouncement from the court, incumbent LECs argue that permitting commingling, as we do in this Order, would risk conversion of the entire channel termination base.[1827]

594. In response to this concern, we apply service eligibility criteria to commingled loop-transport combinations and therefore avoid the possibility of across-the-board loop arbitrage, yet protect access to the UNE portion of a circuit that would otherwise qualify for conversion under the EELs rules we adopt today.[1828] For example, where a state commission finds that transport on a specific route is not available as a UNE pursuant to a Commission-defined trigger, a UNE loop would still be available in combination with a special access transport service on that route *so long as the eligibility criteria are satisfied.* Accordingly, a competitive LEC that provides local voice service would be able to obtain the UNE loop

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Jan. 21, 2003) (BellSouth Jan. 21, 2003 *Ex Parte* Letter). Accordingly, we find that certification is unnecessary to verify that carriers provide qualifying services over these UNEs.

[1825] *Supplemental Order Clarification*, 15 FCC Rcd at 9593, para. 10 n.36 (citations omitted). Our revised definition of dedicated transport, which is limited to transmission facilities within an incumbent LEC's network, squarely removes a key segment of those facilities from the incumbent LEC's unbundling obligation. *See supra* Part VI.C.3.

[1826] *CompTel*, 309 F.3d at 17-18. Incumbent LECs typically sell transmission service over a loop facility out of their special access tariffs as "channel termination." The court went on to explain that "[t]he reason is that there are no use restrictions on unbundled loops, and therefore allowing loops to be freely connected to special access services would allow loops that provide no local services to be unbundled and then merely attached to special access transports." *Id.* at 18.

[1827] *See, e.g.*, Verizon Dec. 17, 2002 *Ex Parte* Letter at 5.

[1828] At least one incumbent LEC endorses the availability of a commingled EEL subject to service eligibility restrictions. Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (filed Feb. 13, 2003) (Qwest Feb. 13, 2003 Commingled EEL *Ex Parte* Letter).

portion of a commingled circuit, but interexchange carriers would be unable to obtain the remaining loop base of special access circuits because of the service eligibility criteria we establish below.

b. Service Eligibility Criteria for High-Capacity EELs

595. A central goal of the service eligibility criteria we establish in this Order is to safeguard the ability of bona fide providers of qualifying service to obtain access to high-capacity EELs while simultaneously addressing the potential for gaming. To that end, we therefore focus on local voice service due to its verifiability and its role as the core competitive offering, either on a stand-alone or bundled basis, in direct competition to traditional incumbent LEC service.[1829] Importantly, in devising a gating mechanism to obtain high-capacity EELs, we recognize that we must go beyond superficial indicia and require satisfaction of multiple network-specific and circuit-specific criteria to ensure that the requesting carrier demonstrates a commitment to the local voice market.

596. In crafting eligibility requirements for competitive access to high-capacity EELs, we find our experience with the safe harbors set forth in the *Supplemental Order Clarification* to be instructive. On the one hand, several incumbent LECs argue that the safe harbors have provided certainty and accountability, have survived judicial review, and urge the Commission to retain them.[1830] On the other hand, many competitive LECs submit evidence that that the safe harbors and auditing procedures have proved to be unworkable and susceptible to abuse by the incumbent LECs.[1831] While the assignment of a local telephone number and other characteristics of local voice service provide a significant degree of bright-line measurability, we are mindful that overly intrusive and onerous compliance requirements, such as monitoring traffic over individual circuits, serve as a drag on competitive entry. To avoid the difficulties and unwanted effects of measuring usage or certifying to exclusivity in providing qualifying services, we adopt rules based largely on elements of the proposed architectural solutions advanced by SBC, Qwest, and BellSouth.[1832]

[1829] Our identification of local voice service as the touchstone for high-capacity EEL eligibility does not limit our definition of qualifying services or otherwise affect our impairment findings.

[1830] *See, e.g.*, BellSouth Reply at 39-41; SBC Reply at 157-63; Verizon Dec. 17, 2002 *Ex Parte* Letter at 1.

[1831] *See, e.g.*, CompTel Comments at 99 n.206; NuVox *et al.* Reply at 51 (claiming that the safe harbors are "too cumbersome" and "amount to a mad science that challenges network engineers, marketing personnel and provisioners – and leaves far too much opportunity for creative interpretation by the ILECs.").

[1832] *See* Letter from Julia O. Strow, Vice-President – Regulatory & Industry Relations, Cbeyond *et al.*, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, Attach. at 3 (filed Feb. 7, 2003) (SBC/NuVox/Cbeyond/SNiP LiNK Feb. 7, 2003 *Ex Parte* Letter); Qwest Feb. 13, 2003 *Ex Parte* Letter; Letter from Herschel L. Abbott, Jr., Vice President – Government Affairs, BellSouth, to Chairman Michael Powell, FCC, CC Docket No. 01-338, Attach. (filed Feb. 13, 2003) (BellSouth Feb. 13, 2003 *Ex Parte* Letter), *in* Letter from Jonathan Banks, General Attorney, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Feb. 13. 2003). As we discuss later in this Part, several parties, these carriers as well as competitive LECs such as Cbeyond have supplemented their original comments and filed alternative proposals that incorporate network-design solutions intended to allow UNE (continued....)

597. We conclude that where a requesting carrier satisfies the following three categories of criteria, it is a bona fide provider of qualifying services and thus is entitled to order high-capacity EELs. First, we find that each requesting carrier must have a state certification of authority to provide local voice service. Second, to demonstrate that it actually provides a local voice service to the customer over every DS1 circuit, we find that the requesting carrier must have at least one local number assigned to each circuit and must provide 911 or E911 capability to each circuit. Third, we find the following additional circuit-specific architectural safeguards to prevent gaming are necessary: each circuit must terminate into a collocation governed by section 251(c)(6) at an incumbent LEC central office within the same LATA as the customer premises;[1833] each circuit must be served by an interconnection trunk in the same LATA as the customer premises served by the EEL for the meaningful exchange of local traffic, and for every 24 DS1 EELs or the equivalent, the requesting carrier must maintain at least one active DS1 local service interconnection trunk; and each circuit must be served by a Class 5 switch or other switch capable of providing local voice traffic. Requesting carriers must certify to meeting all three criteria (authorization, local number and E911 assignment, and architectural safeguards) to qualify for the high-capacity circuit, subject to the certification and auditing requirements set forth in Part VII.C, below.

598. When applied in their totality, the criteria we adopt here to demonstrate that a requesting carrier has undertaken substantial regulatory and commercial measures to provide local voice service will ensure that the requesting carrier is indeed a provider of qualifying services. In this manner, the criteria afford high-capacity EEL access to an integrated communications provider that sells a bundle of local voice, long-distance voice, and Internet access to small businesses, because such a provider is competing against the incumbent LEC's local voice offerings.[1834] In contrast, a provider of exclusively long-distance voice or data services that seeks to use high-capacity UNE facilities without providing any local services would fall short of one of the tests, if not all. As a further check on potential for abuse, we make clear that these requirements apply to all wholesale as well as retail service offerings over high-capacity EELs.

599. We apply the service eligibility requirements on a circuit-by-circuit basis, so each DS1 EEL (or combination of DS1 loop with DS3 transport) must satisfy the service eligibility

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access for local voice traffic, while seeking to minimize gaming by providers of non-qualifying services. We do not adopt in whole the proposals submitted by any of these carriers.

[1833] 47 U.S.C. § 251(c)(6). We therefore deny WorldCom's request to clarify that a collocation requirement is not necessary for competitive LECs to obtain EELs. MCI WorldCom Feb. 17, 2000 Petition for Clarification at 25.

[1834] For example, Cbeyond reports that well over 95% of its nearly 5000 customers had narrowband access and no T1 service prior to signing up for Cbeyond's integrated package. Letter from Julia Strow, Vice President – Regulatory & Legislative Affairs, Cbeyond, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (filed Dec. 16, 2002) (Cbeyond Dec. 16, 2002 EELs *Ex Parte* Letter); *see also* Letter from Michael H. Pryor, Counsel for NewSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (filed Sept. 26, 2002) (NewSouth Sept. 26, 2002 *Ex Parte* Letter) (stating that over 90% of new customers are upgraded from analog to digital broadband services).

criteria. Importantly, our adoption of this circuit-specific approach rather than a customer-specific one prevents gaming, so the qualification of one DS1 EEL to a customer does not qualify other DS1 EELs to that customer. Similarly, for arrangements where DS1 loops are multiplexed onto DS3 transport facilities, each DS1 loop that subtends the DS3 transport must qualify in order to obtain the transport at a UNE price.[1835] We also recognize that the harms associated with gaming by long-distance providers increase in direct proportion to the capacity level that a competitor seeks to utilize. Therefore, for a requesting carrier to obtain a DS3 EEL as a UNE, the requesting carrier must satisfy the criteria for service eligibility for the DS1-equivalent circuit capacity of that DS3 EEL.

600. As the Commission explained in adopting thresholds for pricing flexibility, our selection of tests here is not an exact science, but a determination based on agency expertise, our reading of the record before us, and a desire to provide an easily implemented and reasonable bright-line rule to guide the industry.[1836] Specifically, we find that each of these criteria is highly probative of legitimate provision of a qualifying service, and not overly burdensome for a requesting carrier to satisfy. We are persuaded on the record before us that while no single requirement can prevent gaming, the criteria we adopt are *collectively* sufficient to restrict the availability of these UNE combinations to legitimate providers of local voice service. The cost of taking the steps necessary to meet these criteria – especially collocation and network re-configuration – outweighs the benefits of lowering that carriers' special access rate to a UNE rate. Accordingly, the burdens and inefficiencies for a provider to meet these criteria for non-qualifying service would deter a carrier of non-qualifying services from re-designing its operations to subvert our rules. If these criteria prove insufficient to prevent the gaming of high-capacity EEL use, we stand ready to take corrective action to remedy any abuse.

(i) Authorization to Provide Voice Service

601. The first prong, certification to provide local voice service, typically involves the review of technical and financial fitness by a state commission. Because some states only require providers of local voice service to be registered as telecommunications providers, certification is not mandatory in those states. As we explain in the discussion of certification and audit procedures below, evidence of registration, tariffing, filing of fees, or other regulatory compliance can demonstrate satisfaction of this criterion.[1837] We emphasize that the entity seeking to obtain the EEL must have direct authorization to do so, and cannot rely on certification granted to an affiliate.

[1835] As explained above in Part VI.B.5., we do not require incumbent LECs to ratchet transmission facilities in a blended rate of UNE and special access pricing. Where a requesting carrier serves customers through DS1 facilities that are multiplexed onto a DS3 special access transport service, that carrier may obtain DS1 loops where it satisfies the service eligibility criteria for each loop.

[1836] *See Pricing Flexibility Order*, 14 FCC Rcd at 14276, para. 96 (citing *United States v. FCC*, 707 F.2d, 610, 618 (D.C. Cir. 1983)); *see also* NuVox *et al.* Jan. 10, 2003 *Ex Parte* Letter at 6 ("We can think of no test that will eliminate all possibilities of gaming and any need for enforcement activity.").

[1837] *See infra* Part VI.B.8.

(ii) Actually Providing Local Voice Service to the Customer Over Every Circuit

602. We find that local number assignment to a DS1 circuit, as well as 911/E911 capabilities, indicate that a requesting provider does, in fact, provide local voice service over that circuit to a customer. To ensure the legitimacy of these assignments, we adopt Qwest's proposal that the origination and termination of local voice traffic should not include a toll charge, and should not require dialing special digits beyond those normally required for a local voice call.[1838] Because some competitive LECs do not assign telephone numbers at the time of ordering,[1839] we find that a requesting carrier may satisfy the numbering and 911/E911 criteria to initiate the ordering process for a new EEL circuit by certifying that it will not begin to provide service until a local number is assigned and 911 or E911 capability is provided.[1840] Further, we also clarify that each DS1-equivalent circuit of a DS3 EEL must have its own local number assignment, so that each DS3 must have at least 28 local voice numbers assigned to it.

(iii) Architectural Safeguards to Prevent Gaming

603. Numerous parties to this proceeding proposed different limitations on access to EELs, many of which featured a variety of architectural solutions. The three elements of the criteria we adopt – collocation, interconnection, and termination at a local switch – build off of these proposals.

604. *Collocation.* We find that termination of a circuit into a section 251(c)(6) collocation arrangement in an incumbent LEC central office is an effective tool to prevent arbitrage, because collocation is a necessary building block for providing local voice services and is traditionally not used by interexchange carriers. More specifically, because traditional interexchange configurations route long-distance traffic from a customer premises over tariffed channel termination and transport facilities directly to an interexchange POP, a section 251(c)(6) collocation requirement ensures that a carrier has set up an architecture that ensures that traffic can leave the incumbent LEC network prior to hitting the POP.[1841] Accordingly, the collocation

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[1838] Qwest Feb. 13, 2003 *Ex Parte* Letter, Attach. at 1.

[1839] Letter from John J. Heitman, Counsel for ALTS *et al*, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 9 (filed Dec. 16, 2002) (ALTS *et al.* Dec. 16, 2002 *Ex Parte* Letter).

[1840] However, in any event, a requesting carrier must assign the number and implement 911/E911 capability within 30 days after provisioning of the circuit. *See id.* (noting that proof can be supplied in such a timeframe).

[1841] A carrier that routes traffic directly from a customer premises to a POP on an inter-city network without providing local service would not have a reason to arrange and pay for collocation and local interconnection trunks. For instance, AT&T reports that 75% of its special access circuits terminate at its interexchange carrier POP. AT&T proposes that, to the extent that the Commission determines to limit the use of UNE combinations (but not individual UNEs), special access combinations terminating at an interexchange carrier POP would not be eligible for UNE conversion. AT&T Jan. 16, 2003 *Ex Parte* Letter at 1, 3-4. We therefore dismiss the assertions by some parties that a collocation requirement is unnecessary to ensure the provision of local service. *See, e.g.*, CompTel Comments at 98-99. We also reject the argument that collocation is too insignificant because "direct connections [to a POP] are (continued....)

criterion serves as an easily verifiable test that the circuit terminating at the collocation arrangement carries local voice traffic. As further evidence that a carrier provides qualifying voice service, the collocation arrangement must be within the same LATA as the customer premises.[1842]

605. We emphasize that the collocation must be within the incumbent LEC network, and cannot be at an interexchange carrier POP or ISP POP. However, a requesting carrier can satisfy this prong through reverse collocation. For the purposes of this test, we adopt SNiP LiNK's definition of all mutually-agreeable interconnection methodologies.[1843] We also clarify that any non-incumbent LEC collocation arrangement pursuant to section 251(c)(6) meets this test.[1844] Permitting indirect collocation to satisfy this test is especially critical in light of the fact that fewer transmission facilities will be unbundled than previously following the issuance of this Order,[1845] and our conclusion that incumbent LEC prohibitions on the commingling of UNEs with tariffed services are unjust and unreasonable.[1846]

606. Although at least one carrier contends that a collocation requirement would fail to recognize an alternative network arrangement that carries local voice and other services,[1847] we find that collocation is a necessary threshold to prevent providers of non-qualifying services from improperly gaining access, and that the exclusion of qualifying voice service would be

(Continued from previous page)

not the norm for special access customers." Letter from Dee May, Assistant Vice President, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 2 (filed Jan. 27, 2003).

[1842] *See* AT&T Jan. 16, 2003 *Ex Parte* Letter at 7 ("It is a virtual certainty, however, that facilities used to provide non-switched services between two points in a LATA are used to provide significant amounts of 'local' voice or data traffic."). Where there is no single customer premises, such as where the traffic from multiple DS1 wireline end-user loops are aggregated onto a DS3 transport facility, the point of aggregation will serve as the customer premises for the purpose of this requirement.

[1843] Letter from Steven A. Augustino, Counsel for SNiP LiNK, to William Maher, Bureau Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1 (filed Feb. 5, 2003). This definition would include the installation of incumbent LEC equipment at the premises of a competitive LEC or any other entity not affiliated with that incumbent LEC, regardless of whether the incumbent LEC has a cage.

[1844] For example, an EEL connected to a third-party entrance facility originating in that third-party's section 251(c)(6) collocation would satisfy the collocation requirement.

[1845] *See supra* Part VI.C. (finding that carriers are not impaired without access to inter-network transmission facilities (entrance facilities) and implementing triggers for states to make further findings of non-impairment).

[1846] *See supra* Part VII.B.

[1847] NewSouth states that in certain instances, it procures a DS1 loop from the incumbent LEC which terminates on the incumbent LEC's main distribution frame at the central office. Under this arrangement, NewSouth purchases a cross-connect to the incumbent LEC's multiplexing equipment, which is connected to a channel facility assignment (CFA) block and then connected to incumbent LEC or third party backhaul to NewSouth's switch. NewSouth Comments at 43. NewSouth characterizes the CFA block it purchases from the incumbent LEC tariff as a "POP."

minimal.[1848] We acknowledge the difficulties in anticipating every possible configuration or arrangement of a provider of qualifying services, but our approach has the advantage of relatively easy verification by leveraging the current legal commitments necessary to provide qualifying service.

607. *Interconnection.* As an additional indicator of providing local voice service, we find that each EEL circuit must be served by an interconnection trunk in the same LATA as the customer premises served by the EEL, and that for every 24 DS1 EELs or the equivalent, the requesting carrier must maintain at least one active DS1 interconnection trunk for the exchange of local voice traffic. As a further safeguard against gaming, where a requesting carrier strips off the calling party number (CPN) on calls exchanged over the interconnection trunk, that trunk shall not be counted towards meeting the trunk/EEL ratio.[1849] The costs and difficulties of network configuration necessary to satisfy the interconnection and collocation requirements minimize the potential for these safeguards to be gamed; only a bona fide provider of qualifying local services would undertake these measures, all of which are a necessary precondition to compete directly against the incumbent LEC's voice service.[1850]

608. The 24-to-1 EEL to interconnection trunk ratio provides a reliable gauge that the competitive LEC exchanges local traffic with the incumbent LEC in a manner that indicates that it is a bona fide provider of local voice service.[1851] One incumbent LEC claims that even at full local utilization this ratio allows only for a maximum of four percent local usage and therefore cannot be considered "significant," on the apparent theory that one channel on an interconnection trunk is necessary to serve one voice channel of the 24 channels in a DS1 EEL.[1852] However, proponents of the ratio explain that it has its roots in the general engineering principle that one

[1848] Indeed, even NewSouth notes that most of the local loops that it purchases from incumbent LECs terminate at a NewSouth collocation. NewSouth Comments at 42. Other competitive LECs inform us that a collocation requirement would not present a barrier to many competitive LECs using EELs today. *See, e.g.*, ALTS *et al.* Dec. 13, 2002 *Ex Parte* Letter, Attach. at 7. Accordingly, we dismiss the MCI WorldCom Petition for Clarification to the extent that it seeks a rule explicitly stating that incumbent LECs cannot require competitive LECs to collocate in order to obtain EELs. *See* MCI WorldCom Feb. 17, 2000 Petition for Clarification at 24-25.

[1849] *See* SBC/NuVox/Cbeyond/SNiP LiNK EELs *Ex Parte* Letter, Attach. at 3.

[1850] We establish these requirements for purposes of unbundling high-capacity EELs only, and not for the purposes of the ongoing reciprocal compensation proceeding or any other docket.

[1851] The proponents of a proposal that incorporates the 24-to-1 ratio as a safeguard for smaller competitive LECs explain that "the Commission could reasonably conclude that, in its expert judgment, the purchase and use of proportional and bona fide local interconnection capacity for every DS1 EEL (1) demonstrates a carrier's commitment to facilities-based entry into the *local exchange* market in the relevant LATA and (2) indicates a reasonable likelihood that a significant amount of local traffic is carried on given EEL facilities." Cbeyond *et al.* Feb. 4, 2003 *Ex Parte* Letter at 4.

[1852] Letter from Susanne Guyer, Senior Vice President, Federal Regulatory Affairs and Ed Shakin, Vice President and Associate General Counsel, Verizon, to the Honorable Michael Powell, Chairman, FCC, at 4 (dated Feb. 12, 2003) (Verizon Feb. 12, 2003 *Ex Parte* Letter), *in* Letter from Dee May, Assistant Vice President, Verizon to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Feb. 12, 2003).

DS0 interconnection trunk can serve every five local access lines,[1853] so that one active DS1 local service interconnection trunk can serve 24 DS1 EELs that have 5 local voice channels on each EEL. We find that this ratio therefore provides a reasonable proxy for the capacity of interconnection that a bona fide provider of local voice service competing against the incumbent LEC would require.[1854] Moreover, as we explain above in this Part, we base our EEL eligibility criteria on whether a requesting carrier is a bona fide provider of local voice service, and do not retain the temporary threshold of "significant amount of local exchange service" established in the *Supplemental Order.*

609. Verizon asserts that trunks inbound to a competitive LEC frequently carry Internet-bound traffic and are not obtained by the competitive LEC, and that only competitive LEC-outbound trunks should count toward the ratio.[1855] Due to the variety of interconnection arrangements that a bona fide local voice service provider may choose to implement, we do not exclude all one-way inbound trunks as they can be part of a legitimate interconnection arrangement.[1856] However, where a competitive LEC does not arrange for a meaningful exchange of traffic – which must include hand-offs of local voice calls that flow in both directions – those arrangements cannot be attributed towards satisfaction of this criterion. For similar reasons, we also reject Qwest's proposal that a competitive LEC must associate the individual EEL collocation termination point with a local interconnection trunk in the same wire center.[1857] Because a legitimate provider of local voice service may configure its network in various ways such that each EEL is not terminated in the same wire center as the interconnection trunk,[1858] adopting such a proposal could impose inefficient traffic engineering requirements. Moreover, our requirement that each EEL must be in the same LATA as the interconnection trunk associated with that EEL adequately ensures that interexchange carriers will not game the criteria

[1853] Letter from John J. Heitmann, Counsel for SNiP LiNK and NuVox, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 4 (filed Feb. 14, 2003).

[1854] Verizon concedes that establishing a "reasonable" ratio of trunks to EELs, such as 4-to-1, would help shore up this test. Letter from W. Scott Randolph, Director – Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (filed Feb. 14, 2003) (Verizon Feb. 14, 2003 *Ex Parte* Letter). The nature of interconnection trunk concentration, in which five EELs can be served by one interconnection trunk, supports the test we adopt. Furthermore, as the competitive LEC proponents of the SBC/CLEC EELs proposal point out, competitive LEC customers do place calls to each other that never reach the incumbent LEC network, so that the interconnection trunks between a competitive LEC and incumbent LEC do not capture all the local voice traffic that a competitive LEC originates and terminates. Cbeyond *et al.* Feb. 13, 2003 *Ex Parte* Letter at 4.

[1855] Verizon Feb. 12, 2003 *Ex Parte* Letter at 4.

[1856] For example, a competitive LEC may choose to purchase a two-way trunk, or may purchase a one-way trunk and arrange for the incumbent LEC to purchase a one-way trunk in the opposite direction.

[1857] Letter from Cronan O'Connell, Vice President – Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, 96-98, 98-147 at 1 (filed Feb. 13, 2003) (Qwest Feb. 13, 2003 *Ex Parte* Letter).

[1858] For example, a competitive LEC could build a fiber ring that connects two or more incumbent LEC wire centers where EELs terminate, and hub the traffic from those wire centers to an interconnection trunk that connects to only one wire center.

by purchasing sham trunks that are remote and unrelated to the EEL circuits that carry local voice traffic.

610. *Local Switching*. We find that each EEL circuit must be served by a Class 5 switch or other switch capable of providing local voice traffic. To ensure that the traffic carried over each EEL is not exclusively non-local, a requesting carrier must certify that the switching equipment is either registered in the LERG as a Class 5 or that it can switch local voice traffic. In adopting this safeguard, we also reject the proposal of certain competitive LECs that we should adopt an eligibility restriction whereby a requesting carrier cannot obtain UNEs on circuits that "are served by switching equipment used exclusively to provide interexchange voice services (registered in the LERG as a Class 4-only switch)."[1859] We are not persuaded that a "switch class" approach based solely on LERG registration is sufficiently linked to our service qualification goals. As the *Supplemental Order Clarification* explained in rejecting a proposal to presume that circuits terminating in a Class 5 switch are exclusively local, switch type does not provide a basis for assuming the traffic type of every terminating circuit.[1860] Our record in this proceeding demonstrates that the proposal to ban termination at a Class 4 switch would be over-exclusive, as at least one party informs us that, in the same manner as other carriers, it can and does provide local service over Class 4 switches and "soft" (or packet) switches.[1861] Moreover, grounding our requirements in the technology of the traditional Class 5 circuit-switched network would create a disincentive to the deployment of micro-switching and the integration of data and voice traffic.[1862] In light of the evolving uses of equipment and innovations, we are not inclined to categorically rule out any carrier on the basis of the class of switches it deploys.[1863]

611. The record also indicates that, for many carriers the costs of gaming a local switching requirement outweigh the benefit of a reduction in special access payments. For example, WorldCom explains that none of its Class 5 switches provide dedicated access services

[1859] ALTS *et al.* Dec. 13, 2002 *Ex Parte* Letter, Attach. at 6; ALTS Nov. 14, 2002 *Ex Parte* Letter at 4-5.

[1860] *Supplemental Order Clarification*, 15 FCC Rcd at 9601, para. 25.

[1861] *See* AT&T Apr. 30, 2001 Fea/Taggart Reply Decl. at para. 3 n.1; AT&T Feb. 12, 2003 *Ex Parte* Letter at 12.

[1862] *Collocation Remand Order*, 16 FCC Rcd at 15453, para. 33 (concluding that "multi-functional equipment is designed to enable telecommunications carriers, both incumbent LECs and their competitors, to offer their customers an ever-increasing array of telecommunications services, including advanced services, with ever-increasing efficiency"); *see also, e.g.*, Taqua Comments at 2-3 (discussing its development of alternatives to legacy telecommunications networks and equipment in systems that combine traditional end office switching with integrated softswitch functionality and the ability to provide next-generation subscriber services in a single chassis).

[1863] The local switching safeguard we adopt renders irrelevant WorldCom's pending request for a presumption that circuits that terminate on a Class 5 switch are local circuits. *See* WorldCom, Inc. Petition for Waiver, CC Docket No. 96-98 at 1, 2, 15 (filed Sept. 12, 2000) (WorldCom Waiver Petition). In addition, we note that favoring a switch-neutral approach could benefit smaller businesses by giving them flexibility to purchase innovative and more efficient switches.

and that its long distance switches do not provide local service, and that it cannot reconfigure its Class 5 switches to provide dedicated access-based services.[1864]

(iv) Other Service Eligibility Proposals

612. We conclude that none of the other eligibility tests proposed on the record before us is preferable to the indicia of qualifying services that we adopt here. For example, SBC, BellSouth, and Verizon support a continuation of or limited modification to the current safe harbors,[1865] and Qwest proposes a local use restriction requiring a certification that the facility carries at least 51 percent local voice traffic.[1866] As an initial matter, we note that the Commission established the usage restrictions in the safe harbors as a temporary restriction on conversions while the Commission compiled an adequate record to address the legal and policy issues raised in the *Fourth FNPRM*.[1867] They were meant to be a temporary proxy rather than a permanent restriction, and now that we have had practical experience with traffic tests and adequate time to evaluate them and the underlying record in this proceeding, for several reasons we decline to perpetuate current local voice thresholds mandated by safe harbors (2) and (3), or to adopt any proposal based on enumerated percentages of traffic.

613. We agree with Cbeyond that measuring minutes of use is antithetical to the Act's goals of encouraging the provision new technologies and advanced services, because those usage tests could conceivably work only for channelized DS1 providers and would improperly exclude those carriers deploying packetized networks.[1868] Classifying and measuring voice traffic separately from data traffic is incompatible with the integration of voice and data in new packetized networks, and we find that basing our new rules on the distinction between voice and data would inhibit this new technology. Moreover, mandating thresholds based upon percentages of qualifying traffic would penalize technological advancements in voice compression, and have the perverse effect of disqualifying the most efficient and innovative deployment of voice technology.[1869]

[1864] WorldCom Waiver Petition at 9 ("WorldCom cannot reconfigure its Class 5 switches to carry long-distance traffic without restructuring large portions of its network and related systems and process infrastructure, including its diverse customer and carrier billing, ordering, and provisioning systems.").

[1865] *See, e.g.*, BellSouth Jan. 16, 2003 *Ex Parte* Letter at 4; Verizon Feb. 14, 2003 *Ex Parte* Letter at 2 (stating that "[a]ny enhancement to the existing safe harbors must contain a local traffic requirement.").

[1866] Along with a threshold test that a requesting carrier satisfies the 51% local traffic threshold or is the exclusive local provider, Qwest proposes several other architectural safeguards and a marketing requirement. Qwest Feb. 13, 2003 *Ex Parte* Letter, Attach. at 1. BellSouth's proposed requirements include a 50% threshold for local voice traffic. BellSouth Jan. 21, 2003 *Ex Parte* Letter at 6.

[1867] *Supplemental Order Clarification*, 15 FCC Rcd at 9592, para. 8.

[1868] 47 U.S.C. § 157; Cbeyond Dec. 16, 2002 *Ex Parte* Letter at 2-3. Cbeyond delivers a bundle of local, long-distance, and Internet access services by utilizing dynamic bandwidth allocation of a DS1 through packetized IP technology.

[1869] *See, e.g.*, Cbeyond Dec. 16, 2002 *Ex Parte* Letter at 3.

614. In addition, the record demonstrates that requiring competitors to ascertain and certify to traffic percentages is burdensome and difficult to administer. This has been the case even in the context of converting an existing customer facility from special access to UNEs, and therefore would be even more difficult in the context of initiating service over newly-provisioned circuits.[1870] More specifically, because the carrier providing service does not control customer calling patterns, and local usage can fluctuate day to day or month to month, requiring competitors to certify to future customer use as a precondition to obtaining a UNE puts them in an untenable position.[1871] Although some carriers have been able to measure and categorize their traffic sufficiently to certify to these safe harbors,[1872] many other competitive LECs report that the safe harbor regime is burdensome and unworkable because they lack sufficient information to make the necessary certification at the time the EEL is requested, and have no feasible way to obtain the necessary information going forward to ensure continued compliance.[1873] Further, many competitive LECs allege that incumbent LECs have misconstrued the auditing process and improperly denied competitors' self-certifications.[1874] Although the D.C. Circuit upheld the safe harbors as interim measures, due to the measuring difficulties and potential for burdensome audits inherent to traffic thresholds, we conclude that these usage restrictions are inferior to those we adopt here.[1875]

615. To recognize the increasing market demand for diverse network infrastructure and for other reasons, we also do not perpetuate safe harbor (1), which allowed a carrier to convert

[1870] For example, AT&T explains that because requesting carriers typically order backhaul infrastructure facilities that are not immediately placed in service, "such facilities are not identified with any specific customers and carry no traffic" and thus "it is not even possible to tell which of them would be used to provide any particular type of traffic." Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, and 98-147 at 2 (filed Jan. 16, 2003).

[1871] *See, e.g.*, Letter from Ross A. Buntrock, Counsel for e.spire, to Magalie R. Salas, Secretary, FCC, CC Docket No. 96-98, Attach. at 9 (filed Apr. 19, 2000) ("e.spire can commit to channels carrying local traffic, but e.spire cannot predict the extent to which a given customer's T-1s will carry local traffic"); WorldCom Waiver Petition at 14 ("it is impossible to predict how many switched access long-distance calls a particular customer might make or receive in the aggregate on all of the local channels provided by WorldCom.").

[1872] *CompTel*, 309 F.3d at 17.

[1873] *See, e.g.*, CompTel Comments at 99 n.206; AT&T Comments at 164 (contending that the circuit-by-circuit certification process is "inherently unworkable because CLECs' systems – including AT&T's – are not built to provide the kind of data necessary to support such record keeping requirements"); AT&T Jan. 16, 2003 *Ex Parte* Letter at 2 ("Thus, it is not even possible to tell which [facilities] would be used to provide any particular type of traffic. Accordingly, any attempt to isolate 'UNEs' to 'local' traffic and 'services (or elements that are not UNEs)' to 'non-local' traffic would be impossible."); Cbeyond *et al.* Feb. 13, 2003 *Ex Parte* Letter at 3 (noting that the measurement requirements contained in the usage-based qualification criteria of safe harbors (2) and (3) require additional circuit-specific engineering and monitoring).

[1874] *See, e.g.*, ALTS *et al.* Comments at 100; NuVox Petition at 1.

[1875] Because we are not extending the safe harbors going forward, we hereby dismiss as moot the petitions for waiver of particular safe harbors filed by ITC^DeltaCom and WorldCom. *See* ITC^DeltaCom Waiver Petition; WorldCom Waiver Petition.

special access circuits to EELs upon certification that it is the "exclusive" provider of local exchange service. As competitive carriers inform us, many customers seek multiple local carriers to ensure connectivity in the event of temporary constraints or problems[1876] as well as to apply competitive pressure,[1877] and we are reluctant to adopt rules that encourage carriers to obtain commitments contrary to the market trend towards diversity, or that add additional layers of regulation to the customer-provider relationship.[1878] In addition, because a carrier may certify to exclusivity in good-faith reliance upon a customer's misrepresentation that it has only one local service provider, or that subscribes to a second local service provider at a later time, this safe harbor presents significant difficulties in administration.[1879]

616. We also reject the joint proposal from SBC, NuVox, Cbeyond, and SNiP LiNK to subject a carrier with total telecommunications revenues above two percent of total industry local and toll revenues to the *Supplemental Order Clarification* safe harbors, but apply a more limited set of non-usage safeguards to a "smaller CLEC" with revenues below that threshold.[1880] We find that establishing two tiers of eligibility restrictions based on revenue is not tailored to our goals in imposing restrictions of encouraging local competition but minimizing the arbitrage opportunities for providers of non-qualifying services. The proponents of the tiered approach argue that the fixed costs of deploying systems to track and report the mix of traffic over given facilities "have a more significant economic impact on a smaller carrier with smaller overall telecommunications revenues than on larger carriers," and therefore are more likely to affect the entry decisions of smaller carriers.[1881] However, the SBC/NuVox/Cbeyond proposal fails to capture the decision-making process of a competitive LEC entering a market and the potential for gaming. Any cost/benefit analysis should not involve the ability to spread the costs over other

[1876] *See, e.g.*, AT&T Feb. 12, 2003 *Ex Parte* Letter at 6 (noting that mid-sized and large business end users "are sophisticated customers that demand flexibility" to adjust the number of providers they use and the amount of service).

[1877] Cbeyond Dec. 16, 2002 *Ex Parte* Letter at 3.

[1878] *See* AT&T Jan. 16, 2003 *Ex Parte* Letter at 6 & n.11 (stating that "it is nearly impossible to get customers to certify what their usage will be on particular facilities," and that "many customers may simply consider it not to be any of the CLEC's business whether they are using other providers.").

[1879] "[E]ven if a CLEC could obtain a representation from a customer that it is the customer's only supplier of local services, there is no reasonable way for a CLEC to determine whether it continues to be the customer's sole supplier over time, other than by continually asking the customer, which is at best difficult and awkward from a marketing perspective, and at worst anticompetitive." AT&T Comments on WorldCom Petition for Waiver, CC Docket No. 96-98 (filed Oct. 2, 2000) at 6-7.

[1880] More specifically, a carrier qualifies as a "smaller CLEC" if "its total telecommunications revenues do not exceed two percent of total telecommunications industry local and toll service revenues, and its gross annual toll service revenues do not exceed two percent of all toll service revenues," based upon the industry revenue figures published most recently by the Wireline Competition Bureau. SBC/NuVox/Cbeyond/SNiP Link Feb. 7, 2003 EELs *Ex Parte* Letter at 3. The total industry local and toll service telecommunications revenues for 2000 were $292.8 billion. *Trends in Telephone Service May 2002 Report* at Table 16.1.

[1881] SBC/NuVox/Cbeyond/SNiP LiNK EELs *Ex Parte* Letter at 3.

revenues, but should be limited to identifying the costs of being able to obtain a specific set of EEL circuits against the benefits of obtaining those circuits.[1882] Similarly, the proponents of this test fail to demonstrate that the costs are "fixed," as they would appear to vary with the number of circuits and customers.[1883] Moreover, the record before us does not support the implementation of any tiered system based upon administrative costs and revenue size because there is no evidence of their sizes, much less of their relationship to each other. As Verizon notes, the proponents of this proposal do not quantify or substantiate the costs and burdens of compliance, and would screen out only the very largest carriers – a carrier with over four billion dollars in revenues would qualify as a "smaller CLEC."[1884]

617. We decline to adopt the requirement proposed by Qwest and BellSouth that the service offered to an end user over a high-capacity EEL must be marketed and sold as a local exchange service, or a bundle of services.[1885] State commissions currently regulate the tariffing and other terms of service of common carrier local voice services, and the practical difficulties of policing carriers' marketing and advertising efforts do not support the initiation of additional regulation. Furthermore, we also find Qwest's proposal to require a requesting carrier to have percent of local use arrangements (PLUs) on file[1886] to be overexclusive, because not all competitive LECs report PLUs on local interconnection trunks, and because it has the same usage measurement problems as those described above.[1887]

[1882] For example, there is no reason that a large interexchange carrier or out-of-region incumbent LEC seeking to obtain a small amount of EEL circuits over the course of a year should be held to a more burdensome standard than a mid-sized competitive LEC seeking to obtain a large amount of EEL circuits. In this instance, the mid-sized carrier has a greater incentive for non-qualifying service arbitrage and a greater benefit from lower UNE rates, yet is held to a lesser compliance standard.

[1883] "The only way to determine whether any *particular* circuit qualifies for conversion to an EEL is to undertake very expensive measurement processes with respect to that circuit. . . . [M]easuring the traffic mix on 1,000 circuits is not materially less expensive *per circuit* than measuring the traffic mix on 100 circuits." AT&T Feb. 12, 2003 *Ex Parte* Letter at 9 (emphasis in original).

[1884] Verizon Feb. 12, 2003 *Ex Parte* Letter at 3; *see also* BellSouth Feb. 13, 2003 *Ex Parte* Letter at 3 (seeking further study of the feasibility and costs of traffic measurement as well as the revenue thresholds). The explanation by the competitive LEC proponents of the proposal that the two percent revenue figure is based on the section 251(f)(2) suspension of certain unbundling obligations is unavailing, as the two percent figure in that section of the Act is based on lines, not revenues; is designed for incumbent LECs, not competitive LECs; and addresses a wholly different set of administrative burdens. Cbeyond *et al.* Feb. 12, 2003 *Ex Parte* Letter at 5.

[1885] *See, e.g.*, Qwest Feb. 13, 2003 *Ex Parte* Letter, Attach. at 1; BellSouth Jan. 31, 2003 *Ex Parte* Letter, Attach. 2 at 1.

[1886] Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 Attach. at 19 (filed Nov. 14, 2002) (Qwest Nov. 14, 2002 *Ex Parte* Letter).

[1887] ALTS *et al.* Dec. 16, 2002 *Ex Parte* Letter, Attach. at 10 (explaining that some competitive LECs use meet-point rather than trunking arrangements).

618. We conclude that the three criteria we adopt here together comprise the most probative and administratively reasonable indicia of providing qualifying traffic. We reject proposals to permit access to UNEs based upon partial satisfaction of a broader number of indicators.[1888] For example, several carriers propose allowing requesting carriers to obtain UNEs by meeting a subset of a broader menu of compliance indicia, including local telephone number assignment; "offer[ing] local voice, local data and/or Internet access in the LATA;" and the presence of a switch that is not exclusively used to provide long distance service that serves the circuit.[1889] Some of these additional indicia, such as LERG registration of switch class type, are problematic for the reasons we describe above, or are inconsistent with the qualifying service approach that we adopt. Moreover, because some criteria are more essential to providing qualifying service than others, we are not persuaded that an approach permitting the partial satisfaction of a list of factors is superior to our approach of a focused list of mandatory requirements. If a carrier had a local number assignment and collocations but, for some reason, no longer had a valid certification to provide service or local interconnection, that carrier should not be eligible for a high-capacity EEL facility. We find that requiring all requesting carriers seeking high-capacity EELs to satisfy the same three categories of criteria provides predictability and certainty, and will ensure that the audit process is more easily administered and, therefore, less costly to both incumbent LECs and competitors.

619. Finally, we do not endorse the requests advanced by some incumbent LECs for additional dialogue on architectural solutions with the goal of a collaborative resolution.[1890] In

[1888] We also reject the other proposed iterations of service eligibility restrictions on the record, because they are more attenuated from implementing the goals of our service considerations. For example, NuVox submits a "business plan" test, permitting access to high-capacity UNEs based upon a general determination of whether a competitive LEC offers service in direct competition with incumbent LECs, without regard as to whether specific facilities are used as part of that offering. Letter from John J. Heitmann, NuVox, to Christopher Libertelli, Legal Advisor to Chairman Powell, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2-3 (filed Jan. 15, 2003) (NuVox Jan. 15, 2003 *Ex Parte* Letter). We expressly reject above such a business strategy-specific notion of impairment. *See supra* Part V.B.1.

[1889] For instance, a group of carriers propose that circuits be made available as UNEs upon certification by a requesting carrier that at least two of the following five compliance criteria are met:

> the circuit is connected to a collocation in an ILEC end office; or
> the CLEC has active local interconnection trunks with the ILEC in the LATA; or
> the CLEC offers local voice, local data and/or Internet access in the LATA; or
> the CLEC assigns a local telephone number associated with the circuit; or
> the circuit is not served by a switch that is used exclusively to provide long distance service.

Letter from John J. Heitmann, Counsel for Nuvox, SNiP LiNK, Xspedius and KMC Telecom, to Michelle Carey, Chief, Competition Policy Division, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 5-6 (filed Jan. 17, 2003). Other carriers have suggested modified versions of this approach. *See, e.g.*, NuVox Jan. 15, 2003 *Ex Parte* Letter at 3-4 (proposing a "3 of 5" standard or a "2 plus 1 of 3" standard, based on additional compliance with one of two or more alternative criteria); XO Feb. 5, 2003 *Ex Parte* Letter, Attach. at 4 (proposing that four out of five criteria must be met).

[1890] BellSouth Feb. 13, 2003 *Ex Parte* Letter at 1-3 (contending also that "further industry dialogue in a less rushed atmosphere is likely to result in an improved and more focused proposal"); Verizon Feb. 12, 2003 *Ex Parte* Letter at 4 (asking for more time for various parties to analyze proposals and provide input to the Commission to avoid (continued....)

the many months since the issuance of the temporary restrictions of the *Supplemental Order Clarification*, as well as the issuance of the *January 24, 2001 Public Notice*, and the *Triennial Review NPRM*, the Commission has amassed through numerous pleadings, *ex parte* meetings and an industry roundtable a considerable record of the pragmatic difficulties of the current safe harbors and the risk of conversions.[1891] Now that we have answered the questions regarding service-by-service analysis that led to the interim safe harbors, we conclude that we have a sufficient record to resolve eligibility issues by issuing findings of the appropriate criteria, and that further delay would retard the development of local competition.

C. Certification and Auditing

1. Background

620. In order to allow carriers meeting the safe harbors set forth in the *Supplemental Order Clarification* to convert tariffed loop-transport combinations to UNE rates, the Commission established a framework of self-certification and auditing.[1892] The Commission declined to identify precise terms of certification, but recognized that a letter sent to the incumbent LEC is a practical method.[1893] Further, upon receiving a request from a requesting carrier certifying to meeting one of the safe harbors, the incumbent LEC should immediately process the conversion.[1894]

621. The Commission also found that, to confirm reasonable compliance with the local usage requirements in that Order, incumbent LECs may conduct limited audits only to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options identified by the carrier.[1895] The Commission emphasized "that incumbent LECs may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements."[1896] Moreover, the Commission concluded that "audits will not

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unintended and unanticipated consequences); Letter from William P. Barr, Verizon, to Michael K. Powell, Chairman, FCC, *in* Letter from Ann D. Berkowitz, Project Manager – Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (filed Feb. 6, 2003) (Verizon Feb. 6, 2003 Barr *Ex Parte* Letter) (asking for the Commission to obtain comment on the various proposals).

[1891] Several parties note that the issues associated with access to EELs are not new and do not warrant further delay. *See, e.g.*, Letter from John J. Heitmann, Counsel for NuVox and SNiP LiNK, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (filed Feb. 12, 2003) (noting that EEL access issues have been extensively vetted in the *Triennial Review* proceeding and associated proceedings); AT&T Feb. 12, 2003 *Ex Parte* Letter at 4 (arguing that "the Bells have now had *years* to submit evidence supporting use restrictions generally and the interim rules in particular") (emphasis in original).

[1892] *Supplemental Order Clarification*, 15 FCC Rcd at 9602-04, paras. 28-33.

[1893] *Id.* at 9602-03, para. 29.

[1894] *Id.* at 9603-04, para. 31.

[1895] *Id.* at 9602-03, para. 29

[1896] *Id.* at 9603-04, para. 31.

be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service."[1897] Relying upon broad agreement between incumbent and competitive LECs in that proceeding on audit procedures, and to reduce the burden on requesting carriers, the Commission set forth additional principles providing competitors with notice, limiting the frequency of audits, and establishing practical recordkeeping requirements.[1898]

2. Discussion

622. We adopt certification and auditing procedures comparable to those established in the *Supplemental Order Clarification* for our service eligibility criteria, and tailor the substantive requirements to our eligibility restrictions, as set forth below. Although the bases and criteria for the service tests we impose in this Order differ from those of the *Supplemental Order Clarification*, we conclude that they share the basic principles of entitling requesting carriers unimpeded UNE access based upon self-certification, subject to later verification based upon cause, are equally applicable. Significantly, because the eligibility criteria we adopt in this Order are based upon indicators such as collocation more easily verified than traffic measurement or categorization of the safe harbors, we anticipate that these procedures can effectively limit UNE access to bona fide providers of qualifying service without imposing undue burdens upon them.

a. Certification

623. We conclude that requesting carrier self-certification to satisfying the qualifying service eligibility criteria for high-capacity EELs is the appropriate mechanism to obtain

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[1897] *Id.* at 9603-04 n.86.

[1898] The Commission found "that incumbent LECs must provide at least 30 days written notice to a carrier that has purchased [an EEL] that it will conduct an audit;" "may not conduct more than one audit of the carrier in any calendar year unless an audit finds non-compliance;" and that when "an incumbent LEC provides notice of an audit to the affected carrier, it should send a copy of the notice to the Commission" so the Commission can monitor the implementation. These carriers also agreed that incumbent LECs requesting an audit should hire and pay for an independent auditor to perform the audit, and that the competitive LEC should reimburse the incumbent LEC if the audit uncovers non-compliance with the local usage options. The Commission also stated its expectation "that requesting carriers will maintain appropriate records . . . to support their local usage certification," but emphasized "that an audit should not impose an undue financial burden on smaller requesting carriers that may not keep extensive records," and found that, "in the event of an audit, the incumbent LEC should verify compliance for these carriers using the records that the carriers keep in the normal course of business." *Supplemental Order Clarification* at 9603-04, paras. 31-32.

On May 17, 2002, NuVox filed a Petition for Declaratory Ruling in Docket No. 96-98 identifying certain auditing issues, and seeking further declaration from the Commission regarding auditing procedures. *Pleading Cycle Established for Comments on NuVox, Inc. Petition for Declaratory Ruling*, Public Notice, CC Docket No. 96-98, DA 02-1302, Public Notice (rel. June 3, 2002). Among other relief, NuVox requests that the Commission declare that an independent LEC must provide requesting carrier proof of the independence of the third party auditor, and that competitive LECs must reimburse the incumbent LEC for only the *pro rata* share of the circuits found to be non-compliant. NuVox and other carriers make reference to those pleadings in their comments to the instant proceeding, and we address the relevant portions of the responsive pleadings in this Order.