

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	
_____)	

COMMENTS OF SPRINT CORPORATION

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COMMENTS OF SPRINT CORPORATION

Sprint Corporation, on behalf of its incumbent local exchange ("ILEC"), competitive LEC ("CLEC")/long distance, and wireless operations, respectfully submits its comments in the above-captioned proceeding in response to the Order and Notice of Proposed Rulemaking ("Interim Order"), released August 20, 2004 (FCC 04-179).¹

I. INTRODUCTION AND SUMMARY

Sprint's interests encompass all segments of the telecommunications industry. Sprint's incumbent local division provides unbundled network elements ("UNEs"), while Sprint's CLEC/long distance and wireless operations are requesting carriers that are entitled under the Communications Act of 1934, as Amended ("Act") to secure UNEs

¹ The Interim Order was published at 69 Fed. Reg. 55128 (Sept. 13, 2004). A Public Notice (DA 04-2967) also appeared on September 13. The Interim Order is also the subject of a petition for mandamus captioned United States Telecom. Ass'n v. FCC, D.C. Cir. No. 00-1012 (filed Aug. 23, 2004). The Commission and the United States opposed the petition in a response filed September 16, 2004. Several petitions for review have also been filed in various Circuits.

from ILECs.² Thus, Sprint approaches the complex issues that arise from access to UNEs from the dual perspectives of both a provider and a purchaser of UNEs. Sprint's position is one that, at least in Sprint's internal calculus, fairly balances the legitimate needs and concerns of both types of carriers.

Sprint is not alone in desiring a greater measure of regulatory certainty on the issue of access to unbundled network elements – a certainty denied by the D.C. Circuit's partial vacatur and remand of the Triennial Review Order³ and eroded further by Bell Operating Company ("BOC") petitions for forbearance or waiver that continue to be filed even in the absence of final UNE rules. However, the need for that certainty does not justify short-cuts in addressing the remand issues or in conducting the necessary impairment reviews. Accordingly, Sprint appreciates the Commission's determination to revisit unbundling issues on remand thoughtfully and with a commitment to the goals of the Telecommunications Act of 1996.⁴

² Sprint is a global communications company with more than 26 million customers in more than 100 countries. Sprint's ILEC operations provide service in 18 states, with nearly 8 million access lines. Sprint's CLEC/long distance operations provide UNE-P and UNE-L services across the country. Sprint's mobile wireless operations comprise the nation's largest all-digital nationwide PCS network, covering more than 4,000 communities.

³ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (Aug. 21, 2003) ("Triennial Review Order" or "Triennial Review Order"), modified by Errata, 18 FCC Rcd 19020 (Sept. 17, 2004), upheld in part and vacated and remanded in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), pets. for cert. pending, National Ass'n of Regulatory Util. Commissioners v. United States Telecom. Ass'n, Sup. Ct. Nos. 04-12, 04-15, & 04-18.

⁴ Pub. L. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 et seq. (the "Act").

The Triennial Review Order, though imperfect, is appropriately the starting point for new permanent UNE rules. Most UNEs remain important, and the record will amply reflect the impairment faced by requesting carriers. High-capacity loops and transport (except possibly at the highest, OCn level) are especially critical UNEs from Sprint's perspective, and will be the focus of these comments. The Commission should find impairment for these UNEs except where building- and route-specific evidence shows that the Triennial Review Order's triggers are met.

The Commission can secure this evidence by requiring reporting by competitive carriers and wholesalers, as well as by importing related record information and recommendations from the state commissions. Although this impairment review is admittedly a significant task, it is not an undue one, and it is necessitated by the D.C. Circuit's rulings in USTA I,⁵ which required more granular impairment reviews, and USTA II,⁶ which vacated the Commission's subdelegation of impairment review authority to the state commissions. For high-capacity loops and transport, Sprint believes that the records developed in the state proceedings show that comparatively few loops and routes meet the Triennial Review Order's impairment review triggers – standards which the D.C. Circuit did not overturn. Only such a location-specific impairment

⁵ United States Telecom. Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), pets. for cert. pending, National Ass'n of Regulatory Util. Commissioners v. USTA, Sup. Ct. Nos. 04-12, 04-15, & 04-18 ("USTA II").

⁶ United States Telecom. Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002), cert. denied, 538 U.S. 940 (2003) ("USTA I").

review can be assured of withstanding judicial review and giving the competitive industry the certainty and finality it desperately needs.

The Commission can maintain its definition of impairment, based on economic and operational barriers to market entry. In addressing the court's call for additional precision and breadth, the Commission should not narrow its impairment analysis but should approach it at a detailed market level. Accordingly, the Commission should recognize that CMRS carriers are impaired from fully competing in the local telecommunications market with wireline carriers, despite the court's notice of their ability to compete with other CMRS carriers. It should also recognize that special access is not a universal substitute for UNEs, given the many disadvantages it often poses for would-be market entrants. More importantly, the Commission should end the continued discrimination against CMRS carriers, and remove the unfairness posed to other CLECs, by removing the Triennial Review Order's arbitrary exclusion of entrance facilities from the definition of transport.

If anything, the Triennial Review Order went too far in restricting requesting carriers' access to the high-capacity UNEs that are most critical to the development of competition and to the future entry of wireless services as a true competitive alternative to ILEC services. The Commission should reiterate its commitment to the pro-competitive and market-opening directives of the Act by rejecting BOC attempts to frustrate competition in specific markets and services. It should deny BOC petitions for forbearance and waiver, and reconfirm the broad scope of their section 271 obligations.

It should issue new UNE rules within its six-month deadline, and establish a process to manage the ongoing location-specific impairment review, based on actual evidence.

II. BACKGROUND

A. The Triennial Review Order

Just a year ago, in the Triennial Review proceeding, the Commission issued new rules intended to implement the network unbundling requirement of the Act. It sought to do so in a manner consistent with the court's ruling in USTA I. The Commission addressed "market specific variations in competitive impairment" by providing for "granular" analysis of impairment that would review "customer class, geography, and service."⁷ The Commission also scrapped its previous approach to considering cost disparities between CLECs and ILECs, instead focusing its impairment analysis on those costs that create barriers to market entry for competitors. Id. ¶¶ 85-90.

In the Triennial Review Order, the Commission followed this new impairment framework and eliminated access to enterprise switching, most mass market broadband facilities and capabilities, and access to the broadband capabilities of mass market loops. Id. ¶¶ 2, 4, 7. It also modified or limited access to high-capacity loops and transport. On mass market switching, DS1/DS3/dark fiber loops and dedicated transport, the Commission found the record showed that competitors generally were impaired if denied access to those UNEs. Id. ¶¶ 381-83, 386, 390-91, 437-40, 466-75. The Commission

⁷ Triennial Review Order ¶ 118.

concluded that the record evidence justified a nationwide finding of impairment for those UNEs. Id. ¶¶ 381, 386, 390, 422.

Although the Commission determined that, in some particular markets, CLECs might not be impaired without access to these particular UNEs, the record did not contain sufficient evidence to allow the Commission to identify those markets, because of the limits of the data available. The Commission therefore called on state commissions to commence proceedings to identify any markets where impairment was lacking, and to lift the unbundling requirement in those specific locations, based on Commission-prescribed standards. Id. ¶¶ 384, 387, 393, 423, 473.

With respect to mass market loops, the Commission found that CLECs were impaired without access based on “general economic and operational factors that do not vary significantly by geographic region.” Id. ¶ 198. It determined that there were steep economic barriers associated with alternative loop deployment (¶ 199) and that “the record indicates that deployment of alternative local loop facilities for the purpose of providing telecommunications services to the mass market has been minimal.” Id. ¶¶ 199, 222. The Commission limited this finding to copper and hybrid mass market loops, refusing to order unbundling of FTTH loops under certain conditions.

For Enterprise loops (DS1, DS3, and dark fiber), the Commission found that CLEC deployment was location-specific and that impairment/nonimpairment varied accordingly. The record indicated that the predominant mode of enterprise loop deployment by CLECs was fiber at the OCn level, followed next by DS3. In direct contrast, “the record contains little evidence of self-deployment or availability from

alternative providers, for DS1 loops.” Id. ¶ 298. The FCC therefore instructed states to conduct proceedings to determine, on a location specific basis, where CLECs were impaired. Id. ¶¶ 328-338.

B. The USTA II Decision

In the USTA II decision, the U.S. Court of Appeals for the District of Columbia Circuit vacated the Triennial Review Order’s rules on mass market switching and dedicated transport. USTA II, 359 F.3d at 564-77. The panel ruled that the Act did not give the Commission power to delegate to state commissions its responsibility to make impairment determinations. Id. at 565-68. The court specifically vacated the Commission’s nationwide impairment determinations for mass market switching and dedicated transport. It held they were “inconsistent with [the] conclusion in USTA I that the Commission may not ‘loftily abstract[] away from all specific markets.’” Id. at 569, quoting USTA I, 290 F.3d at 423. The court held that the Commission could not make an undifferentiated nationwide finding of impairment without “exploring the possibility” of “more nuanced” or “narrowly-tailored” alternatives “and reasonably rejecting them.” Id. at 570.

The court did not vacate the Commission’s finding that requesting carriers are impaired without access to high-capacity loops, contrary to allegations later made by the BOCs. Nevertheless, in order to “ensure a smooth transition governed by clear requirements,” the Commission has determined to act conservatively and consider new rules for high-capacity loops, as though they had also been vacated. Interim Order ¶ 4.

Separately, the court held “that the Commission’s impairment analysis must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired.” USTA II, 359 F.3d at 576-77, vacating Triennial Review Order ¶¶ 102-03. The court noted, in particular, that it believed the Commission had not adequately considered the availability of special access as an alternative to UNE transport for wireless carriers. The court remanded the Triennial Review Order’s qualifying/not-qualifying service distinctions for access to UNEs, but upheld its other findings.

In rendering its decision, the court temporarily stayed vacatur of the unbundling rules for mass market switching and dedicated transport. Id. at 595. With the Commission’s encouragement, the four BOCs committed to preserve existing UNE arrangements for a period of time to avoid market disruption while the Commission prepared new UNE rules. Interim Order ¶ 7 & n.26.

CLECs, NARUC, and the state of California petitioned the Supreme Court for certiorari. Those petitions are pending. The U.S. government, in a brief opposing certiorari, noted that “[q]uick agency action to establish new rules consistent with the court of appeals’ decision will avoid the uncertainty – for consumers and the communications industry as a whole – that would be associated with the process of merits review by [the Supreme] Court and any ensuing remand proceedings in the court of appeals.”⁸ But the Commission added that the D.C. Circuit’s treatment of its nationwide

⁸ Brief of the Federal Respondents, National Ass’n of Regulatory Util. Commissioners v. USTA, Sup. Ct. Nos. 04-12, 04-15, & 04-18 (filed Sept. 1, 2004) at 25.

impairment findings conflicts with the Supreme Court's rulings on unbundling and violates the principles of judicial deference.⁹

In this case and USTA I, the D.C. Circuit imposed on the Commission, in conducting its impairment analysis under Section 251(c)(3) and (d)(2), requirements that go beyond those found in the statute itself. As the court of appeals has recognized, the 1996 Act provides the FCC with “no detail” about how to carry out the “extraordinar[ily] complex[ly]” task of determining which network elements incumbent carriers must make available to competitors.

In light of that complexity, the Commission concluded, even as it acts “quickly to issue new network-unbundling rules that comply with the court of appeals’ decision,” it is entitled to deference “to an expert agency’s reasonable implementation of a complex, broadly drafted statute.” Id. at 26.

C. The Interim Order

On August 20, 2004, the Commission initiated this remand proceeding by issuing the Interim Order. The order requests comment on how the Commission should revise its findings and rules on unbundling to respond to the USTA II decision. Interim Order ¶¶ 8-15. The Commission requests comment, in particular, on impairment “at a granular level” to assist the agency in determining “which specific network elements” it should require ILECs “to make available as UNEs in which specific markets, consistent with USTA II.” Id. ¶ 11.

⁹ Id. at 24, citing Verizon Comms. Inc. v. FCC, 535 U.S. 467, 539 (2002) (“The job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility in deciding what and how items must be leased and the way to set rates for leasing them.”).

In the Interim Order, the Commission found that “the pressing need for market certainty” made it necessary to issue interim rules, to allow transition until updated rules are issued on remand. Id. ¶ 16. To prevent abrupt termination of “existing UNE arrangements” – which plainly “would be inimical to competition and its benefits for consumers, and thus ... inconsistent with the public interest” – the Interim Order adopts rules that “require [ILECs] to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004,” the day before the mandate issued in USTA II. Id. ¶¶ 10, 16. The order provides that these interim rules will remain in place only until final rules are promulgated or six months after the Interim Order appeared in the Federal Register.¹⁰

Each of the commissioners has signaled a determination to issue final unbundling rules within this timeframe. Chairman Powell has even scheduled a vote on the final rules for the December 2004 meeting, in hopes that an order might be completed as soon as then. Interim Order, Statement of Chmn. Powell at 2. Sprint applauds the Commission’s determination to make this docket a high priority.

¹⁰ The Interim Order also provides that the interim rules will not apply where they “are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening FCC order affecting specific unbundling obligations, or (3) with respect to rates only, a state public utility commission order raising the rates for network elements.” Interim Order ¶ 16.

III. FRAMEWORK FOR UNBUNDLING

A. Approach to USTA II on Remand

The Triennial Review Order significantly reduced unbundling obligations of ILECs, excessively so in some respects. Nevertheless, Sprint believes the Triennial Review Order can and should be the foundation for the Commission's final unbundling rules. The Commission should make adjustments to the Triennial Review Order as appropriate to address the USTA II court's "general observations" and to enhance competition in the local telecommunications market.

As the Commission is well aware, the federal appellate courts do not dictate policy. It is the Commission's responsibility, and prerogative, to determine the appropriate measure of unbundling to implement the local competition provisions of the Act. The Commission is entitled to a large measure of deference as the expert, policy-making agency.¹¹ With all due respect to the D.C. Circuit, Sprint agrees with the Commission that the panel in USTA I and USTA II failed to give the Commission the full measure of deference to which it was and is entitled, and that it acted in a manner inconsistent with the Supreme Court's guidance in AT&T and Verizon.¹² Regardless,

¹¹ SEC v. Chenery, 318 U.S. 80, 88 (1943); Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-45 (1984).

¹² AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999) ("AT&T"); Verizon Comms. Inc. v. FCC, 535 U.S. 467, 539 (2002) ("Verizon").

Sprint is confident that the Commission can effectively address the issues raised by the USTA II panel in its remand order. As the Commission has acknowledged,¹³

the court of appeals did not purport to apply the statutory impairment standard conclusively to particular facts. The court instead stated that it was making “general observations” about its understanding of the impairment standard and required the Commission to conduct “a re-examination” of impairment issues on remand and “implement a lawful scheme.”

Remand, and even vacatur, do not mean that the Commission cannot, or should not, reach the same or a very similar result with a larger record and a better explained and more fully reasoned order.

Given the Commission’s determination to issue final UNE rules as promptly as can be reasonably accomplished, the Interim Order directs the parties to restate any arguments and repeat and evidence previously provided in this and related dockets. Interim Order ¶ 15. Accordingly, Sprint’s comments will address a wider range of issues than those affected by the USTA II decision.

B. Threshold Statutory Analysis

In light of the USTA II’s cautionary language on impairment, the Commission has again invited comments on the way it has applied the “necessary” and “impair”

¹³ Brief of the Federal Respondents, National Ass’n of Regulatory Util. Commissioners v. USTA, Sup. Ct. Nos. 04-12, 04-15, & 04-18 (filed Sept. 1, 2004) at 26, 27.

standards of Section 251(d)(2).¹⁴ Sprint believes, by and large, the Commission interpreted the standards reasonably in the Triennial Review Order.

1. Definition of Impairment

In the Triennial Review Order, answering the D.C. Circuit's criticism that the UNE Remand Order's impairment definition was overly broad, the Commission refined its definition based on barriers to market entry.

We find a requesting carrier to be impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic. That is, we ask whether all potential revenues from entering a market exceed the costs of entry, taking into consideration any countervailing advantages that a new entrant may have.

Triennial Review Order ¶ 84. This more granular analysis includes "consideration of the relevant barriers to entry, as well as a careful examination of the evidence, especially marketplace evidence showing whether entry has already occurred in particular geographic and customer markets without reliance on the incumbent LECs' networks but instead through self-provisioning or reliance on third-party sources." *Id.*

¹⁴ For elements that are proprietary, the Triennial Review Order re-adopted the UNE Remand Order's definition of "necessary" as meaning "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer." See Triennial Review Order ¶¶ 20, 171, quoting Implementation at the Local Competition Provisional of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 at ¶ 44 (1999) (subsequent history omitted; emphasis in original) ("UNE Remand Order").

On review, the USTA II panel acknowledged the Commission's efforts to refine its impairment definition to comport with its direction in USTA I. The court "observe[d] that the [Triennial Review] Order's interpretation of impairment is an improvement over the Commission's past efforts in that, for the most part, the Commission explicitly and plausibly connects factors to consider in the impairment inquiry to natural monopoly characteristics ... or ... to other structural impediments to competitive supply." 359 F.3d at 571-72. These factors include sunk costs (§ 75 & n.244, §§ 76, 80, 86, 88), ILEC cost advantages (§ 75 & n.247, § 90 & n.302), first-mover advantages (§ 75 & n.249, § 89), and operational barriers to entry within the ILEC's control (§ 91).

The court nevertheless criticized the Commission's impairment definition as "vague." The Commission's impairment analysis is based on whether the operational and entry barriers "make entry into a market uneconomic." But the Triennial Review Order did not explicitly describe whose market entry would be the measure. To whom would this standard apply, the court asked?¹⁵

Any CLEC no matter how inefficient? By an average or representative CLEC? By the most efficient existing CLEC? By a hypothetical CLEC that used the most efficient telecommunication technology available...?

Sprint believes the Commission can simply and cleanly resolve this issue by explaining that the impairment standard is based on a *reasonably efficient CLEC*, based on the technology reasonably available at the time of the analysis. It need not always use the most efficient telecommunications technology available,

¹⁵ 359 F.3d at 572.

which the court noted is the standard built into TELRIC, but rather the analysis should be based on what would be reasonable for a requesting carrier to employ.

That said, impairment should take consideration of start-up costs that competitors incur when first entering the market. Some may argue that these normal start-up costs should not be considered. However, ignoring start-up costs altogether would be inconsistent with the recognition that a new entrant cannot be expected to build facilities before it has an established customer base in that market. In some instances, moreover, it may even be wasteful for a new entrant to do so. It may be inefficient for a new entrant to build loop plant if, for example, there is excess plant available from ILECs or others that makes additional CLEC investment potentially unwise.

2. “At a Minimum” Statutory Analysis

The Triennial Review Order’s impairment definition was, as the USTA II panel put it, “a looser concept of impairment” than focusing solely on “natural monopoly features,” but the Commission’s revised approach duly brought “the costs of unbundling ... into the analysis under § 251(d)(2)’s ‘at a minimum’ language.” 359 F.3d at 572. The court concluded that “we cannot fault” this approach, since it is “especially true” that “the statutory structure suggests that ‘impair’ must reach a bit beyond natural monopoly.” Id. The Act limits unbundling for “proprietary” network elements to those that are “necessary,” but for those that are non-proprietary it requires only “a decision whether

their absence would ‘impair’ the requester’s provision of telecommunications service.”

Id., citing §§ 251(d)(2)(A) and (B).

Sprint believes the Commission can reaffirm its determination in the UNE Remand Order and the Triennial Review Order that it may consider other factors advancing the goals of the Act in fashioning an impairment analysis.¹⁶ However, the Commission must bear foremost in mind the Act’s chief goals of opening local markets and promoting competition.

3. Encouraging Facilities Investment

In the First Report and Order, the Commission acknowledged that the Act does not require CLECs to own *any* facilities.¹⁷ The Eighth Circuit and the Supreme Court confirmed that ruling. The Supreme Court also made clear that Congress did not intend UNEs to be a temporary, transitional mechanism.

Section 251(c) addresses the practical difficulties of fostering local competition by recognizing three strategies that a potential competitor may pursue, and that no threshold investment in facilities is envisioned or required by the Act.

¹⁶ Section 251(d)(2)(a) provides that “[i]n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether (A) access to such network elements as are proprietary in nature is necessary; and (B) [whether] the failure to provide access to such network elements would impair the ability of the telecommunication carrier seeking access to provide the services that it seeks to offer.” 47 U.S.C. §§ 251(d)(2)(A)-(B) (Access Standards).

¹⁷ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd 15499 at ¶¶ 328-40 (subsequent history omitted) (“First Report and Order”); Iowa Utilities Bd. v. FCC, 120 F.3d 753, 808-10 (8th Cir. 1997), aff’d in part & rev’d in part, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 392-93 (1999).

Verizon, 535 U.S. at 491.¹⁸ In the UNE Remand Order, the Commission reiterated that the Act does not “explicitly express a preference for one particular competitive arrangement” over another. UNE Remand Order ¶ 6.

On facilities investment, the Commission should take a realistic, and long-term, view. Development of competition – particularly facilities-based competition – takes time, and carriers must be able to develop business plans that incorporate reliance on unbundled network elements without being at the mercy of ever-shifting regulatory winds. The Act is also, by its very terms, not time-specific. It does not require that to have access to UNEs a requesting carrier needed to enter the market in 1996, or by 2004, or by any other date. The Act envisions that unbundling – under both sections 251 and 271 – will remain in place indefinitely.

The Commission has recognized that a carrier needs to develop a customer base before it can build facilities. After all, the BOCs themselves have followed essentially a pure resale policy in their expansion into the interstate long distance market. ILECs are large resellers of the long distance networks of independent IXCs. Thus, even the well-

¹⁸ The Court also expressly rejected the BOCs’ assertion that mandated access to BOC facilities discourages investment in facilities. In its ruling upholding the Commission’s TELRIC pricing requirements, the Court concluded that this BOC claim “founders on fact,” given the extraordinary capital investment undertaken by both new entrants and incumbents. Verizon, 535 U.S. at 516 (rejecting BOC notion that unbundling discourages investment), 517 (finding that the Commission’s unbundling requirements are not an “unreasonable way to promote competitive investment in facilities.”), & 517 n.33 (noting “the commonsense conclusion that” competition enabled by TELRIC rates means “the incumbents will continue to have incentives to invest and to improve their services to hold on to their existing customer base.”).

funded BOCs understand the importance of developing a sufficient customer base before investing in their own facilities.

New entrants actually are unlikely to rely on ILEC facilities where they in fact are not impaired. New entrants have every incentive to build their own facilities wherever feasible, even where the costs of doing so are higher than leasing facilities of others. No carrier likes to be dependent upon its major competitor, absent a fully effective wholesale market – something that does not exist today. This is particularly true where that competitor is the incumbent – a reluctant and even hostile supplier. By building its own facilities, the new entrant enjoys greater control and flexibility, and it avoids the vagaries of shifting regulatory winds.

Thus, the concern expressed in the Triennial Review Order that the availability of UNEs at cost-based rates might deter investment in or use of alternative facilities is illogical and unfounded. In adopting its pricing standard for UNEs in the First Report and Order, the Commission found that this standard would "encourage efficient levels of investment and entry." *Id.* ¶ 672. Obviously, it makes little sense to encourage investment in uneconomic facilities. Society is better off only if an alternative provider can achieve costs lower than the ILEC through investment in its own facilities. Artificially restricting the availability of facilities to encourage alternative investment would simply result in uneconomic duplication and, ultimately, the failure of enterprises whose cost structures are inherently higher than those of the ILECs. With all due respect, Sprint believes the Triennial Review Order's sweeping elimination of unbundling of broadband capabilities – namely, fiber to the premises, broadband capabilities of hybrid

loops, and packetized loops – will, if anything, retard investment in advanced services, while leading to higher prices for consumers. The Commission, Sprint believes, has read too much into section 706, a mere footnote in the Act. 47 U.S.C. § 157 note.

The Commission should proceed carefully to avoid fostering needless and counterproductive regulatory uncertainty. Such uncertainty actually discourages investment, raises the cost of capital, and reduces competition. Merely by debating these well-settled factors, the Commission can undermine the goals that Congress has directed the Commission to advance. That is especially true today, given the difficult time that non-ILEC carriers are having throughout the industry.

4. Intermodal Alternatives

The Commission should note that the USTA II panel rejected BOC claims that the Commission's impairment standard unlawfully excluded consideration of intermodal alternatives. 359 F.3d at 572. The court found the Commission expressly stated that alternatives *are* to be considered when evaluating impairment, and the Commission is free to determine the weight to be assigned in any given context.

In USTA I, the D.C. Circuit had already made clear that the Commission could not ignore intermodal alternatives. However, the Commission correctly recognized in the Triennial Review Order that it may not properly assume that availability of intermodal alternatives is determinative of impairment or nonimpairment. The presence of intermodal competitors does not mean that a requesting carrier is not impaired. For example, the fact that CATV systems compete is irrelevant, at least if the CATV provider

does not offer true competitive wholesale alternatives to the ILEC's unbundled network elements. CATV facilities are generally closed to competitors.

Even where cable TV-based telephony services are available, unbundling remains essential to promote competition and investment. In most parts of the country, cable based services remain limited to residential customers. Lifting unbundling requirements in those areas would allow only a duopoly of two closed systems. Consumers would be left to choose between two monopoly-based alternatives, either the cable TV company or the ILEC. As the Commission determined in 1997, mobile and fixed wireless systems are no substitute for wireline broadband facilities. As the Commission recognized then, "declining to unbundle loops in areas where cable telephony is available would be inconsistent with the Act's goal of encouraging entry by multiple providers." UNE Remand Order ¶ 189.

Wireless networks do not have facilities to make available to competitors. Instead, they must rely on ILEC facilities, in particular on ILEC transport, to provide their services. This puts them in the awkward position of relying on a competitor -- a reluctant supplier that has control over their key costs. Making matters worse, the largest wireless carriers are controlled by BOCs, which gives them owners' economics and further distorts competition against competing carriers. Being forced to pay special access for ILEC transport continues to impair wireless carriers from competing in the local services market against wireline carriers, including both ILECs and CLECs.

5. Impairment Where State Regulation Holds Rates Below Historic Costs

The USTA II panel criticized the Triennial Review Order's "brief treatment" of the impact of the implicit universal service subsidies that ILECs contend remain in some states. Id. at 573. The court voiced concern that "state regulators have commonly employed cross-subsidies, tilting rate ceilings so that revenues from business and urban customers subsidize residential and rural ones." Id., citing USTA I, 290 F.3d at 422.

Sprint believes the Triennial Review Order was clear enough in stating that impairment reviews "should also consider how the existence of universal service payments and implicit support flows will impact competitors' ability to serve the specific market." Triennial Review Order ¶ 518. The impairment review that the Commission itself will conduct on remand will give it an opportunity to consider record evidence on the existence and impact of any lingering implicit subsidies on a location-specific basis. The Commission should solicit that evidence, if applicable, from the state commissions.

Nevertheless, the impact of such implicit subsidies is easily exaggerated. Sprint is an ILEC with operations in 18 states, including both urban and rural service areas. In Sprint's experience, the impact of residual universal service subsidies on impairment is easily exaggerated. If the problem were as great as the BOCs allege, CLECs would be making far greater use of resale of ILEC services under section 251(c)(4) than the record likely reflects. Moreover, to the extent such subsidies remain a problem, they are clearly of diminishing impact. As the Supreme Court observed, "the Act requires that universal service subsidies be phased out, so whatever possibility of arbitrage remains will be only temporary." AT&T Corp. v. Iowa Utilities Bd. 525 U.S. 366, 394 (1999).

Admittedly, Congress recognized the potential impact of implicit subsidies on competition. Section 254 instructs the Commission, “after consultation with the Joint Board, to establish specific, predictable, and sufficient federal support mechanisms to preserve and advance universal service.” In particular, section 254(e) requires federal support mechanisms to be “explicit and sufficient to achieve the purposes of this section.” The states, and the Commission, have made substantial progress in eliminating or adjusting for remaining subsidies. The Commission has found that “[t]he extent of interstate implicit support flows has decreased substantially since passage of the 1996 Act.” Triennial Review Order ¶ 159. Through the CALLS Order,¹⁹ the 2001 MAG Order, and the Universal Service Orders,²⁰ cross-subsidies in interstate services have been largely reduced, if admittedly not completely eliminated.

To the extent that cross-subsidies remain a problem, they are in part attributable to section 254 of the Act, which directs that consumers in rural, insular, and high-cost areas should have access to telecommunications and information services “that are reasonably comparable to those provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.” 47 U.S.C. § 254(b)(3). On the wholesale side, Sprint believes that there is synergy between encouraging competition and eliminating cross-subsidies, and that the Commission can

¹⁹ Price Cap carriers are subject to the CALLS Order plan. The Commission had already reformed interstate access charges in the 1997 Access Charge Reform Order. Triennial Review Order ¶ 160 n.522.

²⁰ See Triennial Review Order ¶ 160 nn.522, 526, & 527. See also *id.* ¶ 167 n.542.

largely eliminate the lingering effects of subsidies indirectly by promoting greater competition.

On the retail side, the most effective way to deal with retail cross-subsidies is through a comprehensive reform of intercarrier compensation and universal service. Sprint has been among a large group of carriers that worked for over a year to develop a consensus plan that would resolve these issues fairly and responsibly. The Intercarrier Compensation Forum (“ICF”) recently presented its comprehensive proposal to the Commission.²¹ Sprint is among the carriers that have endorsed the plan, because it would facilitate efficient competition, promote the deployment of new technologies, enhance universal service, and advance consumer interests. Sprint encourages the Commission to embrace the ICF proposal and consider appropriate action to implement it.

In the meantime, however, ILECs have proven themselves fully capable of defending their interests before the state commissions and, when need be, on appeal. On remand, the Commission can demonstrate that further reform measures are underway to address the issue. And if necessary, the Commission can inform its impairment analysis by soliciting and considering evidence from state commissions about whether and how such subsidies materially distort market entry in the state.

²¹ Regulatory Reform Proposal of the Intercarrier Compensation Forum, Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92 (filed Aug. 25, 2004).

C. More Granular Statutory Analysis

1. Geographic or Market Specific Considerations

The Triennial Review Order found that each individual enterprise or high-capacity loop and transport route ultimately must be examined to determine whether the impairment standard is met. Only by such a location-by-location review could the Commission hope to fulfill the D.C. Circuit's instruction in USTA I to assess impairment in a genuinely "granular" way.

Realizing that this review would be a large and fact-intensive task, the Commission delegated the impairment determinations to the state commissions, which were directed to commence impairment review proceedings, to develop appropriately detailed records, and to make impairment determinations using criteria set out in the order and rules. The USTA II panel did not criticize this level of review but vacated the Triennial Review Order's delegation to the state commissions of the impairment determinations for switching and dedicated transport.

This may lead some parties to advocate abandoning a location-specific review in favor of crude and simplified surrogates. The Commission should not attempt to apply the section 251(d)(2) impairment analysis using market size, market density, line count, or wire center size. By definition, such an approach is purely arbitrary; the Commission cannot set a threshold that would apply accurately or fairly. For high-capacity loops and transport, in particular – even in the largest cities, the highest-density business districts, and the largest wire centers – competitive alternatives remain far from the ubiquitous level needed to justify eliminating unbundling on a broad basis. Impairment is not

limited to smaller cities, or lower density areas, or smaller central offices. Indeed, in Sprint's experience, access to non-ILEC alternatives has remarkably little direct correlation to these criteria, whether in urban or rural settings. For high-capacity loops and transport especially, picking arbitrary thresholds would only discourage investment and frustrate competition where it is just beginning to take root.

Frankly, there should be no legitimate business need for any geographic carve-outs. If non-ILEC alternatives are actually available to requesting carriers in a particular area to such an extent that requesting carriers would not be impaired by the absence of ILEC facilities, then it should be no particular burden to require ILECs to continue making those unbundled elements available. If the market is in fact competitive, then the ILECs – pursuing their own business self-interest – would rationally be offering unbundled elements anyway. If ILECs did not make elements available, they would risk the possibility of stranded investment as alternatives became available to buildings or groups of buildings. The history of mandatory long distance resale shows why.

More than two decades ago, the FCC determined that interexchange carriers had to make their facilities-based services available for resale without restriction.²² At the time, the market was dominated by a single carrier, AT&T, which opposed resale. Today, however, all network-based IXC's – including AT&T – vigorously compete for

²² See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C.2d 261 (1976), amended on remand, 62 F.C.C.2d 588 (1977), aff'd, AT&T Corp. v. FCC, 572 F.2d 17 (2d Cir. 1978), cert. denied sub. nom., IBM Corp. v. FCC, 439 U.S. 876 (1978); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 F.C.C.2d 167, 168 (1980) (subsequent history omitted).

reseller customers, in order to increase their network utilization and lower their own unit costs, so they can better compete with each other on the *retail* level. Today, of course, IXCs remain subject to the Commission's mandatory resale and shared use policies, yet no one would argue that this imposes a significant business restraint on the network-based IXC industry.

The same would be true of ILECs and the local market. Ultimately, it is in the interest of any ILEC to have the largest and best facilities-based network in its market, and not to allow any competitor to grow to rival its scale and scope. Thus, even if competitively provided facilities were available on a wide enough scale that the impairment test were no longer satisfied, retaining the legal obligation to make UNEs available should not work a hardship on the ILEC. The ILEC would want to continue to sell network elements, regardless of these regulatory requirements, to maintain its market position. In the long distance market, no IXC is actively lobbying the FCC to eliminate resale and shared use requirements, even though the long distance market is now fully competitive. Likewise, in the access market, when CAPs began offering alternatives to incumbent access services, the BOCs did not seek to eliminate their obligation to provide access. Instead, they sought downward pricing flexibility to compete for that business. The fact that the BOCs oppose unbundling, even in high-density business markets, merely confirms that adequate competitive alternatives do not exist, and that requesting carriers are still impaired today.

Moreover, the Commission previously considered and rejected a specific geographic or market review of access to UNEs, sought by BellSouth. In the UNE

Remand Order, the Commission rejected that carrier's proposal to exempt from unbundling large business loops in Special Access pricing zones 1 and 2. The Commission recognized that the cost of constructing such loops – even to serve large businesses in concentrated urban districts – makes it infeasible to duplicate the ILEC plant that was built over decades. The Commission has recognized that the size of the investment required would lead "to patches of competition rather than seamless offerings." UNE Remand Order ¶ 185. The same reasoning still holds true now.

2. Impairment Review for High-Capacity UNEs

The Triennial Review Order recognized that a generalized geographic impairment review was inappropriate. It realized that some UNEs – high-capacity loops and transport – necessitate a building-by-building or route-by-route impairment analysis. It also recognized that, in reality, impairment is and will remain the usual fact of life for DS0, DS1, DS3, and dark fiber loops and DS1, DS3, and dark fiber transport routes, because these facilities are the most difficult for requesting carriers to self-provision or to secure from non-ILEC providers.

ILEC facilities are vast and ubiquitous. Competitors cannot build their own facilities overnight. Instead, they must develop a customer base before they can deploy facilities. Most buildings and routes will probably remain served only by the ILEC for a long time to come. The task of performing the necessary building-by-building and route-

by-route impairment analysis is inevitably a large one. It is, however, manageable within the resources reasonably available at the Commission.²³

Sprint believes the appropriate way to approach impairment for these particular UNEs is a default or preliminary finding of impairment for these UNEs, subject to a finding of nonimpairment at particular locations when evidence allows. The Commission may be receiving some of that evidence in comments submitted in response to the Interim Order. The Commission can also import records from the state commissions and solicit state commission recommendations. Many of the state factual records on high-capacity loops and transport are fully mature and will allow the Commission to complete findings in a relatively short time. The Commission can likely complete location-specific impairment review for those states even in the course of issuing its final rules.

As for those and other states, the Commission can direct ILECs, CLECs, and wholesalers to provide additional evidence on a short timetable. Thereafter, on an ongoing basis, it can require prompt initial reporting by wholesale providers and self-

²³ Sprint participated in state impairment proceedings. In Ohio, for example, the direct testimony of SBC's Scott Alexander identified only 31 DS1 loops meeting the self-provisioning or wholesale trigger, and only 48 DS3 dark fiber loops meeting the potential deployment triggers. He identified 28 DS1, DS3, and dark fiber transport routes meeting the wholesale triggers, and just 19 DS3 and dark fiber self-provisioning triggers. In Georgia, the testimony of Sprint's Jim Dunbar noted that BellSouth had identified only 52 dark fiber loops meeting the self-provisioning trigger, and just 42 DS1 or DS3 loops meeting the self-provisioning or wholesale triggers. He also noted that BellSouth had identified no DS1 transport routes meeting the self-provisioning or wholesale triggers, and just 154 DS3 and dark fiber routes meeting either the self-provisioning, wholesale, or potential deployment triggers. Even if these particular BOCs' positions have changed, this experience shows that the number of high-capacity loops and transport routes needing review is actually much lower than the Commission might imagine.

provisioners and can establish a regime for regular reporting on actual competitive deployments. The Commission has broad authority to require reporting of data to ensure sufficient, accurate information on which to base its decision-making. Virtually everyone in the telecommunications industry has experience in reporting information on facilities and services to the Commission. Where information is business-sensitive, it could be submitted confidentially. The Commission could produce an aggregated database of the information, subject to protective order if necessary.

ILECs should know where they have lost customers and transport traffic, and they have every incentive to bring that information to the Commission's attention promptly. In addition, the Commission may reasonably expect that self-provisioners and wholesalers both would have incentive to disclose such information to the Commission. Where a CLEC has self-provisioned, a finding of non-impairment at that location or on that route would, where triggers are met, would likely reward its investment by limiting CLEC competitors to higher cost options. And since alternative access vendors naturally price their services by reference to the ILEC's pricing, where a wholesaler has invested in facilities and makes them generally available to CLECs, a finding of non-impairment could make its facilities and services more valuable by limiting competitors' access to cost-based UNE alternatives. Although to some this may seem anticompetitive, that concern is moderated by the fact that the triggers require multiple deployments sufficient, in the Commission's judgment, to establish nonimpairment.

This approach gives the Commission the ability to promptly commence a location-specific, granular impairment review, and to adjust its findings on a regular basis

as additional competitive facilities are deployed (or retired) and as updated evidence becomes available.

In USTA I, the court found it arbitrary and capricious for the Commission “to adopt a uniform national rule ... without regard to the state of competitive impairment in any particular market.” 290 F.3d at 422. In vacating the Triennial Review Order’s “national finding of impairment” as to mass market switching (USTA II, 359 F.3d at 569-70), the same panel did not strike down the overall findings of impairment for high-capacity loops, nor did it preclude a national impairment finding on UNEs where supported by appropriate evidence at a granular level. The court also did not strike down the use of triggers in assessing impairment for high-capacity loops and transport. Accordingly, Sprint believes the Triennial Review Order’s self-provisioning and wholesale triggers for high-capacity loops and transport, which the Triennial Review Order adopted for the state commissions to use, can be maintained and implemented by the Commission itself.

The “potential deployment” trigger, applied to high-capacity loops and transport above the DS1 level, however, should be discarded.²⁴ Sprint believes the “business case” approach to impairment review is inevitably subjective, arbitrary, unmanageable, and lacking any foundation in the real world of impairment. And although the USTA II panel cautioned that the Commission should not “simply ignore facilities deployment on similar routes,”²⁵ the Commission should realize, and can explain, that the mere fact that

²⁴ See 47 C.F.R. §§ 51.319(a)(5)(ii), 51.319(a)(6)(ii), 51.319(e)(2)(ii), 51.319(e)(3)(ii).

²⁵ 359 F.3d at 575.

a CLEC reaches one building, or has deployed transport between two ILEC offices, is really irrelevant to whether it is impaired for another high-capacity loop or transport route. For example, even if a CLEC can reach one customer in a high-rise building, that does not mean he can reach another in the same building. If a CLEC reaches one building on a street does not mean it is not impaired in reaching even a very similar building nearby. One may house a single large tenant, and the other many small tenants. Or the CLEC may be unable economically to reach all of the other building, or may be denied economic access to it at all by the owner. If a CLEC has deployed between two ILEC wire centers does not mean it can be economically rational to deploy between other offices. Requesting carriers have limited resources and must make choices.

It can be no surprise that the subjective “potential deployment” trigger was unworkable and highly contentious in the state proceedings. It hugely increased the amount of review posed for the states, and of the disputes to be resolved, and for no real benefit. In contrast, by conducting a location-by-location and route-by-route analysis of *actual* impairment, based on *objective* and *quantifiable* triggers, the Commission can achieve a realistic result using real-world evidence of business plans actually executed by competitors and wholesalers.

Combining a default finding of impairment – which is justified by the record applicable to high-capacity loop and transport facilities generally – with application of nonimpairment triggers in a building-by-building and route-by-route analysis reasonably fulfills the Commission’s obligation to provide a more particularized and location-specific impairment review.

The Commission probably cannot complete a location-specific review for all potentially nonimpaired high-capacity loops and transport routes by the end of the year, as the BOCs might demand. Any proper impairment review will take time. In one of their latest obstructionist and anticompetitive maneuvers, the BOCs have asked the D.C. Circuit to rule that, if the Commission “fails to make an affirmative impairment finding with respect to any given element by the end of the year, it should be deemed to have found no impairment with respect to that element, and such determination should be binding on the states.”²⁶ However, in response, the Commission and the United States rightly pointed out that “a reviewing court cannot itself make determinations that Congress has assigned to an administrative agency.”²⁷ Instead, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”²⁸ That is precisely what the Commission should be, and doubtless will be, doing in this remand proceeding.

Given the complexity of tasks involved here, that may take some time, and the Commission is entitled to a measure of deference to its policy-making and reasonable time necessary to implement it. The Commission could also issue nonimpairment

²⁶ Petition for a Writ of Mandamus, USTA v. FCC, No. 00-1012 (filed Aug. 23, 2004) at 21.

²⁷ Opposition of Respondents to Petition for a Writ of Mandamus, USTA v. FCC, D.C. Cir. No. 00-1012 (filed Sept. 16, 2004) at 23.

²⁸ Id., quoting INS v. Orlando Ventura, 537 U.S. 12, 16 (2002) (internal quotations omitted).

determinations on particular high-capacity loop locations and transport routes incrementally, rather than withholding its findings until all reviews are completed. After all, this review – just as were the state reviews initiated by the Triennial Review Order – will necessarily be an ongoing process.

D. Availability of Special Access

The USTA II court held “that the Commission’s impairment analysis must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired.” 359 F.3d at 13 (emphasis added). The court did not assume that the mere presence of special access or resale alternatives means that a requesting carrier is not impaired. Beyond the effects of pricing on impairment, the court found that “the Commission is free to take into account such factors as administrability, risk of ILEC abuse, and the like” in finding that requesting carriers are impaired without access to UNEs. The court said only that the Commission must not “arbitrarily exclud[e] alternatives offered by the ILECs.” Id.

The court’s analysis, which arose in the context of the BOCs’ claim that CMRS carriers should be ineligible for access to UNEs, was misguided in one important respect. It assumed that CMRS carriers are not impaired without unbundled access to dedicated transport, based on the market entry, rapid growth, and vibrant competition *between* CMRS carriers. 359 F.3d at 575. Even the “multimillion dollar sums that the Commission regularly collects in its auctions of such spectrum,” it assumed, “seem to

indicate that wireless firms currently expect that net revenues will, by a large margin, more than recover all their non-spectrum costs.” Id. at 575-76.

Sprint does not dispute that there is a rapidly expanding market for such wireless services. But it vigorously disputes the court’s false assumption that the success of CMRS carriers *competing against one another* indicates that they are not impaired when seeking to enter the local telecommunications market in competition with the ILEC. The court was focused solely on intra-silo competition, not competition in the broader market. The fact that the wireless carriers have been able to compete against one another means little if they are unable to compete *directly* with the ILEC, which is measured by the number of end users that are substituting wireless services for ILEC wireline services.

The court failed to account for the fact that CMRS carriers, despite their huge investment in wireless networks and new technologies, have been unable to put more than a tiny dent in the local telecommunications market. CMRS carriers have managed to persuade only 3 to 5% of local telecommunications customers to substitute wireless for wireline services. USTA II, 359 F.3d at 575; Triennial Review Order ¶ 53. To compete directly with ILECs (and with wireline CLECs), CMRS carriers will have to invest billions more in new technology to support quality, ubiquity, and broadband capabilities that customers will demand. The amount of transport needed to provide broadband capabilities in a wireless network grows in proportion to the increase in bandwidth. Sprint is currently experiencing this as it plans the roll out of the EV-DO architecture in its wireless network. Even then, given the limits of technology and costs, it is not clear

that they can become a true competitive substitute to ILEC services in all local telecommunications markets without access to UNE dedicated transport.

Not every CMRS carrier shares an interest in competing directly with ILEC services. The court overlooked the fact that the two largest CMRS carriers are affiliates of three BOCs. Those carriers enjoy favorable access to BOC transport, which gives them an unfair competitive advantage even in the CMRS market.

The court also failed to account for how BOC entry into the all-distance market affects impairment for long distance carriers. Increasingly, the BOCs offer bundled packages of local and long distance services, and commonly other services as well. Their ability to do so, thanks to section 271 authorizations based largely on the presence of UNE-based competition,²⁹ places independent long distance carriers at an increasingly serious competitive disadvantage and frustrates their ability to enter the local market. The Commission need only look to the rapid growth in BOC long distance share, and the sharp decline in the health of stand-alone long distance carriers.

For high-capacity loops and transport, in particular, special access can rarely be a substitute for access to UNEs. Special access services, as a general matter, are not yet competitively priced. ILECs largely control pricing, especially in the largest markets,

²⁹ See, e.g., Application of Ameritech Mich. Pursuant to § 271 of the Comms. Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Mich., 12 FCC Rcd 20543 at ¶ 160 (1997); Joint Application by BellSouth Corp., BellSouth Telecoms., Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Ga. and La., 17 FCC Rcd 9018 at ¶¶ 3, 11-15 (2002).

where they have received pricing flexibility. Special access prices are volatile, which frustrates market entry, and CLECs have complained of price squeezes in some markets. Competitors also need certainty and predictability to justify the investments necessary for market entry and, especially, for deployment of their own facilities. It was to provide a measure of certainty that Congress directed that cost-based rates apply. It was to provide a measure of certainty that the Commission adopted TELRIC as the pricing model, a model that the Supreme Court has expressly upheld. And it was to provide a measure of certainty that the Act gave the Commission sole authority to regulate both intra- and interstate aspects for interconnection and access to UNEs,³⁰ and that it expressly preempted states from adopting any inconsistent regulations.

For evidence of some of the pricing problems associated with special access, the Commission can review pricing experience in those markets where the BOCs have received pricing flexibility. Where pricing flexibility has been introduced – ostensibly to allow ILECs to *lower* prices to meet competition – prices have commonly *risen*. Sprint has witnessed first-hand increases in pricing designed specifically to frustrate efforts to reduce costs by shifting traffic to its Metropolitan Area Networks (“MANs”). As MAN facilities have come on line, in market after market, SBC and Verizon have increased pricing for those facilities that Sprint has not replaced with its MAN network and for which there is no competitive supply. These actions are taken specifically to frustrate the cost savings for which Sprint’s investment in facilities was made and in full recognition of the monopoly power that they hold. Similarly, CMRS carriers have yet to make

³⁰ See, e.g., First Report and Order ¶ 84.

significant inroads as a true substitute for the BOCs' local service, in part because the BOCs have priced special access transport in a manner to suppress their threat – at least that posed by CMRS carriers that are not already BOC-controlled.

Performance standards also pose a serious problem. Unlike for UNEs, there are no performance standards for special access. The records developed in section 272 proceedings establish that BOCs have repeatedly discriminated in favor of their own affiliates and against competitors. The risk of BOC abuse is even higher, given that the Commission has allowed these market safeguards to sunset on a state-by-state basis without addressing the records or the concerns of competitors and state commissions. And the BOCs certainly have a sorry record of compliance with market-opening requirements of the Act. Together, they have been assessed fines, mandatory refunds, or performance penalties totaling more than \$2 billion.³¹

Given the demonstrated difficulties of administrability, the vagaries of special access pricing, the practical difficulty of determining when the special access price reaches a level to trigger impairment, and the record and risks of BOC abuse, it is doubtful that the availability of special access can ever be expected to commonly substitute for access to UNEs. The Commission need not “ignore” the availability of non-UNE alternatives, but it must examine them with appropriate skepticism. After all, special access predates the Act, and Congress understood that it would continue to be

³¹ A running tally of performance penalties, fines, ordered refunds, and other payments are tallied at Bell Fine Watch at www.voicesforchoices.com/.

available under the unbundling rules implemented by the Commission. It cannot and should not be used as an excuse for shortchanging the unbundling regime.

E. Commercially-Negotiated Agreements

Sprint supports negotiated agreements between carriers, where possible, but they cannot substitute for unbundling rules under section 251(c)(3). In the First Report and Order, the Commission found that ILECs have little incentive to negotiate with competitors whose sole effect will be to compete in their territories and erode their customer and revenue base.³² The only incentive the BOCs have ever had to negotiate on unbundled access to their networks was the need for a measure of cooperation to receive Commission authority to enter the in-region long distance market. Now that each of the BOCs has received such authority, there is little reason to believe they can be expected to negotiate alternatives to UNE rules in good faith.

Recent experience validates the First Report and Order's findings. After the USTA II ruling, the Commission sought to encourage agreements between BOCs and CLECs. Despite the Commission's efforts, and despite meetings between CLECs and ILECs – including efforts by Sprint on both sides – virtually no agreements were reached. This shows just how difficult it is for parties to reach commercial agreements, especially in the absence of regulatory certainty.

³² First Report and Order ¶¶ 9, 15, 55, 141, 245, 307.

Commercial agreements may become more feasible when final rules are in place. In the meantime, the Commission must be realistic given the stark differences in interests between competing carriers.

IV. SPECIFIC NETWORK ELEMENTS

Just eight years after Congress passed the 1996 Act, high-capacity UNE loops and transport remain vital to the operations and plans of competitive entrants. Despite significant investment by CLECs, alternative access vendors, and other providers, alternatives to loop and transport elements remain very limited. They likely will continue to remain so until non-ILEC competitors have expanded their own high-capacity facilities vastly beyond their current reach. The Triennial Review Order has already marked a sharp reduction in the availability of UNEs, and several CLECs have already been compelled to announce reductions in their service offerings. The Commission should not take steps that would further retard competition, as the BOCs continue to insist. Rather, it should open the door to increased competition in the local telecommunications market by rescinding the Triennial Review Order's exclusion of entrance facilities and allowing wireless carriers access to UNE transport.

A. Loops

As the Commission has recognized time and again,³³ "[u]sing the loop to get to the customer is fundamental to competition." *Id.* ¶ 30. Requesting carriers are impaired

³³ Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al., 14 FCC Rcd 20912 (1999) ("Line Sharing Order").

without access to DS0 loops, DS1 and DS3 loops, and dark fiber loops. The Triennial Review Order confirmed that, as a general matter, ILEC loop facilities continue to be a bottleneck at all but the highest, OCn levels.³⁴ Sprint believes the Commission rightly found that requesting carriers are impaired without access to UNE loops, absent a building-specific showing of nonimpairment.

Sprint believes that the Triennial Review Order's definitions for loop and subloop should be maintained. The separate elements should not be eliminated or combined into a single, "unified" loop network element. The loop, subloop, and network interface device, for example, are each separate elements and stand-alone parts of a network. The Commission should focus on them separately, rather than simply on the end-to-end connection. Additionally, the definition should be technology-neutral and readily adapted to new technologies as they are deployed. There are some cases, such as a copper loop, where the requesting carrier will want the entire loop facility. There are other cases, such as a high-capacity loop, where the requesting carrier may want bandwidth, such as a DS3, or perhaps dark fiber.

High-capacity loops should include attached electronics. ILECs should be required to add electronics (such as add/drop multiplexers) at TELRIC for equipment that is normally deployed in their network and in the course of normal capacity augments.

³⁴ As the Commission reviews dedicated transport on remand, it should reconsider the Triennial Review Order's national finding of that requesting carriers are not impaired without access to OCn UNE loops. Triennial Review Order ¶ 202. The Commission based that finding on the availability of dark fiber loops. If access to UNE dark fiber loops were restricted, the Commission would need to reassess and likely reverse its finding of nonimpairment for OCn loops.

The UNE Remand Order distinguished between high-capacity loops and loops capable of providing high-speed services. High-capacity loops “retain the essential characteristic of the loop” since they use attached electronics to “boost the wire’s capacity.”³⁵ High capacity loops are analogous to special access channel terminations, and the same rules for adding electronics for special access facilities should apply to high capacity loops. In the case where additions are necessary, TELRIC-based “special construction” practices should apply.

Retaining the requirement to include attached electronics on high-capacity loops is imperative given the new architectures that are being and will be deployed by ILECs. Eliminating the requirement to include electronics, even those capable of providing high-speed and advanced services, would effectively preclude competing carriers from offering high-speed services to large segments of customers.

In the Triennial Review Order, as in UNE Remand Order, the Commission recognized that self-provisioning of the loop is not viable, given the prohibitive cost and time necessary to duplicate the vast and ubiquitous network that the ILECs built over decades. ILECs enjoy advantages of scope and scale, a large existing customer base, predictable revenue streams, and lower costs of capital. Building out any loop plant is expensive and time consuming regardless of the capacity. But requiring CLECs to build before developing a customer base greatly increases their risk and raises their cost of capital. Triennial Review Order ¶¶ 86-87; UNE Remand Order ¶ 182. Loop deployment carries more risk than other types of facilities, such as switching, because loops serve a

³⁵ UNE Remand Order ¶ 176. DS1, DS3, and OCN loops are examples.

highly limited area and are dedicated to a particular location. Triennial Review Order ¶ 205; UNE Remand Order ¶ 183. The customer base acquired by CLECs thus far has not provided them the scale necessary to build a ubiquitous loop plant. Surely, each CLEC cannot be expected to build to 100% of the market when dozens of CLECs combined have only a one eighth share of the market.

BOC investment in loop plant alone, as set out in the 2003 ARMIS 43.04 Reports, is over \$177 billion.³⁶ In stark contrast, the Commission's latest report on local telephone competition revealed that reporting CLECs served just 16.3% of the nation's end-user switched access lines – spread 135 CLECs – and that 23.5% of those lines were CLEC-owned.³⁷ That means fewer than 4% of the nation's lines are served by CLECs on their own "last-mile" facilities.

Recognizing the readily apparent direct correlation between lines served and loop investment, it is clear that CLEC loop facilities do not compare favorably to ILEC facilities. Given the current state of the capital market, the economy, and of the telecommunications industry in particular, it is unreasonable to assume that CLECs have the financial capability to build on a substantial scale. Even though competing carriers have begun building out to some customers, this does not suggest that it is economical to build to all customers. Triennial Review Order ¶ 206; UNE Remand Order ¶ 184. As the

³⁶ This figure is set out in rows 1277 and 1460. It includes only BellSouth, Qwest, SBC, Verizon, and Puerto Rico Telephone Company. Mid-sized ILECs, including Sprint, are no longer required to report ARMIS 43.04 data.

³⁷ Industry Analysis & Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of Dec. 31, 2003 (June 2004) ("Local Competition Report") (published at <http://www.fcc.gov/wcb/iatd/comp.html>) at Tables 1, 3.

Commission knows, in today's environment, investors have become very cautious about carriers that are investing heavily in their own facilities, particularly before securing a solid customer base, and many CLECs have gone bankrupt. Moreover, the costs of constructing new loop plant are high and vary greatly depending on the specific circumstances of the area. Sprint has received quotes averaging \$[] per foot or \$[] per mile to construct new fiber loop in metropolitan areas. One of Sprint's major alternative access providers has quoted Sprint over \$[] per mile. These quotes do not include right of way ("ROW") costs, environmental and regulatory costs, or franchise fees.

Because of these substantial fixed costs, it is simply too risky for a CLEC to construct its own loop plant unless it has a sufficiently long-term commitment from a customer in that building to justify the investment. It is difficult to secure such a commitment when the customer has the option to switch back to the ILEC, or to a competitor using ILEC facilities.

Construction of facilities by any given carrier or an Alternative Access Vendor ("AAV")³⁸ is also impractical due to the long time it takes to bring such facilities on-line. In addition to the time necessary to build, competing carriers face delays securing ROW access and obtaining permits, as well as delays stemming from municipal "franchise" conditions, construction moratoriums, preservation constraints, even endangered species

³⁸ In these comments, Sprint treats AAVs as a subset of CLECs, i.e., CLECs that offer facilities to other carriers.

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Comments of Sprint Corp.
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issues.³⁹ ROW and conduit exhaustion are serious problems in major business centers, including Washington and New York. For example, Sprint was unable to pull its own fiber through New York's Lincoln Tunnel for two years because of lack of available space. Only after another carrier's copper cable was removed was Sprint able to proceed. In another case, Sprint was unable to bid for a major customer on Staten Island because none of Sprint's vendors were willing to bid due to the difficulties of dealing with the Port Authority for running fiber on its bridges. Customers will not wait the months required by CLECs to acquire permits, cut streets, install additional equipment, engineer, construct, and test new facilities. With the ILEC, the customer seldom faces any such delays. Also, an AAV necessarily requires some level of commitment from a carrier, because it faces the same risks of stranded investment when constructing new facilities.

The small percentage of buildings that are in fact served by alternative sources of supply is evidence of the barriers and constraints to loop deployment discussed above. There are approximately 739,000 commercial buildings alone in the U.S.⁴⁰ Except for an insignificant number, all of those are reached by the incumbent LEC. Despite growth in alternative access provider facilities over the last three years, AAVs reach only a tiny fraction of that number. Sprint has developed a comprehensive, nationwide database of

³⁹ See Ex Parte Submission of the Industry Rights-of-Way Working Group, submitted in CC Docket No. 98-146, WT Docket No. 99-217, and CC Docket No. 96-98 (Jan. 25, 2002).

⁴⁰ U.S. Dep't of Commerce, Statistical Abstract of the United States (2003), Table 982. This figure understates the number of buildings that house heavy telecommunications end-users. It excludes hospitals, university buildings, hotels, small buildings, many government and military facilities, and other categories of buildings.

buildings served by AAVs, which it originally developed to identify AAV alternatives to ILEC special access channel terminations.⁴¹ This database is actively used by Sprint employees who are charged with finding alternatives to ILEC bottleneck facilities and to reduce access expenses. It was not compiled as some theoretical exercise in order to support any position in this proceeding.

The database includes locations in [] communities across all 50 states. It shows that just [] commercial, government, and office buildings, or just [] percent of the nation's total, are potentially reached by an AAV. Even among major buildings where Sprint currently has an existing special access customer, []% have no AAV connection. For the period of December 1 through December 31, 2003, of [] special access loops ordered by Sprint, only [] – or []% – terminated in buildings that had some potential form of AAV option.⁴² This percentage is relatively unchanged from the study Sprint conducted for its comments in the Triennial Review proceeding nearly two years earlier.

But these figures actually *overstate* the availability of feasible AAV alternatives, particularly for high capacity loops, since many of the AAVs identified in Sprint's database are able to serve only a single customer in the building and cannot be used to

⁴¹ Channel terminations are essentially the same as high-capacity loops, and thus the lack of alternatives for special access equates to a lack of alternatives for high capacity loops.

⁴² This lack of suitable alternatives exists even though Sprint has abandoned its former policy of avoiding reliance on affiliates of its major long distance competitors – AT&T and MCI – for special access loop facilities. In order to reduce access costs, Sprint now fully considers their capabilities whenever it needs alternate sources of supply.

provision service to each and every tenant. In addition, because of various factors, including circuit availability, cost, the quality of the AAV's plant and service, the AAV's financial stability, and the administrative impracticability of dealing with multiple small companies, AAV facilities will often be unsuitable to meet a competitor's needs.

Perhaps even more telling is the actual number of AAVs serving each building and how it compares with the wholesale triggers established by the Commission in the Triennial Review Order. Of the [] buildings identified in Sprint's database, only [], or []%, have potentially two or more AAVs reaching any portion of the building. That number does not significantly improve even if limited to the largest MSAs. Sprint's database reveals that there are [] locations in the top 50 MSAs with at least one potential AAV, but of those only [], or just []% have two or more. This is set out in detail in Appendix A to these comments.

Nor can mobile telephone or fixed wireless offer an alternative to ILEC loops, as the Commission has already recognized. UNE Remand Order ¶ 188. Wireless phone subscribership has grown significantly, but the great majority of consumers that have wireless phones still maintain their wireline services. Although 3G deployment holds promise of higher speeds, deployment of 3G technology is only beginning. Fixed wireless is even less developed. Sprint also has significant experience with fixed wireless and, due to limitations of current technology, is not pursuing sales aggressively at this time. Additionally, as the Commission is aware, the largest fixed wireless carriers (Teligent and Winstar) have gone bankrupt, and the latter has discontinued services

altogether. Other carriers, like Sprint, have scaled back or delayed investments in this still-developing technology.

Nor is cable TV plant an adequate alternative source of loop. Although voice service provided by cable TV companies is growing, recent statistics suggest that as of December 2003, cable-delivered telephone service reached just 3.2 million subscribers nationwide, or scarcely 2% of nationwide switched access lines.⁴³ Nearly all are mass market customers, and “cable is primarily suited for service to residential customers, rather than to business customers.” Triennial Review Order ¶ 439 n.1349. Moreover, the Commission has recognized that “declining to unbundle loops in areas where cable telephony is available would be inconsistent with the Act’s goals of encouraging entry by multiple providers,” and at best would force consumers to choose between just the ILEC and the cable TV provider. UNE Remand Order ¶ 189.

Removing the loop unbundling requirement would not stimulate CLEC deployment of facilities, especially given the existing capital constraints in the telecommunications industry. It would only inhibit the growth of local competition. Eliminating ILEC obligations to offer unbundled loop facilities would introduce uncertainty in the competitive marketplace and would cast doubt on the ability of any carrier to compete effectively against the ILEC.

⁴³ Local Competition Report at 2 & Table 5.

B. Subloops

In the Triennial Review Order, the Commission reconfirmed the UNE Remand Order's finding that requesting carriers should not have to buy the entire loop if they have built part of the network, and that unbundled subloops support the Commission's goal of encouraging investment in facilities-based competition. Triennial Review Order ¶ 253; UNE Remand Order ¶ 212. Taking an all-or-nothing approach to the local loop would undermine the Commission's and the Act's stated goals.

Sprint realizes that CLEC use of ILEC subloops, to date, has been very limited. Sprint believes CLECs have not taken advantage of the subloop element because it generally is not economically viable until the CLEC has achieved a customer base that supports at least a partial building out of loop plant. The Commission reached the same conclusion in the UNE Remand Order, finding "that access to subloop elements promotes self-provision of part of the loop, and thus will encourage competitors, *over time*, to deploy their own loop facilities and *eventually* to develop competitive loops where it is cost efficient to do so." UNE Remand Order ¶ 209 (emphasis added). Although in Sprint's experience, there is little current demand for subloops, there are several subloop applications that are feasible even today, and they are likely to occasion increased future demand. An example is an office park or a campus with multiple buildings. Often, there may be a logical point of separation between the ILEC loop and a common access point to all of the buildings. If the requesting carrier decides to build facilities within the campus and to connect them to the ILEC loop, there is no reason it should not be allowed to secure the subloop from that point. Likewise, if the ILEC has built the distribution

plant in the office park or campus, and a CLEC succeeds in gaining the customer, the CLEC may want to access the distribution subloops, which it could connect to its own feeder plant to reach its own switch. In addition, unbundled subloops will ensure an ability to have optical fiber interface arrangements within manholes or at other technically feasible interface points.

At the same time, Sprint's incumbent Local Division has not incurred large burdens or increased costs in having the subloop defined as a UNE, and Sprint doubts that it has been a burden for other ILECs either. It is a competitive risk, not an operational burden. For all these reasons, Sprint believes the Commission should retain subloops on the list of mandatory UNEs to allow time for competitive networks to develop.

Recently, the Commission issued a reconsideration order extending FTTH treatment to MDUs, provided the building is “predominantly residential.”⁴⁴ Sprint has interpreted the Commission’s intention that fiber subloop going into an MDU that is predominantly residential is also removed from the unbundling obligation. The Commission may elect to take this opportunity to confirm that understanding.

⁴⁴ Order on Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 9, 2004) at ¶ 4.

C. Network Interface Device

The Commission should retain the current definition of the network interface Device (“NID”) and maintain it as a standalone network element. As the demarcation point between the loop and the customer-owned inside wire, a requesting carrier may need access to the NID to access the inside wire even when it provides its own loop facilities.

In the Triennial Review Order (at ¶ 346), as in the UNE Remand Order (at ¶ 238), the Commission recognized that there are no realistic alternatives to the ILEC NID that would allow requesting carriers to provide service. In the FCC's recent report on telephone competition, ILECs reported having 152 million end-user switched lines, of which 119 million were residential and small business lines.⁴⁵ While not all lines terminate at an individual NID, they all terminate in some device, and it is not practical to expect requesting carriers to replicate the tens of millions of NIDs existing in the ILEC networks today. NIDs are specific to the customer premises, and site visits are costly and time-consuming -- especially for small business and residential customers. Although the NID itself may not be very expensive, it is the total cost of installing a NID at every customer location that substantially impairs requesting carriers, as the Commission has recognized. UNE Remand Order ¶ 239.

Moreover, in some instances, rerouting the inside wire to the location of a NID placed by the requesting carrier may be physically impossible. Even where possible, a

⁴⁵ Local Competition Report at Table 2.

requesting carrier may face daunting delays and costs to negotiate with building owners for separate access. In some cases, there may be no space available to install a separate NID, or the building owner may assess expensive conditions or charges. The CLEC is placed at a competitive disadvantage to the ILEC that already has a NID in place, typically free of any charges. In addition, if requesting carriers were required to provide NIDs where they obtained the loop from the ILEC, this would require moving the ILEC loop and customer inside wire to the CLEC NID or the installation of a complicated system of jumpers or cross connects. These arrangements would simply have to be undone if the end user ever changed service back to the ILEC, which would be a waste of resources for all carriers involved.

Sprint is unaware of any alternative providers of standalone NIDs. When Sprint is successful in securing alternative vendors for loop facilities, they may provide the connectivity at the customer's premises. When Sprint does provide its own loop facilities, Sprint typically provides its own terminals. Even then, however, access to the ILEC NID may be essential to connect to inside wiring or intra-building cable. While not allowing access to ILEC NIDs may not absolutely bar facilities-based investment, it would certainly impair requesting carriers from providing service, by adding prohibitive service costs and delays and wasting carrier resources.