Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

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THE LOOP AND TRANSPORT CLEC COALITION

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Summary

In this proceeding, the fate of local competition is at a crossroad. The FCC's initial task on remand is to respond to the *USTA II* court's concerns. But that is not the Commission's only task, nor should it be its primary task. If this proceeding is about how much of the 1996 Act the Commission will give back to the ILECs in order to placate what is seen as a hostile court, the FCC will have done a great disservice to the institution and the statutory objectives of the Communications Act, as amended. This FCC should not be consigned to history as the agency that abandoned the 1996 Act and presided over a retraction of competition in telecommunications services. Rather, this Commission should respond to the court in a manner that furthers the 1996 Act's statutory mandate to promote competition, particularly competition from providers that use unbundled network elements to overcome impairment. In addition to answering the court's concerns, the FCC should take this opportunity to set a secure foundation for facilities-based local competition in both residential and business services. It must declare clearly and forcefully, to customers, to the investment community, to the ILECs, and to the courts, that the millions of customers that benefit from facilities-based service today will continue to enjoy the fruits of a competitive market.

I. Answering the Court

Switch-based competitors are fulfilling the promise of the 1996 Act. These entities are creating significant economic benefits for consumers in the United States, including the provision of innovative services, lower prices, and greater choices in the market. Members of the Loop and Transport CLEC Coalition have led the way in in*TRO*ducing new services to small and medium sized businesses – including business class broadband, integrated T-1s and, more recently, Voice over IP services. In addition, several members of the Loop and Transport CLEC

Coalition serve substantial bases of residential customers, providing flat-rated, "all distance" calling packages to their customers. The Loop and Transport CLEC Coalition companies serve their business and residential customers using their own facilities where it is economic to deploy, using facilities of third parties where they are available as a practical and economic matter, and using unbundled network elements where CLECs are impaired without such access. This approach is necessary to compete against an entrenched incumbent. This is what the Act *allows* them to do. This is what the FCC's rules on remand must *enable* them to do.

In answering the court, the Commission should not abandon the impairment standard that it employed in the *Triennial Review Order (TRO).* The touchstone of impairment – defined in the *TRO* as "[a] lack of access to an incumbent LEC network element [which] poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic" – remains the proper measure by which to determine access to network elements. The Commission can respond easily to the court's "general observations" about this standard, which at most require small and entirely logical refinements to the application of this standard.

The Commission also can respond to the court's instruction to consider the significance of ILEC special access in its impairment determinations. The availability of ILEC tariffed special access services does not merit significant weight in any impairment analysis of loops and transport for wireline services. ILEC special access services already are priced far above cost, and are on the rise, making economic use of them by wireline competitors impossible. When CLECs have used tariffed special access services, they do so overwhelmingly only on a temporary basis or only because ILEC intransigence has steered CLECs to special access. Absent the development of significant competition to constrain the ILECs' market power in the

relevant market for special access, the FCC would be justified in creating, as the *USTA II* court invited, a blanket rule that accords no weight to the availability of ILEC tariffed special access when the Commission evaluates the impairment that wireline CLECs face.

With respect to the impairment analysis for dedicated transport, the Commission should retain its route-specific and capacity-specific approach to these elements. Practical experience and the records in the state impairment proceedings demonstrate that actual deployment will vary decisively from one route to another, and that deployment on one route (or in one general area) is not a reliable indicator of the barriers to entry present on another route. In addition, as the Commission found in the *TRO*, the barriers to entry for purposes of serving an OCn level of demand are significantly different than the barriers to entry for purposes of deploying DS1 transport. As a result, the only approach that avoids an unacceptable risk of false positives is a route-specific approach applied separately for DS1, DS3 and dark fiber capacities.

For DS1 loops and DS1 transport used in combination with loops (*i.e.*, non-multiplexed DS1 EELs), the evidence overwhelmingly demonstrates that requesting carriers seeking to serve DS1 enterprise customers face extremely high economic and operational barriers to deploying DS1 facilities to serve these customers. These high entry barriers are coupled with much lower revenue opportunities and the inability to recoup costs via long term contracts. As a result, requesting carriers face impairment nationwide for DS1 loops and DS1 EELs.

With respect to DS3 transport and dark fiber, requesting carriers face impairment in the vast majority of instances, as the Commission recognized in the *TRO* and as the *USTA II* court appeared to accept. In seeking to identify the limited instances where an exception to impairment exists, the Commission should be careful not to let the easy cases overwhelm its resources. Specifically, for ease of administration, the FCC may conduct an impairment analysis

on a group of similar routes, provided those routes share the same relevant characteristics with respect to the barriers to entry on the routes (but it may not group routes that do not share common characteristics). If it does this grouping properly, the Commission may narrow the need for a more detailed route-specific inquiry by finding impairment and non-impairment, as the case may be, for certain groups where an exceptional case is extremely unlikely to be present. This administrative determination makes application of the route-specific test more manageable and allows the Commission to take the characteristics of similar routes into account where the barriers to entry are in fact similar. For the remainder of the routes, the Commission should proceed quickly to a fact-specific impairment analysis using a simplified set of trigger criteria.

The Loop and Transport CLEC Coalition recommends three groups of routes for this purpose. In the first group, the FCC should consider routes between the largest central offices in the largest urban areas. Within this group of routes, the Commission may find non-impairment on routes with the following characteristics: (1) the two end points of the route are in the same LATA in a top 50 MSA, (2) at least four fiber-based collocators have established operational collocations at both ends of the route and (3) each of the end points serves a central office with at least 50,000 business lines (indicating a level of aggregate demand that makes wholesale service likely to exist). The Commission need not require a specific wholesale component for routes meeting these criteria.

Conversely, in the second group, the FCC should find impairment for all routes where at least one end point serves a central office with fewer than 25,000 business lines. For these routes, requesting carriers are not likely to be able to overcome the barriers to deploying DS3 transport or dark fiber.

For routes not meeting either of these characteristics, the FCC is not able to make an impairment finding without examining the extent of competitive deployment on the particular route. For these routes, the FCC should collect the information necessary to conduct a trigger analysis, although it may simplify application of the triggers in order to take into account the court's concerns. The FCC should find impairment on these routes unless (1) at least five fiber-based collocators have established active collocations at both ends of the route and (2) at least two of these fiber-based collocators self-certify that they are wholesale providers of transport to or from both end points. As an alternative to collecting this information in this proceeding, the Commission could establish a self-executing trigger implemented via certifications during the UNE ordering process.

Finally, the Commission should respond to the court's vacatur of the definition of transport by applying its impairment tests to entrance facilities. Entrance facilities, as they have come to be known, are transport facilities that carry traffic between an ILEC central office and a CLEC's equipment, such as a switch. These facilities are no different than any other form of dedicated transport and are subject to similar impairments as with any other transport. Because one end of an entrance facility will terminate at the CLEC's equipment, however, the impairment tests for transport may be modified to look solely to the characteristics of the "ILEC side" of the transport route. For example, entrance facilities should not be available as unbundled network elements from a central office in the top 50 MSAs if the office serves 50,000 or more business lines and at least four fiber-based collocators have active collocations in the office.

II. <u>Promoting Small Business Competition</u>

Spurred on by the activist *USTA II* decision, the ILECs have launched a new offensive against facilities-based local competition. Their goal is to roll back competition to the pre-1996

Act era, where competition was limited to a niche market that imposed only a minor nuisance on the massive cash machine that is incumbent carrier local exchange service. Such an outcome would cost small and medium sized businesses $5 billion annually, des*TRO*y tens of billions of dollars in investments in telecommunications facilities and deal a crippling blow to the deployment of advanced telecommunications capabilities. The Commission cannot sit back and allow competition to be dismantled in this manner.

Now is the time for the Commission to back up its often stated commitment to facilities-based competition with actions that foster such competition. The Commission must fulfill its promise to promote competition with actions – *in this proceeding* – that meaningfully advance the ability of new entrants to use their facilities efficiently to serve business and residential customers. The Commission should make a pact, with customers, with the investment community and with itself as trustee of the 1996 Act, to promote competition in residential and small business telecommunications. This pact would contain five key promises to telecommunications consumers everywhere:

- that the new "business class dialtone" – DS1 loops and DS1 EELs – will be made available nationwide as UNEs;
- that DS3 transport will be available nationwide, either through multiple competitive supply, or lacking that, through network elements, so that carriers may serve their customers;
- that loop/transport combinations and routine network modifications will be available on a nondiscriminatory basis, whether the customer selects a CLEC or an ILEC as its service provider;
- that the Section 271 bargain will be fulfilled and 271 checklist items will be unbundled at reasonable, cost-based rates, regardless of the impairment determination under section 251; and
- that business customers will not lose access to DS1 capabilities from their provider of choice, regardless of the network technology that an ILEC chooses to deploy..

These five promises are critical to placing facilities-based competition on a firm footing for the future. Competitors like the members of the Loop and Transport CLEC Coalition are bringing the kinds of benefits that the 1996 Act envisions, offering consumers new services, lower prices and meaningful alternatives to incumbent carriers. Action in this proceeding is necessary to turn the Commission's rhetoric into reality.

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Advanced Telcom, Inc.; Birch Telecom, Inc.; Broadview Networks, Inc.; Eschelon Telecom, Inc.; Grande Communications, Inc.; KMC Telecom Holdings, Inc.; NuVox Communications; SNiP LiNK, LLC; Talk America Inc.; Xspedius Communications LLC; and XO Communications, Inc. (hereinafter the "Loop and Transport CLEC Coalition," "Coalition," or "Joint Commenters"),[1] through counsel, hereby submit their joint initial comments in the above-captioned proceeding.[2]

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[1] Each coalition member has deployed its own fiber or switching equipment, or both.

[2] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order and Notice of Proposed Rulemaking, WC Docket No. 04-313 CC Docket No. 01-338, FCC 04-179 (rel. Aug. 20, 2004) ("*Interim Order and NPRM*").

I. IN*TRO*DUCTION

Eight years after passage of the Telecommunications Act of 1996 (the "1996 Act"), the fate of local competition is at a crossroad. If this proceeding is about how much of the 1996 Act the Commission will give back to the ILECs in order to placate what is seen as a hostile court, the FCC will have done a great disservice to the institution and the statutory objectives of the Communications Act, as amended. Rather, this Commission should respond to the court in a manner that is consistent with the 1996 Act's statutory mandate to promote competition, particularly competition from providers that use unbundled network elements to overcome impairment. As the Commission recognized by a unanimous vote in the *Triennial Review Order*, access to high-capacity loops and dedicated transport are critical to bringing the benefits of facilities-based competition to the American consumer.

A. The Purpose of This Proceeding

From the outset, the Commission must recognize that the D.C. Circuit's decision in *United States Telecom Association v. Federal Communications Commission* ("*USTA II*") did not (and could not) overturn the pro-competitive requirements of the 1996 Act or the Commission's statutory obligations to implement them. To the contrary, in the opening paragraph of the *USTA II* decision, the court emphasized that the purpose of the 1996 Act is to "foster a competitive market in telecommunications" and "[t]o enable new firms to enter the field despite the advantages of the incumbent local exchange carriers."[3] The Supreme Court, in its 2002 *Verizon* decision, described the purposes of the Act in even more forceful terms. The Court characterized Congress as pursuing an "entirely new objective of *uprooting the monopolies*" supported by

[3] *United States Telecom Ass'n. v. FCC*, 359 F.3d 554, 561 (D.C. Cir. 2004).

previous regulatory regimes.[4] The principal aim of this new regime was to make regulated utilities' monopolies "vulnerable to interlopers."[5] Indeed, as the Supreme Court saw it, Congress had abandoned its traditional neutrality in economic markets in favor of an approach "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property."[6]

It is this mission that the FCC must remember in this proceeding. The Commission's task is to respond to the *USTA II* court's concerns in a way that is faithful to Congress' intent to "uproot" the monopolies and create robust competition in all markets, especially advanced telecommunications services provided to small and medium sized businesses.

The Commission must also recognize that it got most of its job right in the *Triennial Review Order*. Significant portions of the FCC's nearly 600 page order were upheld by the court of Appeals -- and other significant findings were unchallenged by the ILECs. The court largely upheld the Commission's general impairment standard, offering a few "general observations"[7] that may bear significance in particular determinations. However, the court also upheld or left intact several determinations that relied upon application of that impairment standard. These include: nationwide findings with respect to DS0 loops (impairment), subloops (impairment), OCn level loops (non-impairment), OCn level transport (non-impairment), and call-related

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4 *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 488-89 (2002) (emphasis added).

5 *Id.*, 489.

6 *Id.*

7 *USTA II*, 359 F.3d at 572.

databases (non-impairment). In addition, contrary to the ILECs' repeated attempts to expand the *USTA II* holding, the court also left intact the FCC's findings of impairment for enterprise loops.[8]

Although the court in *USTA II* remanded the Commission's dedicated transport unbundling rules for further review, the court did not disturb the FCC's underlying factual findings. Those factual findings made clear that, in the vast majority of instances, carriers would be impaired without access to ILEC network elements. The court's concerns about the possibility of similar routes and the significance of special access, as explained below, can be addressed with reasonable modifications that will achieve substantially the same outcome. That is, after properly answering the court's concerns, the Commission can be confident that it will have a regime that orders unbundling where impairment exists and finds non-impairment on a not insignificant number of routes where dedicated transport is suitable for multiple competitive supply.[9]

B. Realizing the Goals of the 1996 Act

In the years leading up to the enactment of the 1996 Act, many of the market features that the incumbent local exchange carriers ("ILECs") now cite to as evidence of competition already existed in some form. For example, in approximately 15 states, carriers were permitted to

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[8] See section V.A. *infra*.

[9] This result is consistent with Chairman Powell's separate statement to the *Interim Order and NPRM*, which expresses his continued commitment to the unbundling of these network elements. Statement of Chairman Michael K. Powell ("In the Triennial Review Order, I supported fully requiring incumbents to unbundle DS1 loops and transports, as did every one of my colleagues. I remain steadfastly committed to providing the key network elements to these facilities competitors in this proceeding, without which they would be impaired."); Statement of Commissioner Kathleen Q. Abernathy ("While our rules must change, I remain committed to ensuring that bottleneck transmission facilities continue to be unbundled, consistent with our statutory mandate.").

provide local services in direct competition with the ILECs.[10] These states and others permitted competitive access providers to deploy facilities to deliver high volumes of long distance traffic to end users. In addition, the ILECs offered special access services to carriers in every market in the country. Although these early forms of competition were starting to take hold, Congress recognized that these developments alone were not enough. Congress knew that a bold restructuring of telecommunications policy would be necessary, one that uprooted long-standing monopolies and sought "to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property."[11]

Congress recognized that uprooting the Bell Companies' telecommunications monopoly would not be easy. Thus, to ensure that competitors would have adequate access to potential customers, Congress included three key features in the 1996 Act designed to assist new entrants in overcoming the ILECs' con*TRO*l over bottleneck facilities. First, Congress required the ILECs to provide nondiscriminatory access to unbundled network elements under section 251. Among other duties, section 251 requires the ILECs to "provide, to any requesting telecommunications carrier for the provision of telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory."[12] Second, in exchange for authority to provide in-region long distance services, Congress required the BOCs to open their local networks to competitive carriers. The fourteen point "competitive checklist" holds at its

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[10] *See Local Competition Report*, Tables 4.8, and 4.12 (Industry Analysis Division, Common Carrier Bureau, Federal Communications Bureau (Dec. 1998)).

[11] *Id.*

[12] 47 U.S.C. § 251(c)(3).

center the requirements that the BOC provide access to local loop transmission, local transport and local switching on an unbundled basis. Third, Congress required the FCC to promote advanced service deployment under section 706. Section 706 requires this Commission and each state commission "to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[13] These three elements are designed to work in tandem to establish a secure framework for meaningful and lasting competition in local telecommunications services.

Clearly, Congress recognized access to the incumbent LEC infrastructure as crucial to the development and proliferation of competition. Thus, the only sure-fire way to ensure the continued development of facilities-based competition is for the Commission to stay the course established in the *Triennial Review Order* and retain loops and transport as UNEs.

1. Competitive Carriers Are Bringing Significant Benefits to Small and Medium Sized Businesses

Without question, competitive carriers such as members of the Loop and Transport CLEC Coalition, have contributed mightily to the U.S. economy generally and the development of a robust national telecommunications infrastructure specifically. The Joint Commenters alone have in combination constructed more than 12,500 route miles of fiber optic transmission facilities[14] and almost 200 switches.[15] The enormous capital investments that they have made

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13 47 U.S.C. § 157 nt.

14 Declaration of Wil Tirado, Director of Transport Architecture, XO Communications, Inc., ¶ 2 (Oct. 1, 2004) (7,136 route miles) ("Tirado Decl."); Declaration of James C. Falvey, Senior Vice President of Regulatory Affairs, Xspedius Communication, LLC, ¶ 3 (Oct. 4, 2004) (3,400 route miles) ("Falvey Decl."); Declaration of Mike Duke, Director of Government Affairs, KMC Telecom Holdings, Inc., ¶ 3 (Oct. 1, 2004) (2,100 route miles) ("Duke Decl."); Declaration of Dan Wigger, Vice President – Network Engineering & Operations, Advanced TelCom, Inc., ¶ 2 (Oct. 1, 2004) (100 route miles) ("Wigger Decl.").

15 Tirado Decl. ¶ 2 (XO) ("almost 150 Class V5 circuit switches … and VoIP softswitches); Falvey Decl. ¶ 3 (Xspedius) (38 switches); Duke Decl. ¶ 3 (KMC) (35 switches); Declaration of Rebecca H. Sommi, Vice

. . . *Continued*

now provide critical route redundancy in scores of markets across the country, which redounds not only to benefit of customers whose needs preclude reliance on a single vendor, but also assures homeland security by decreasing the risk that a single targeted attack can shut off access to critical communications services. It is not surprising that facilities-based competitive LECs enjoyed some of their earliest and largest success in New York City and Washington, D.C., where large enterprise customers and government users have an urgent need for access to alternate communications networks. And the general competitive discipline they have provided to the pricing of incumbent LECs have benefited all customer classes -- mass market, enterprise and government alike.

However, the primary beneficiaries of facilities-based competitive LEC services to date have been the small and medium-sized business communities. A recent study by the Small Business Administration ("SBA") found that fully 29 percent of small businesses located in me*TRO*politan areas served by competitive carriers subscribe to their services,[16] achieving savings over comparable incumbent LEC services of 30 percent on average. The National Federation of Independent Business estimates that small business save up to $6 billion annually in the aggregate by subscribing to competitive LEC services.[17] Indeed, SBA found that small business customers that use DS1 service paid incumbent LECs $799 monthly on average, whereas competitive LECs charged small business customers only $389 monthly on average for

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President – Operations Support, Broadview Networks, Inc., ¶ 4 (Oct. 1, 2004) (5 Switches) ("*Sommi Decl.*")

16 Stephen B. Pociask, TeleNomic Research LLC (for SBA Office of Advocacy), A *Survey of Small Businesses' Telecommunications Use and Spending* at Pgs. ii, 67, 71 (Mar. 2004) ("*SBA Study*").

17 See Letter from Dan Danner, Senior Vice President, Public Policy, National Federation of Independent Business, E*x Parte* Presentation in CC Docket Nos., 01-338, 96-98 and 98-147 (stating that "a study released by Economics and Technology reveals small businesses could save between $2.2 billion and $6 billion a year in lower telephone bills if competitive providers maintain full access to UNE-P.

the same DS1 connectivity.[18] For the small business community that is the engine that drives the nation's ongoing economic recovery, such enormous expense savings are critically important.

Of course, the benefits delivered by competitive LECs are not limited to price competition. Competitors have truly led the way in the deployment of new technology. Through the years they have been the first to deploy fiber optics, wireless transmission, packet switching and VoIP.[19] They also have led the way in service innovation. Competitive LECs were the first to offer services to small business that provided broadband capability, data back-up and recovery, bundled products and flat rate calling.[20] But perhaps the single most important service enhancement initiated by competitive LECs has been the in*TRO*duction of DS1-based integrated access services. These products enable small- and medium-sized business customers to route all of their local, long distance and internet access traffic over a single DS1 line.[21] Prior to the entry of competitive carriers, incumbent LECs required customers to purchase (wastefully) separate T-1 lines for each individual application.[22]

Importantly, economists that have studied the market found that the competitive benefits delivered by competitive LECs are realized almost immediately after they initiative service in an area. They found that when a competitive LEC enters a new market, incumbent LECs quickly reduce prices and revamp their service offerings to be more customer friendly.[23] For example, after a competitive LEC entered one market, the incumbent LEC quickly reduced prices by

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18 SBA Study at 57-58.

19 *See* Mayo/MiCRA/Bates White Economic Impairment Analysis, pgs. 9-14 (October 4, 2004) ("*MMBW Analysis*").

20 *Id*.

21 *E.g*., Wigger Decl. ¶ 7 (Advanced TelCom); Tirado Decl. ¶ 5 (XO); Falvey Decl. ¶ 9 (Xspedius)

22 *See MMBW Analysis* at 10.

23 *See id*. at 12-13.

nearly two-thirds for customers willing to sign term plans.[24] In other cases, incumbent LECs have rushed out their own integrated DS1 access products after being forced to compete with competitive carrier bundled service offerings.[25] It is not surprising that the SBA has concluded that,"[t]he main concerns of small business end users, namely price, customer service, and flexibility, are readily addressed by CLEC offerings…. [and] the presence of alternative carriers has placed competitive pressure on ILECs to lower prices and offer increased services."[26]

Most of these considerable public benefits are dependent upon the continued availability to competitive LECs of cost-based UNEs. As the attached declarations from the Joint Commenters make clear, facilities-based competitive carriers rely heavily on the availability of loop and transport UNEs to transmit traffic where it is not feasible for them to deploy their own facilities.[27] A recent economic study conducted by MiCRA found that replacing UNE DS1 loops and transport alone with ILEC special access services would increase carrier costs by more than 100% on average, resulting in gross annual cost increases to competitive LECs exceeding $2 billion.[28] Indeed, in some states the cost increase would be ten-fold.[29] Most competitive LECs --

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24 *See id*. at 13.

25 *See id.*

26 Letter from Thomas M. Sullivan, Counsel, Small Business Administration, Office of Advocacy to Michael K. Powell, Chairman, Federal Communications Commission (Feb. 5, 2003) (On file with the Federal Communications Commission).

27 Tirado Decl. ¶¶ 16-17 (XO) (explaining difficulty in building fiber laterals to buildings), ¶¶ 35-36 (building transport is time consuming and not often cost-justified); Falvey Decl. ¶¶ 21-22 (Xspedius) (difficulty in building laterals), ¶ 28 (transport costs $110,880 to $211,200 per mile to deploy), ¶ 30 (Xspedius could never justify building transport at DS-1 level); Wigger Decl. ¶ 21 (Advanced TelCom) (building lateral costs $100,00 to $150,00 per mile), ¶ 37 (Advanced Telcom would not build transport without guaranteed 15 DS3s worth of traffic).

28 Mark T. Bryant, Ph.D. and Michael D. Pelcovits, Ph.D., *The Economic Impact of the Elimination of DS1 Loops and Transport As Unbundled Network Elements,* Pg. 9, Microeconomic Consulting & Research Associates, Inc., (Jun. 29, 2004) ("*MiCRA Study*").

29 *Id*., 6.

approximately 86% of them are small businesses themselves[30] -- simply cannot absorb such shocking cost increases. They typically operate on thin operating margins and such cost increases must be passed through directly to customers in the way of price increases.[31] Recognizing this fact of life, MiCRA calculated that replacement of UNE DS1 loops and transport with special access would result in direct retail price increases to small and medium sized business customers averaging 25% and decreasing consumer welfare by approximately $4.9 billion annually.[32] Competitive LEC customers in turn would pass along the impact to their own customers, and says MiCRA, incumbent LEC special access pricing policies thereby would infect the broader economy with "inflationary price increases."[33] As the MMBW concluded "elimination of loop and transport UNEs would have a devastating effect on the CLECs, and prices would increase substantially in the markets actually served by the CLEC.[34]

The bottom line is that the networks and services deployed by facilities-based competitive LECs benefit everyone -- residential, enterprise and government consumers alike. But small and medium business customers have become especially reliant on the availability of low priced and flexible competitive LEC product offerings. To pull the rug out from under competitive LECs now by denying them access to cost-based UNEs would have a particularly

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30 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provision of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶¶ 746, 750 (2003) (the "*Triennial Review Order*" or "*TRO*"), corrected by Errata, 18 FCC Rcd. 19020 (2003).

31 *See Interim Order and NPRM*, Dissenting Statement of Commissioner Michael J. Copps.

32 *MiCRA Study* at 10-12; *MMBW Analysis* at 57, ¶ 109.

33 *Id.*, 10.

34 *MMBW Analysis* at 57, ¶ 108.

destructive impact on this critical customer segment. Writing of the need for continued availability of UNEs, Commissioner Copps has observed:

> Small businesses power this country's economy. They generate between two-thirds and three-quarters of all new jobs. They produce over half of our private sector output …. Right now, thousands of small business consumers enjoy affordable access to innovative broadband services that were previously available only to the largest business customers. Clearly, America's small businesses are deriving huge benefits from these services, and their productivity has been increasing as a result.[35]

Through the use of UNEs in tandem with their own network facilities, competitive LECs have succeeded in putting small businesses on a more equal footing with large enterprises in terms of their access and cost to state-of-the-art communications services. Elimination of critical UNEs would usher in a return to yesteryear, when small business was forced by monopolistic incumbent LEC policies to operate at a sizeable communications disadvantage to the large enterprise competitors. Surely, this is an outcome that is antithetical to the purposes of the 1996 Act.

2. Establishing The Proper Foundation For Competition Is The Best Way To Encourage Investment In Facilities And Broadband Deployment

The FCC is on record that a primary purpose of the 1996 Act was to foster facilities-based competition. All five Commissioners have recognized that vibrant facilities-based competition is a primary goal of the 1996 Act, and the development of facilities-based competitors is in the national interest. Soon after publication of the *Triennial Review Order*, for example, Chairman Powell told a House of Representatives Committee that "[i]t has long been my view that facilities-based competition (both full and partial) has produced the most welfare

[35] *See Interim Rules and NPRM,* Dissenting Statement of Commissioner Michael J. Copps.

for consumers (through lower prices and differential product offerings), provides for positive investment for our economy, creates jobs and provides us with valuable infrastructure alternatives in the face of threats to our homeland."[36]

All five Commissioners also have recognized that continued access to loops and transport is essential for facilities-based competition to flourish. The Commission voted unanimously in the *Triennial Review Order* to continue to require that ILECs provide competitors with access to critical DS1 and DS3 UNE loop and transport facilities. In his separate statement, Chairman Powell emphasized that competitors must "continue to receive access to high-capacity loops"[37] and Commissioner Abernathy acknowledged that competitors' continued access "to the bottleneck transport and loop elements [is] critical to the continued development of facilities-based competition."[38]

Recently, in the *Interim Order and NPRM*, Commissioners again voiced s*TRO*ng support for facilities-based competition and their commitment to providing competitors the network elements necessary for facilities-based competition. Chairman Powell, for example, expressed full support for requiring the incumbents to unbundle loops and transport, stating:

> I … have consistently supported intramodal competitors that are facilities-based. Carriers like … NuVox, McLeod and XO have been important contributors to competition. In the *Triennial*

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36 *See* Written Statement of Michael Powell, Chairman of the FCC, on Health of the Telecommunications Sector: A Perspective from the Commissioners of the FCC, before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce House of Representatives (February 26, 2003); *see also* Press Release, FCC Chairman Michael Powell Announces Plan for Local Telephone Competition Rules, FCC (June 24, 2004) (stating that "facilities-based competition brings the innovation and value that consumers demand."); Remarks of Michael Powell, Chairman of the FCC, at the National Association of Regulatory Commissioners General Assembly (March 10, 2004) ("Competition among these facilities-based networks, combined with the openness of Internet Protocol, has begun the transformative forces of innovation an entrepreneurial spirit into a sluggish telecommunications sector.").

37 *See TRO*, Separate Statement of Chairman Michael K. Powell, Approving in Part and Dissenting in Part.

38 *See TRO*, Statement of Commissioner Kathleen Q. Abernathy.

> *Review* Order, I supported fully requiring incumbents to unbundle DS1 loops and transport, as did every one of my colleagues. I remain steadfastly committed to providing the key network elements to these facilities competitors in this proceeding, without which they would be impaired.[39]

He expressed confidence that the Commission "[would] be able to provide these elements, once we have a full and complete record, consistent with the guidance of the court."[40] Similarly, Commissioner Abernathy restated her commitment to "ensuring that bottleneck transmission facilities continue to be unbundled, consistent with [the Commission's] statutory mandate."[41]

Without belaboring the matter, this Commission has been adamant, consistent and unanimous in finding that the 1996 Act was intended in large measure to facilitate the emergence of facilities-based competition. The Commission has been equally emphatic that access to cost-based UNEs is fundamentally important to achieving this Congressional purpose, and there is no reason to abandon that resolve now.

C. <u>The Face of Facilities-Based Competition Today</u>

The carriers that make up the Loop and Transport CLEC Coalition are all switch-based competitors striving to fulfill the goals of the 1996 Act. As a group, the Coalition members have been among the most self-sufficient providers of local and advanced telecommunications services, and remain ready, willing and able to deploy advanced telecommunications services wherever there is demand for such services. These carriers have dedicated tremendous resources

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39 *See Interim Order and NPRM,* Statement of Chairman Michael K. Powell.

40 *Id*.

41 *See Interim Order and NPRM,* Statement of Commissioner Kathleen Q. Abernathy; *see also* Dissenting Statement of Commissioner J. Copps ("The Commission was unanimous in upholding unbundled access to DS1 transmission facilities in the original Triennial Review Order, and nowhere does the court state that our rules requiring the unbundling of high-capacity loop facilities are vacated. To suggest that special access rates apply in six months and a day is not just devastating – it is, as a legal matter, wholly unnecessary").

and invested tremendous amounts of capital to build state-of-the art networks capable of providing advanced telecommunications services to residential and business customers alike. Our coalition serves more than 1.1 million customers throughout the United States.[42] They have deployed fiber networks, created route diversity through additional backbone infrastructure, and activated a wide array of circuit switches, packet switches, and softswitches throughout the United States. XO Communications alone has deployed 7,136 route miles of fiber, comprising 884,827 fiber miles,[43] and Xspedius has fiber covering more than 3,400 route miles.[44] In addition, our coalition owns almost 200 switches — Class 5 and above[45] — in more than 120 markets.[46] These facilities include both digital circuit switches and softswitches for VoIP.[47] As Chairman Powell acknowledged in the *Interim Order and NPRM*, Coalition members have been important contributors to competition.[48] Their substantial investments in telecommunications equipment and infrastructure have laid an excellent foundation for facilities-based competition in the markets for local and advanced telecommunications services.

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42 Declaration of Warren Brasselle, Vice President – Network Operations, Talk America Inc., ¶ 2 (Oct. 1, 2004) (600,000 residential and small business customers) ("Brasselle Decl.); Sommi Decl., ¶ 3 (Oct. 1, 2004) (230,000 residential and business customers); Tirado Decl, ¶ 2 (Oct. 1, 2004) (180,000 business customers); Declaration of David A. Kunde, Executive Vice President of Network Operations and Engineering, Eschelon Telecom, Inc., ¶ 3 (Oct. 1, 2004) (35,000 business customers) ("Kunde Decl."); Falvy Decl., ¶ 9 (Oct. 4, 2004) (23,050 customers, primarily business); Wigger Decl., ¶ 2 (Oct. 1, 2004) (18,000 business customers); Duke Decl., ¶ 3 (Oct. 1, 2004) (10,000 business customers); Declaration of Anthony Abate, President and CTO, SNiP LiNK, LLC., ¶ - (Oct. 1, 2004) ("Abate Decl.").

43 Tirado Decl. ¶ 2.

44 Falvey Decl. ¶ 3.

45 Tirado Decl. ¶ 2 ("almost 150 Class V5 circuit switches … and VoIP softswitches"); Falvey Decl. ¶ 3 (38 switches); Duke Decl. ¶ 3 (35 switches); Sommi Decl. ¶ 4 (5 switches);

46 Tirado Decl. ¶ 2 (70 markets); Duke Decl. ¶ 3 (35 markets); Kunde Decl. ¶ 3 (12 markets); Wigger Decl. ¶ 2 (7 markets).

47 Tirado Decl. ¶ 2

48 *See Interim Order and NPRM*, Statement of Chairman Michael K. Powell. The Chairman specifically cited XO, Covad, McLeod and NuVox as carriers that are fulfilling the promise of facilities-based competition.

We encourage the Commission to familiarize itself with today's market realities by taking a closer look at each member of the Loop and Transport CLEC Coalition. Without companies such as these, the development of robust and sustainable wireline local competition would suffer substantially. These are the companies deploying advanced telecommunications capability and deploying redundant networks. And they will continue to deploy, if and when regulatory and market conditions allow. A brief description of each Coalition member follows. Members of the Loop and Transport CLEC Coalition also extend an invitation to the Commission and its staff to come to the field to have a first-hand look at the face of facilities-based competition today.

1. Advanced Telcom Inc.

Advanced Telcom is a facilities-based CLEC based in Santa Rosa, California. Advanced TelCom owns and operates fiber optic rings with associated switching and op*TRO*nic equipment in 7 me*TRO* area markets in 4 states.[49] Advanced TelCom operates 7 Digital Circuit Switches (Lucent and Nortel) located in Host Sites that are interconnected to other carriers and retail end-user customers through 24 SONET based Fiber Rings that use approximately 100 miles of ATI constructed and owned fiber and approximately 500 miles of leased dark fiber.[50] The network also requires interconnection to inter-office dedicated transport facilities to reach its ILEC collocations and ultimately its UNE's for last mile access to its retail customers. The company offers a complete set of telecommunications services including local and long distance voice, Internet access and ISP services, Web Hosting, Customer Collocation, and Integrated voice and

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[49] Wigger Decl. ¶ 2.

[50] *Id*.

data services.[51] Services are provided to more than 18,000 business customer accounts by means of a combination of the company's own facilities, unbundled network elements, enhanced extended links ("EELs"), and services purchased from ILECs, and facilities and services purchased from other competitive telecommunications carriers.

2. Birch Telecom

Founded in 1997, Birch is a multi-regional provider of local and long distance facilities-based voice and data services. Birch focuses on serving both small and medium sized businesses and residential customers in SBC's traditional Southwestern Bell Telephone Company five-state area and BellSouth's nine-state region. Birch also has a limited presence in some areas of Qwest's 14-state service territory. Currently, Birch serves over 500,000 local access lines throughout its multi-state territory. Texas is the largest of Birch's markets, with nearly 200,000 local access lines. Birch has more than 240 active collocation arrangements in various SBC central offices in Missouri, Kansas, Oklahoma, and Texas. Birch currently utilizes these collocation arrangements to provide its high-capacity digital services to medium and large businesses.

3. Broadview Networks

Broadview is a facilities-based CLEC headquartered in New York City. The company offers a complete set of telecommunications services including local and long distance voice, Internet access, Ethernet, Wavelength, Web Hosting and Integrated voice and data services.[52] Broadview provides service to approximately 230,000 voice grade equivalent business and residential lines by means of a combination of the company's own facilities and UNEs, as well

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[51] *Id*.

[52] Sommi Decl. ¶ 3.

as services purchased from ILECs, and facilities and services purchased from other competitive telecommunications carriers.[53] Broadview has recently begun to deploy its own fiber network consisting of a number of route diverse OC48 rings serving four of its five switch sites which are located in the northeast part of the United States.[54] Over the past five years, Broadview has built 179 collocations in Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania and Rhode Island.[55]

4. Eschelon Telecom

Eschelon was founded in 1996 and is a rapidly growing provider of integrated voice, data, and Internet services. The company offers a comprehensive line of integrated telecommunications products ranging from telephone systems to advanced voice and high-speed Internet services.[56] Eschelon employs more than 900 telecommunications/Internet professionals and provides telecommunications services to over 35,000 business customers with over 230,000 total access lines in 12 Tier I and II markets.[57] Eschelon currently offers service in: Denver and Boulder, Colorado; Eugene, Oregon; Minneapolis and St. Paul, Minnesota; Phoenix, Arizona; Portland, Oregon; Reno, Nevada; Salem, Oregon; Salt Lake City, Utah; Seattle, WA and Tacoma, WA.[58]

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53 *Id*.

54 *Id*. ¶ 4.

55 *Id*.

56 Kunde Decl. ¶ 3.

57 *Id*.

58 *Id*.

5. Grande Communications

Grande Communications provides both residential and commercial customers in communities in Texas with a bundled package of cable television, telephone and broadband Internet service. Grande delivers this service over its own fiber optic, SONET network that it is building in the streets and alleyways of the cities it serves. Grande's network includes its own switching capacity as well as its own long haul fiber network in Texas, Oklahoma, Arkansas and Louisiana. Grande Communications also provides network services that include services to other carriers. Since February of 2000, Grande has raised and invested almost $650 million in private equity and public debt to build its own state of the art network to bring competitive alternatives to Texas. More than 825 people are employed at Grande, building and operating its network and serving its customers. As of June 30, 2004, Grande's new deep-fiber network passed more than 288,000 homes and small businesses in Texas cities with a total population of 1.4 million, and Grande had achieved 40% customer penetration.

6. KMC Telecom

KMC is headquartered in New Jersey and has two distinct operating divisions: the Advanced Communications Services ("ACS") Division and the Nationwide Data Services ("NDS") Division. ACS is a facilities-based integrated communications provider, which supports individual businesses, institutions, and government organizations with advanced Voice, Data, and Internet services in thirty-five (35) mid-sized cities, primarily in the mid-west and the southeast. ACS owns and operates fiber optic rings with associated switching and op*TRO*nic equipment in thirty-five (35) me*TRO* area markets in seventeen (17) states. It has a Lucent 5ESS switch in each market, plus an average of sixty (60) route miles of SONET fiber. NDS is a nationwide provider of next-generation telecommunications infrastructure and services at the

network edge which provides a range of outsourcing and operations services for wireless carriers, interexchange carriers (IXCs), internet service providers (ISPs), cable MSOs, utilities and power companies looking to enhance their service offerings or expand their geographic reach.

7. NuVox

NuVox is a privately held, facilities-based provider of integrated voice, data and broadband services to small and medium-size businesses in the southeast and midwest. NuVox recently concluded a merger of equals between NewSouth Communications and NuVox Communications. The combined company provides service to approximately 38,000 customers in sixteen states, and 48 markets, ranging from major urban areas such as Atlanta to small cities such as Hickory, North Carolina. The company has invested more than $500 million in network facilities consisting of 28 Class 5 voice switches 13 core data sites with GSR-class routers, a Sonus Softswitch VIOP platform, multiplexing and other transmission-related equipment located in 280 collocation arrangements, network operations and back office systems, customer premises equipment that enables small businesses to obtain integrated services over the DS1 facility. NuVox targets small and medium-size business customers that can be served with one or more DS1 local loops. NuVox offers to these customers local voice and data services, domestic and international long distance services, dedicated high speed internet access services, unified voice, e-mail and fax messaging and other advanced services, including local and wide area network management, virtual private networks, and web-based business applications.

8. SNiP LiNK

SNiP LiNK is a facilities-based CLEC serving small businesses and institutional end users primarily in suburban southern New Jersey and southeastern Pennsylvania. SNiP LiNK is

privately held, and has been recognized five times as one of the fastest growing small businesses in the Philadelphia area.[59] SNiP LiNK provides its customers with a full suite of bundled voice and broadband services using its own switching equipment and leased ILEC transmission facilities, principally as transport UNEs.[60] SNiP LiNK's most popular product is a converged local voice and dedicated internet access product that allows customers to receive always-available dedicated Internet access and full-featured Centrex services over a single high speed line, often at rates at or below the ILEC's current Centrex price.[61] Over 50 percent of SNiP LiNK's customer base receives converged voice/data services over T-1 lines.[62] Recently, SNiP LiNK has in*TRO*duced Voice over IP services to business and residential customers.

9. Talk America

Talk America is a facilities-based CLEC based in Reston, Virginia, and owns and operates switching and op*TRO*nic equipment in De*TRO*it, Michigan.[63] The company offers a complete set of telecommunications services including local and long distance voice, Internet access, and DSL. Services are provided to more than 600,000 residential and small business customers by means of a combination of the company's own facilities, UNEs, as well as services purchased from ILECs and facilities and services purchased from other competitive telecommunications carriers.[64] Talk America operates a local facility based network in Michigan, where Talk America has over 300,000 customers and is in the process of building out

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59 Abate Decl. ¶ 3.

60 *Id*. ¶ 5.

61 *Id*. ¶ 6.

62 *Id*.

63 Brasselle Decl. ¶ 2.

64 *Id*.

a facilities-based network to service those customers, including a Lucent 5E switch in De*TRO*it, and nine collocations.[65]

10. XO

XO is now the nation's largest facilities-based CLEC. Based in Reston, Virginia, XO owns and operates fiber optic rings with associated switching and fiber optic equipment that serve 70 me*TRO* area markets in 26 states. XO now has almost 150 Class 5 circuit switches (Nortel DMS500 and Lucent 5ESS) and VoIP softswitches (Sonus). It also has deployed 7,136 route miles of its own fiber optic facilities composed of 884,827 fiber miles of me*TRO* fiber transport facilities. The company offers a complete set of telecommunications services including local and long distance voice, Internet access, Virtual Private Networking, Ethernet, Wavelength, Web Hosting and Integrated voice and data services. Services are provided to more than 180,000 business customers by means of a combination of the company's own facilities and ILEC UNEs, as well as facilities and services purchased from other competitive telecommunications carriers, and through XO's Tier One Internet peering relationships. XO also is one of the nation's largest holders of fixed wireless spectrum, potentially covering 95 percent of the population of the 30 largest U.S. cities.

11. Xspedius

Xspedius Communications, which in 2001 purchased the assets of e.spire, is a privately held facilities-based CLEC based in O'Fallon, Missouri.[66] It provides businesses across the southern United States with innovative integrated voice, data and Internet services over a

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[65] *Id*. ¶ 3.

[66] Falvey Decl. ¶ 2.

network covering more than 3,400 route miles and including 38 switches.[67] Xspedius competes with all four RBOCs (Qwest, BellSouth, Verizon, and SBC), as well as Sprint (Las Vegas) and Valor (Broken Arrow, Oklahoma). Xspedius offers switched local services in twenty states and the District of Columbia, and as of August 31, 2004 is serving 23,050 (primarily business) customers.[68]

II. THE COMMISSION'S IMPAIRMENT STANDARD IS SOUND

In the *TRO*, the FCC established a standard for determining when, applying Section 251(d)(2), a CLEC would be "impaired" by a denial of access to a non-proprietary network element. The Commission defined impairment as "a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic."[69] The Commission focused its impairment analysis on five types of entry barriers that CLECs face: (1) economies of scale, (2) the existence of sunk costs, (3) "first-mover" advantages, (4) absolute cost advantages and (5) barriers within the con*TRO*l of the incumbent LECs.[70]

In *USTA II*, the D.C. Circuit found that the FCC's impairment standard "plausibly connects factors to consider in the impairment inquiry to natural monopoly characteristics … [or] connects them (in logic that the ILECs do not seem to contest) to other structural impediments to competitive supply."[71] The court found "no statutory offense" in the FCC's use of its "broader concept of impairment" balanced by consideration of the "full context" in making an unbundling

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67 *Id.*, ¶ 3.

68 *Id*.

69 *TRO*, ¶ 84.

70 *Id.*, ¶¶ 87-91.

71 *USTA II*, 359 F.3d at 571-72.

decision.[72] The Court offered several "general observations" for the Commission's consideration in making impairment determinations on remand. First, the court addressed that portion of the Commission's standard that judged whether an impediment would make market entry uneconomic. The Court expressed concern that this standard may be "too open ended" because it does not address the type of CLEC for which the impediment must make entry uneconomic.[73] Second, the court reaffirmed *USTA I*'s holding that the FCC cannot ignore intermodal alternatives.[74] Third, the court questioned whether the Commission adequately considered impairment in markets where state regulation holds rates below historic costs.[75] These observations can be addressed by the Commission without modifying its impairment standard.

A. <u>The Core of the Commission's Definition is Sound</u>

The Court in *USTA II* specifically refrained from any general criticism of the Commission's general impairment standard articulated in the *Triennial Review Order*. Indeed, the court specifically observed that the Commission's interpretation of "impairment" in the *Triennial Review Order* represented an improvement over past efforts because the Commission "explicitly and plausibly" connected the factors to be considered in the analysis to natural monopoly characteristics and or to other structural impediments to competitive supply, such as sunk costs, ILEC absolute cost advantages, first-mover advantages, and operational barriers to entry within the con*TRO*l of the ILEC.[76] Instead, the court noted that only in the context of

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72 *USTA II*, 359 F.3d at 572; *cf. Verizon v. FCC*, 535 US at 510 (FCC may order unbundling at the expense of incentives to deploy facilities).

73 *USTA II*, 359 F.3d at 572.

74 *Id.*, 572-73.

75 *Id.*, 573.

76 *USTA II*, 359 F.3d at 571-72.

concrete application of the impairment standard to specific network elements is the impairment standard justiciable.

Thus, in the context of the current rulemaking, there is no reason to reformulate the general impairment standard adopted in the *Triennial Review Order*. The standard applied in this proceeding should continue to be "[a] lack of access to an incumbent LEC network element [which] poses a barrier to entry, including operational or economic barriers, that are likely to make entry into a market uneconomic."[77]

The Commission adopted a granular, market-by-market approach informed by the consideration of relevant entry barriers and the examination of other evidence that entry into the relevant market is uneconomic, especially evidence whether entry into the market has already occurred in both geographic and customer markets without reliance on the ILEC's network, *i.e.*, through self-provisioning or reliance of third-party provisioning.[78] The Commission focused on a number of specific entry barriers, and should continue to do so throughout the current examination: scale economies, sunk costs, first-mover advantages, absolute cost advantages, and barriers within the con*TRO*l of the ILEC, such as hot-cut delays, in the case of unbundled switching.[79] This analytic framework should, again, be retained, because nothing in the *USTA II* order brings it into question.

Regarding customer class distinctions, the Commission remained open to, but did not require as a general matter, a finding, for any given element, distinct market segments existed for

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[77] *TRO*, ¶ 84. The alternative formulation set forth by the Commission was that impairment no longer exists when "all potential revenues from entering a market exceed the costs of entry, taking into consideration any countervailing advantages that a new entrant may have." *Id.*

[78] *Id.*

[79] *Id.*, ¶¶ 85-91.

mass market, small and medium businesses, and large business, or some combination thereof.[80] Geographic granularity, too, was to be determined on an element-by-element basis, a matter which is detailed below in the separate contexts of loops and transport. Finally, the Commission conducted its impairment analysis in the context of services that competitive providers might offer using the network elements in competition with traditional ILEC telecommunications services.[81] None of the foregoing aspects of the FCC's *Triennial Review Order* require changes before impairment analyses are conducted. Consequently, much of the data and analyses prepared for the States' impairment proceedings in the wake of the *Triennial Review* decision are pertinent to the impairment investigations the FCC must now undertake.

In the *Triennial Review Order*, the Commission utilized the "at a minimum" language in Section 251(d)(2) of the statute to balance evidence of impairment with indications that unbundling would serve to undermine important goals of the 1996 Act. Thus, even where impairment was found, it is possible that unbundling would nonetheless not be required if the Act's goals would therefore be disserved. Whether that would be the case in any given scenario, of course, is a matter to be determined within the Commission's discretion.[82] Moreover, the court did not question the Commission's ability to order unbundling in situations where not *all* goals of the Act would be satisfied if unbundling were to occur.

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80 *Id.*, ¶ 123.

81 *Id.*, ¶ 141.

82 *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (agencies receive judicial deference when implementing ambiguous statutory mandates or "gaps"); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978) (agency predictive judgments warrant deference); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 410 (3d Cir. 2004) (agency is accorded highest deference when engaging in "line-drawing").

Conversely, the Commission recognized that the "at a minimum" standard would support the requirement of unbundling even in the absence of a formal finding of impairment.[83] The *USTA II* court looked upon this interpretation of the unbundling standard with approbation, specifically noting that the Commission had moved beyond a dichotomous treatment of impairment and was able to accommodate different degrees of impairment, or even the lack thereof, by "examining the full context before ordering unbundling."[84] In so doing, the court made clear that the Commission's discretion to order unbundling extended beyond those situations simply where impairment existed.

B. The Commission Can Address The Court's Concerns With, At Most, Minor Modifications To Clarify Application Of The Impairment Standard

At bottom, in light of the *USTA II*'s general acceptance of the FCC's impairment standard, the court's complaint was more about the standard's implementation with respect to specific elements and the Commission's administration of the matter. Rather than revisit the impairment standard in any general sense, the Commission should instead focus on development of criteria applicable to each element by which impairment will be assessed relative to the conceptual standard developed by the Commission in the *Triennial Review Order*. Indeed, the competitive industry can ill afford to have the agency tinker with that which the court has looked on favorably, increasing the prospect of another *vacatur* of the Commission's unbundling rules, or any significant part thereof.

Despite the general favor bestowed on the impairment standard articulated in the *Triennial Review Order*, the court did identify several areas where the impairment standard, as a

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83 *TRO*, ¶¶ 173-74.

84 *USTA II*, 359 F.3d at 572.

general matter, required further refinement or clarification, which the Commission should accommodate at this time:

a. Uneconomic Entry: Certain aspects of the FCC's general impairment standard did come under scrutiny. The Court found, "vague almost to the point of being empty," the Commission's failure to identify for whom entry was required to be uneconomic before operational and entry barriers would amount to impairment.[85] Rather than entertaining an impairment analysis based on the hypothetically "most efficient" CLEC, the Commission should look more broadly to the capabilities of most CLECs. The Commission's impairment analysis, and Sections 251(c)(3) and 251(d)(2), are geared toward determining which elements should be made available to *all* telecommunications carriers upon request. Section 251(c)(3) promises the availability of unbundled network elements "in accordance with the requirements . . . of [Sections 251 and] 252" to "*any* telecommunications carrier." Meanwhile, Section 251(c)(2)(B) refers to the question of whether "the failure to provide access to such network element would impair the ability of *the telecommunications carrier seeking access* to provide the services it seeks to offer." Reading these provisions together, the Commission's consideration of impairment is to be focused on the impairment of *any* telecommunications carrier.

Nonetheless, mindful that looking at impairment from the perspective of *any* telecommunications carrier creates the potential danger that, as the Supreme Court noted in *AT&T v. Iowa Utilities Board*, there would be no effective limiting factor,[86] it is perfectly reasonable for the Commission to pursue a middle ground. The Act does not require requesting competitive telecommunications carriers to be "optimally efficient" or to use the most advanced

[85] *USTA II*, 359 F.3d at 572.

[86] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999).

technologies. Indeed, the Act encourages, as has the Commission since its passage, that CLECs have available a variety of network architectures and infrastructures in ordre to enter a market.[87] It is natural to expect that telecommunications carriers, regardless of their exact network design or business plan, will strive toward some reasonable level of efficiency and use of existing technologies. Therefore, in light of the general availability of Section 251(c)(3) unbundled network elements once unbundling is required, it is appropriate to use a "reasonably efficient" CLEC using the telecommunications technologies currently available as the measure by which uneconomic entry is assessed.

b. Intermodal alternatives: The Commission already determined in the *Triennial Review Order* to consider intermodal alternatives, such as cable competition in broadband services. The Court acknowledged this, but reserved review of the weight assigned by the Commission to the presence of such alternatives.[88] As discussed in more detail below, the Commission should only consider the presence of intermodal alternatives an indication of relevant competitive entry where the facilities are comparable in cost, quality, and maturity to the incumbent's network elements.[89] Further, the Commission should determine whether the presence of the intermodal alternatives is not so much evidence of free competition but of unique advantages that CLECs would not enjoy, *i.e.*, cable companies often enjoy economies of scope, first mover advantages, and government franchise protections. As such, the presence of

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87 Conversely, it is appropriate and consistent with the approach advocated by the CLEC Coalition that entrenched ILECs, who historically enjoyed a legally-protected monopoly and retain vestigial benefits from that era of regulation, be held to a "most efficient" standard under the Act's analyses, *e.g.*, under the TELRIC pricing standard adopted to implement Section 252(d)(1).

88 *USTA II*, 359 F.3d at 572-73.

89 *TRO*, ¶ 97.

intermodal alternatives may have little relevance to an impairment analysis in particular markets or regarding particular elements.

c. Retail rates below historic costs; universal service: In criticizing the Commission's treatment of below-cost retail costs in the *Triennial Review Order*, the *USTA II* was most interested in the FCC's handling of impairment in the scenario where TELRIC rates were below artificially low ILEC retail rates, such that CLECs would have the opportunity to cut even further into ILEC revenues.[90] Implicitly, if not explicitly, the court expected the Commission on remand to take into account in such scenarios the impact of unbundling on ILEC revenues and, more specifically, the ILEC's ability to support the Act's universal service goals. As the Commission noted in the *Triennial Review Order*, the Act already includes a number of protections against unbundling and UNE pricing under Sections 251 and 252 putting untoward pressure on universal service obligations, in that rural and small carriers are or can be relieved of bundling obligations that apply to incumbent local carriers in general.[91]

Further, as the Commission noted, the rates principally affected in the scenario of concern to the court are intrastate rates. The Commission has properly noted that Section 252(d)(1) is a cost-based rate standard. If impairment is found, the Commission should not take into account considerations unrelated to the criteria in Section 252(d)(1). This has already been approved by the Supreme Court. If the UNE rates are arguably too low, such that an ILECs thin margins may be threatened, the States are free, in recognition of the consumer welfare within their borders, to adjust retail rates in a way that promotes competition. As the court noted, retail

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90 *USTA II*, 359 f.3d at 575.

91 *TRO*, ¶ 162; *see also* 47 U.S.C. §§ 251(f)(1) (rural carrier exemption); 251(f)(2) (small carrier suspensions).

rates can be set so low as to prevent CLEC entry even at TELRIC pricing.[92] Not to put too fine of a point on it, but if the presence of such rates is not a factor the Commission can consider, even if only under the "at a minimum" clause, then the central goal of the 1996 Act will be frustrated. The Commission's consideration of such rate levels as a barrier to entry is proper.

III. THE COMMISSION SHOULD RETAIN THE ROUTE-SPECIFIC AND CAPACITY-SPECIFIC APPROACHES TO EVALUATING IMPAIRMENT FOR DEDICATED TRANSPORT UNES

With respect to high-capacity loops and transport, the Commission determined that it should evaluate impairment for each capacity level (*e.g.*, DS1, DS3, and OCn). The Commission also concluded that it would analyze impairment on a route-specific basis. In *USTA II*, the D.C. Circuit criticized the route-specific approach (for dedicated transport) to the extent it ignored deployment of transport facilities along "similar routes."[93] Using as an example transport routes between three points, A, B and C, where the points are in the same geographic market and "are similarly situated with respect to the barriers to entry that the Commission says are con*TRO*lling," the court stated that the Commission cannot ignore ("without a good reason") deployment along the A-B route when deciding whether CLECs are impaired on the A-C route.[94] Although the court was satisfied with the Commission's explanation why deployment on the A-B route was not sufficient to demonstrate that barriers to entry on the A-C route could be overcome, the court held that the Commission had not adequately explained why, in its view, the Commission treated deployment on the A-B route as irrelevant.[95]

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92 *USTA II*, 359 F.3d at 573.

93 *Id.*, 575.

94 *Id.*

95 *Id.*

A. A Route-Specific Analysis Should Be The Centerpiece Of The FCC's Impairment Analysis

At the outset, it appears that the court's primary concern with the Commission's dedicated transport analysis relates to only one application of the route-specific approach. The court addressed what it saw as an "implicit decision" to treat similar routes as irrelevant to the impairment analysis for a particular route. The court did not discuss the Commission's potential deployment test for transport routes not meeting the triggers, and it appears that the court may have been unaware of this additional element of the *TRO*'s analysis. Thus, the decision may be explained more by this omission than by a failure of the Commission to consider deployment in similar circumstances.

Putting that aside, the scope of the problem identified by the court is very narrow. The court's specific example of a "similar route" was very carefully circumscribed; it describes a scenario where the two routes in question are very nearly identical in that despite the different end points, the routes are in the same geographic area and are similarly situated with respect to the barriers to entry that the Commission identified. The criticism thus affects only this particular application of the route-specific test and the Commission's response should be directed toward this particular application. As shown below, this can be done through time-saving refinements to the route-specific approach.

In the ordinary instance, the Commission's application of a route-specific test will produce the correct result. The Commission concluded that it is appropriate to analyze transport at a route-specific level because this approach "will provide the most accurate determination of

impairment."[96] The Commission was correct in this factual determination. The route-specific approach yields the most accurate impairment determinations because it most closely mirrors the way that CLECs encounter impairment. When the Joint Commenters decide whether to self provision interoffice transport facilities, they do so by evaluating their specific needs between two central office locations and their ability to deploy facilities on an economic basis in that instance.[97] The factors weighed in that decision include a number of elements unique to the particular area where the facilities are needed. For example, carriers will consider the availability of rights-of-way between the two end points.[98] They will consider whether the route is an urban, suburban or rural area, and the expected construction costs associated with deploying facilities along that particular route. They also will consider the time it will take to deploy facilities, including the impact of local permitting requirements, safety codes, environmental restrictions and any applicable construction freezes. Some routes can cost two or three times more to build in an area than a route of similar length in a different area.

Carriers also would not make a decision to deploy facilities between two end offices without considering route-specific characteristics of the end offices and the expected level of traffic between those locations. Carriers typically deploy transport facilities only after they reach a sufficient concentration of traffic and they have a reasonable prospect of recouping the

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96 *TRO*, ¶ 401.

97 As Wil Tirado explains for XO, "our decision to self-deploy interoffice facilities is driven by the demand for our services on a particular route, … the decision of whether to construct interoffice facilities is *route-specific* and is driven by the *density of business traffic on a particular route*." Tirado Decl. ¶¶ 38-39 (XO) (emphasis added). Talk America states that it "is committed to deploying its own facilities wherever such construction can be economically justified." Brasselle Decl. ¶ 5 (Talk America). According to Mike Duke of KMC, "[o]nly the largest enterprise customers could justify such an investment." Duke Decl. ¶ 9 (KMC). Broadview states that it took 3 years for it to amass the traffic necessary to justify building transport facilities. Sommi Decl. ¶ 5 (Broadview).

98 As explained by SNiP LiNK, the difficulties in obtaining right of way and pole attachments are considerable, even for a relatively simple network build. Abate Decl. ¶¶ 13-16 - (SNiP LiNK).

deployment costs.[99] As a result, a CLEC's fiber rings ordinarily will connect to only a handful of ILEC central offices. CLECs would not connect to every central office in a market, nor could they.[100] Instead, CLECs make decisions on which routes to build based on the barriers to entry faced with respect to that route, and its reasonable expectation that it will recover the costs of deployment over a reasonable period of time. Whether a CLEC is impaired without access to any particular transport route will depend upon application of the same factors.

Route-specific variations are particularly pronounced in the case of alternatives outside the ILEC network. All of the members of the Loop and Transport CLEC Coalition look to purchase transport facilities from non-ILEC wholesalers whenever possible. They *prefer* to deal with a competitive supplier, as these entities often prove to be more willing wholesalers than the ILECs. But practical experience shows that a need for dedicated transport always is route-specific, and the availability of transport will vary dramatically depending upon the route.[101] For example, Advanced Telecom is able to use a competitive wholesale provider on fewer than 20% of the routes where it needs transport.[102] SNiP LiNK was unable to locate wholesale providers serving its needs for backhaul transport between central offices for more than a few specific routes in Philadelphia.[103] The fact that a competitive wholesale provider offers dedicated

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99 *See* Abate Decl. ¶ 10 - (SNiP LiNK); Sommi Decl. ¶ 5 (Broadview); Tirado Decl. ¶¶ 38-39 (XO).

100 As the Commission has repeatedly recognized, no CLEC would be able in a short period of time to replicate the extensive transport networks that the ILECs have deployed over the course of 100 years of monopoly protection. *See e.g., Local Competition Order*, 11 FCC Rcd. at 15, 510, ¶ 14.

101 *See* Sommi Decl. ¶ 12; Abate Decl. ¶ 18.

102 *See* Wigger Decl. ¶ 43. *See also* Brasselle Decl. ¶¶ 9-10 (noting that Talk America has been able to use competitive whole providers in approximately 35% of its routes.).

103 *See* Abate Decl. ¶ 18.

transport between some locations in a market is not meaningful unless the provider is offering dedicated transport on the route where the CLEC requests service.

From an economic perspective, a route-specific test also is appropriate. According to the *MMBW Study* use of the proper market definition for analyzing impairment is central to sound decisionmaking. As explained in the *MMBW Analysis*, the standard economic approach to geographic market definition draws upon the concept of geographic demand-side substitutability.[104] That is, the geographic market should be defined by the smallest area for which a hypothetical monopolist that was the only present and future producer in that "market" would and could impose a small but significant and non-transitory price increase, holding all other factors constant.[105] In the case of dedicated transport, demand-side geographic substitutability for telecommunications services such as those provided by using enterprise loops and transport is extremely low.[106] If a monopolist were to impose a small but significant and non-transitory price increase on the route from A-B, a customer would be "extremely unlikely" to substitute calling on a different route, for example, from A-C. Because demand-side substitution is extremely unlikely, the Commission's determination of customer-by-customer and route-by-route markets for dedicated transport is entirely sound and highly unlikely to give rise to "error costs."[107]

Because the route-specific approach produces the most accurate result, it should remain as the core of the Commission's impairment analysis. There is no justification for deviating

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104 *See MMBW Analysis* at 33,¶ 58.

105 *Id.* at 34 ¶ 59.

106 *See* i*d.*

107 *Id.*

from the route-specific approach when the routes are not similar in the way described by the court. If two routes do not share the same barriers to entry, then the routes are distinct for impairment purposes. In fact, to treat dissimilar routes in a similar manner would conflict with the *USTA II* court's admonition that an agency cannot proceed by very broad categories where the relevant markets "vary decisively" with respect to the impairment criteria.[108]

Moreover, where routes do share similar characteristics, the court recognized that deployment on the A-B route, is not sufficient, by itself, to find non-impairment on the A-C route.[109] The court's acknowledgement of this distinction – and explicit approval of the FCC's reasoning on the point -- is implicit agreement with the proposition that each route possesses different impairment factors; in other words, that impairment must be analyzed in each and every instance.

As described more fully in Section __, infra, the Loop and Transport CLEC Coalition recommends that the Commission refine its process for examining specific routes to streamline the analysis. The Commission can do this by grouping transport routes into categories of routes with similar characteristics. Importantly, these routes should be grouped based on characteristics that reflect the barriers to entry present on each particular route. By grouping routes with similar barriers to entry together, and then identifying appropriate criteria for finding non-impairment on those groups of routes, the Commission can have a reasonable assurance that its tests do not ignore deployment on routes containing similar barriers to entry.

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108 *See USTA II*, 359 F.3d at 570.

109 *See USTA II*, 359 F.3d at 575.

B. The FCC's Capacity-Specific Approach is Wise

USTA II did not criticize the Commission's decision to analyze impairment separately by the capacity needs of the requesting carrier, and rightly so. The record clearly established that impairment differs based on the capacity needed by the requesting carrier. As the Commission explained in the *TRO*, the capacity that a requesting carrier requires on a particular route "is a reliable measure of the ability of competing carriers to incur additional costs related to obtaining transport from an alternative provider, or self-providing [the facility.]"[110] This flows from the entirely logical proposition, unchallenged by the ILECs, that the lower the available capacity, the more difficult it is for a carrier to recover the substantial fixed and sunk costs associated with deploying the facility. In short, the ability of a requesting carrier to overcome the barriers associated with deploying transport facilities is driven by the density of business traffic on a particular route.[111] For this reason, the Commission should continue to examine transport facilities on a capacity specific basis.

C. Alternatives to a Route-Specific Analysis Create a Substantial Risk of "False Positives" Eliminating Access

The Court noted that, "any process of inferring impairment *(or its absence)* from levels of deployment depends on a sensible definition of the markets in which deployment is counted."[112] None of the alternatives presented by the ILECs in their *ex parte* filings rely on a sensible market definition for impairment purposes. Rather than rationally connecting impairment to the facts, these alternatives create a considerable risk of falsely identifying non-impairment in instances when CLECs are impaired without access to UNEs.

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110 *TRO*, ¶ 377.

111 Tirado Decl. ¶¶ 38-39 (XO); Sommi Decl. ¶ 5 (Broadview); Brasselle Decl. ¶ 6 (Talk America).

112 *USTA II*, 359 F.3d at 574 (emphasis added).

The principal alternative suggested by ILECs is an MSA-wide determination.[113] The Commission has already rejected this approach because it is overbroad. As the Commission stated in the *TRO*, use of an MSA approach "could permit unbundling on routes where no impairment exists, or foreclose access to unbundled transport on routes where impairment does exist."[114] This determination was adequately supported by the record in the *TRO*. Widespread fiber deployment was "most prominent in the largest me*TRO*politan areas,"[115] but such deployment was not uniform throughout a given area. Whether there is or will be a competitive supplier of interoffice facilities available is not a function of a me*TRO* area, a MSA or even a density zone. In each of those cases, you are likely to find a mix of routes where competitive supply can exist and those where it cannot.[116]

IV. ILEC SPECIAL ACCESS SERVICES ARE NO SOLUTION FOR THE IMPAIRMENT EXPERIENCED BY CLECS USING HIGH-CAPACITY FACILITIES

The availability of ILEC tariffed special access services does not merit significant weight in any impairment analysis under Section 251(c)(3) for high-capacity loops and transport. ILEC special access services are already priced far above cost and are on the rise, making economic use of them by wireline competitors impossible. As the record presented herein shows, where CLECs utilize tariffed special access services, they overwhelmingly do so only on a temporary

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113 Verizon *Ex Parte* in CC Docket 01-338, Competing Providers Are Succefully Providing High-Capacity Services To Customers Without Using Unbundled Elements, Pg. 20 (Jun. 2004) ("*Verizon Ex Parte*").[114] *TRO*, ¶ 402.

115 *TRO*, ¶ 378 n.1159.

116 *See* Falvey Decl. ¶ 32 (Xspedius) ("Whether there is or will be a competitive supplier of interoffice facilities available is not a function of a me*TRO* area, an MSA, or even density zone. In each of these cases, you are likely to find a mix of routes where competitive supply can exist and those where it cannot."); Tirado Decl. ¶ 39 (XO).

basis or where no real alternatives exist to permit them to enter into or expand within a local market. Absent the development of significant competition to constrain the ILECs' market power in the relevant markets for special access, or a radical restructuring of special access price regulation to simulate pricing in a robustly competitive market, the mere availability of special access facilities should be accorded no weight in any impairment analysis. Indeed, under the *USTA II* decision, the Commission is justified in creating a blanket rule treating the availability of ILEC tariffed service as irrelevant to impairment.

A. When Conducting An Impairment Analysis, *USTA II* Requires Only That The Commission Consider The Possibility of ILEC Tariffed Access Services As An Alternative To ILEC Unbundling Obligations Under Section 251(c)(3).

In the *Triennial Review Order*, the FCC reaffirmed its prior conclusion that, in any impairment analysis, "little weight" should be afforded to evidence that requesting carriers are using ILEC tariffed services, such as special access, to provide their retail services.[117] In so doing, the FCC again concluded that it would be inconsistent with the purposes of the 1996 Act to permit ILECs "[t]o avoid all unbundling merely by providing resold or tariffed services as an alternative" because this would allow ILECs unilaterally "[t]o avoid unbundling at TELRIC rates simply by voluntarily making elements available at some higher price."[118]

However, in *USTA II*, the D.C. Circuit found that the FCC's impairment analysis "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired."[119] Specifically, the court held that the Commission could not

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117 *TRO* ¶102.

118 *TRO* ¶102.

119 *USTA II, 359 F.3d* at 577.

"arbitrarily" exclude alternatives to unbundling other than self- and third-party provisioning, such as tariffed special access services.[120] The Court directed the FCC, on remand, to consider evidence of the use of tariffed special access offerings when determining which facilities must be unbundled.[121]

But the court also unmistakably acknowledged that the Commission can assemble a record justifying a finding of impairment and determine that no weight should be given to the availability of special access in an impairment analysis. Specifically, the court's implicit directive to the FCC was to develop "an appropriate record" that considers the significance, if any, of the fact that ILEC-tariffed special access services are available when determining whether would-be-entrants are impaired. Importantly, the court did not mandate a finding that where special access alternatives to unbundling exist, impairment may not be found. To the contrary, the D.C. Circuit opined that "on an appropriate record the Commission might find impairment *even when services were available from ILECs outside of section 251(c)(3),*"[122] and that the availability of ILEC tariffed special access could very well be "irrelevant to impairment," provided that the Commission adequately explains its analysis.[123] The Court further clarified that the Commission is free to take into account relevant factors such as ease of administration and the risk of ILEC abuse, factors that "might in principle support a blanket rule treating the availability of ILEC tariffed service as irrelevant to impairment."[124]

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120 *Id.*

121 *Id.*

122 *Id.*, at 576 (emphasis added).

123 *Id.*

124 *Id.*

To develop an adequate record on this issue, the *NPRM* sought comment "on how various incumbent LEC service offerings and obligations, such as tariffed offerings . . . fit into the Commission's unbundling framework."[125] As shown hereafter, ILECs' have misused the pricing flexibility afforded them by the Commission to increase special access pricing to altitudinous levels. By choosing to price their special access services grossly above cost, ILECs have themselves forfeited any notion that new entrants can use them to compete effectively. As a consequence, the mere availability of special access simply cannot support a finding of no impairment. Although certain ILECs contend that competitors make heavy use of special access under tariff pricing today, as detailed herein, the data upon which they rely actually underscore the difficulties that CLECs face in obtaining high-capacity loop and transport UNEs. The data does not, as the ILECs would have the Commission believe, prove that CLECs are able to compete effectively by relying on tariffed special access services.

On the contrary, the manner in which the ILECs provide special access show that there are innumerable and significant barriers to entry associated with special access and that to date, those barriers are have not been overcome by the market.[126] To this end, the studies filed in the FCC's pending special access dockets and the MMBW Study commissioned for thie proceeding demonstrate that if competitors were to rely on special access in the absence of a Section 251(c)(3) unbundling requirement, they would not be able to compete with the ILECs in any meaningful fashion. Consequently, the Commission should adopt a blanket rule that the mere availability of special access is inconsequential to its impairment analysis.

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125 *See Interim Order and NPRM*, ¶ 9.

126 *See generally* Economics and Technology, Inc., *Competition in Access Markets: Reality or Illusion, A Proposal for Regulating Uncertain Markets*, at 8 (Prepared for Ad Hoc Telecommunications Users Committee, Aug. 2004) ("*ETI Access Study*").

B. Non-Cost Based ILEC Special Access Service Rates Are Much Too High To Overcome CLEC Impairment.

The notion of "leveling the playing field" is a fundamental tenet underlying the 1996 Act. Congress recognized that new entrants could not possibly replicate overnight the ubiquitous legacy networks constructed by monopoly ILECs and funded over a century's time by captive ratepayers. To put new entrants on a reasonably equal footing, Congress crafted Sections 251-252 to provide them access to unbundled network facilities *at cost-based rates*. Providing access to ILEC facilities simply is not helpful if they are priced so high as to provide ILECs an inherent advantage in pricing end user services. That is precisely why ILEC special access services cannot sustain entry by wireline competitors. Recent studies reveal that ILECs, *on average*, post a 40% rate of return on capital investments in special access facilities. Indeed, ILEC special access pricing practices over the past five years have been a consistent pattern of substantial and sustained pricing abuse under the pricing flexibility regime instituted by the Commission.[127] Priced exorbitantly above cost, ILEC special access services simply cannot be integrated economically into CLEC networks on a widespread basis. Consequently, the availability of tariffed special access facilities is no bar to an impairment finding in any relevant market.

1. ILEC Special Access Pricing Is And Will Continue To Be Too High To Sustain Competitive Market Entry.

An analysis of the pricing of ILEC special access services reveals exorbitantly priced ILEC special access services, subject to no meaningful con*TRO*ls and evidencing the total lack of competition for high-capacity loops and transport facilities.[128] The high prices for special

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[127] *See* George S. Ford & Lawrence J. Spiwak: "*Set It and Forget It? Market Power and the Consequences of Premature Deregulation in Telecommunications Markets*," (Phoenix Center Policy Paper No. 18) (Jul. 2003) ("*Phoenix Center Paper*").

[128] *See generally ETI Access Study* and *Phoenix Center Paper*.

access may be traced, in part, to the Commission's 1999 *Pricing Flexibility Order* in which the Commission granted the ILECs greater pricing flexibility for special access services "[a]s they face increasing competition."[129] The special access pricing flexibility rules permit the ILECs essentially to obtain complete freedom from price regulation based on little or no showing of facilities-based competition.[130] Indeed, in Phase II of the Commission's pricing flexibility regime, an ILEC is freed entirely from price cap regulation (which the Commission has relied on as an important safeguard against anticompetitive pricing behavior) *even where* it faces no facilities-based competition on any channel termination route and no competition on the vast majority of interoffice transport routes in an MSA.[131] Although the Commission intended for its special access pricing flexibility rules to result in decreased rates in areas where the Commission believed competition would force prices to market levels, this unfortunately has not proven true.

On the contrary, special access pricing has risen dramatically under the pricing flexibility regime. The Phoenix Center for Advanced Legal and Economic Public Policy Studies ("Phoenix

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129 *In re Access Charge Reform*, Fifth Report and Order, 14 FCC Rcd. 14221, 14272 ¶ 93 (1999) ("*Pricing Flexibility Order")*. As used by the Commission, "pricing flexibility is a mechanism that deregulates narrow portions of a dominant firm's business as it presumably becomes competition without have to deregulate the entire firm." *Phoenix Center Paper* at 12.

130 Under the pricing flexibility rules, flexibility is granted in two steps or phases. In Phase I, ILECs receive the right to offer volume and term discounts and to enter into contract tariffs (in which they tailor the price and service to the "individualized" needs of a particular customer). In order to receive such flexibility for transport services, the ILEC need only show that *one* collocated carrier using non-ILEC interoffice transport is present in 15 percent of the wire centers in the MSA or in wire centers representing 30 percent of the ILEC's revenues from dedicated transport and special access services other than channel terminations between ILEC end offices and end user premises in an MSA. The standards for Phase II pricing flexibility are substantially the same, with the exception that non-affiliated carriers must have collected in 50 percent of the wire centers in the MSA or in wire centers representing 65% of the ILEC's revenues from dedicated transport and special access services other than channel terminations between ILEC end offices and end user premises in an MSA. Notably, no information is required or sought regarding *the routes* on which transport is being provided from those wire centers. *Pricing Flexibility Order* ¶ 24-25. In the *Triennial Review Order*, the FCC required non-impairment showings to be made on a route-by-route basis. ¶¶ 202, 314 *et. seq.* So the ILECs' proposal to rely on the pricing flexibility rules as a check on discontinuation in the provision of special access along specific routes would be unjustified.

131 *See Pricing Flexibility Order* ¶153.

Center") last year found that the FCC's 1999 deregulatory scheme for special access has resulted in substantial and sustained price increases for special access in areas where the ILECs were granted pricing flexibility for such services.[132] After detailed study, the Phoenix Center found that, on average, the rates subject to pricing flexibility over the previous four years were substantially higher than previous regulated rates, and were sustained over a significant period of time.[133] The authors showed that, while the amount of the increase varies substantially among ILECs, deregulated rates exceed the regulated rates for all ILECs. The chart below summaries the analysis:[134]

AVERAGE % PRICE INCREASE OF UNREGULATED SPECIAL ACCESS SERVICES

	BellSouth	SBC	Verizon	Qwest
DS1	3%	10%	14%	20%
DS3	12%	10%	10%	0%

The Phoenix Center concluded that the majority of the price increases were accounted for by the increased ability of the ILECs to exercise their market power, not an increase in costs:

> [T]the price increases for Special Access services where pricing flexibility is granted appear to be predominantly *driven by market power and not costs*. Consequently, it appears that the wide geographic markets and collocation triggers of the Commission's [pricing flexibility] deregulatory paradigm have led to an increased exercise of market power in (at least some) Special Access markets, thus placing an unnecessary drain on the U.S. economy.[135]

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132 *Phoenix Center Paper* at 8.

133 *Id.*, 23.

134 *Id.*, 23, 25 & Table 1.

135 *Id.*, 27 (emphasis added).

The Phoenix Center concluded that the Commission unduly relied upon abstract measures of competition in its pricing flexibility triggers. While the Commission insisted that its collocation triggers and MSA market definition were "sufficient to preclude the incumbent from exploiting any monopoly power over a sustained period," the Phoenix Center found no evidence that the Commission engaged in any market power analysis to confirm this position.[136] They aptly concluded that "without evidence, the Commission's expectations are nothing more than assertions . . .[because] [t]he Commission presented no evidence in support of its assertion that its collocation triggers represented sufficient competition to check ILEC market power."[137] This conclusion was shared by the MMBW Analysis which determined that "RBOCs have taken advantage of pricing flexibility to raise special access rates in the geographic areas no longer subject price caps."[138]

Revealingly, in the *Triennial Review Order*, with several years of experience under pricing flexibility, the Commission itself determined that satisfaction of the Commission's pricing flexibility triggers provide no evidence that competition in high-capacity loop and transport alternatives exists:

> The record indicates that incumbent LECs have qualified for special access pricing flexibility in numerous MSAs throughout their regions, almost exclusively by meeting the triggers based on special access revenues. Because the revenue trigger requires only a single collocated competitor and the purchase of substantial amounts of special access in a concentrated area, *this test provides little or no indication that competitors have self-deployed*

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136 *Id*., 19, 22.

137 *Id.*

138 *MMBW Analysis at 60*, ¶ 116 (emphasis in omitted.)

> *alternative facilities, or are not impaired* outside of a few highly concentrated wire centers.[139]

A more recent study conducted by the Boston-based telecommunications consulting firm, Economics And Technology, Inc. ("ETI"), went even further in its analysis. Whereas the Phoenix Center focused on historical price trends, ETI analyzed how special access rates compare to special access related costs of service. ETI reviewed the pricing practices for DS1 and DS3 special access services of each of the four BOCs – BellSouth, Qwest, SBC and Verizon – and found a substantial increase in both BOC special access prices and associated earnings:

> Unfortunately, the net effect of the FCC's *Pricing Flexibility Order* has been an *increase in prices and an increase in ILEC earnings*. Clearly, additional entry has not continued to occur at a level sufficient to constrain pricing, and the ILECs have been able to exercise their ability to raise prices to monopoly levels. For example, in Manhattan (the largest and arguably the most competitive telephone market in the country), Verizon's prices for DS1 special access have increased by almost ten percent since Phase II pricing flexibility was granted. And this situation is not unique to New York City: price increases in the range of ten percent have occurred in other areas subject to Phase II pricing flexibility such as Baltimore, Philadelphia, Springfield (MA), and Washington D.C. In other words, the current regulatory scheme has permitted carriers to charge higher prices to customers in ostensibly "competitive" markets and lower prices to customers in markets without evidence of competition. This is precisely the opposite of the outcome that had been predicted by the FCC, and the opposite of what one would anticipate if price-constraining competition actually existed. [140]

ETI determined that current special access prices exceed underlying costs, *on average,* **by 43%**.[141] These findings were echoed in the recent study conducted by MiCRA, which found that special access rates are now set sufficiently high to provide with ILECs with a profit margin on

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139 *TRO*, ¶ 397 (emphasis added).

140 *ETI Access Study* at 37 (citations omitted)(emphasis in original).

141 *Id*., iv.

capital investments of **over 40%** on average,[142] and by the MMBW Analysis which confirms that in 2003 special access earnings averaged **43.7%** for all of the RBOCs.[143]

The fact that ILECS have been granted complete pricing flexibility for special access after demonstrating only the existence of an abstract indicator that competitive provision of special access in part of their territory *might develop* has resulted in a situation in which ILEC special access pricing is no longer restrained by either market forces or regulatory review. The pricing practices of the ILECs demonstrate conclusively that, under the existing regulatory regime, there is simply no connection between special access pricing and ILEC costs of service; and thus tariffed special access services are not an economic alternative for competitive carriers seeking to replace unbundled loops and transport.

2. Special access rates are much higher than the cost-based TELRIC rates established by state commissions after investigation in accordance with Commission rules.

Unlike special access, which ILECs now normally can price at their whim without regard to cost, UNE pricing is established by state commissions in accordance with the FCC's TELRIC costing principles. The divergence between special access prices and TELRIC rates for comparable facilities is telling. The MiCRA study found that special access rates contain substantially higher charges for transport mileage between ILEC wire centers and for termination of transport facilities in ILEC wire centers. Loop rates also are much higher under special access tariffs than the equivalent rates for UNEs.[144] Thus, although UNEs are functionally equivalent in many ways to high-capacity loops and transport, the ILEC tariffs make it evident that the rates

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142 *MiCRA Study* at 4

143 *MMBW Analysis at 60,* at ¶ 112 (citing ARMIS Reports 43-01, 43-04.)

144 *MiCRA Study* at 1.

charged for special access services are substantially higher than those charged for the use of the similar UNE facilities.[145]

The experience of the Joint Commenters bears this out. Several of the Joint Commenters have appended charts to their Declarations, showing the prices that they currently pay to purchase DS1 level special access on a state-by-state basis, as compared with the amount that such CLECs currently pay for DS1 UNE loops in the corresponding states. As can be seen by such charts, the differential in the pricing of special access services as compared to UNEs is of critical importance. These charts reveal that CLECs commonly must pay well over 100% more – often 300-400% more -- to purchase connections to buildings as DS1 special access as compared with the costs of purchasing DS1 UNEs.[146] Indeed, in some states, the difference is as high as 6,000-13,000%! [147] Moreover, even where CLECs are "willing" to accept special access plans with terms of 5 years or more, they nevertheless have experienced increased costs of more than 300% -- such as with Bell South in Florida --[148] where CLECs purchase ILEC tariffed special access services in lieu of cost-based UNEs. As a result, in most areas, ILEC special access prices far exceed the prices for corresponding UNEs and thus special access does not provide an economically viable substitute to UNEs for competitive carriers.

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145 *MiCRA Study* at 4.

146 *Id.*

147 Brasselle Decl. ¶ 12, *Attachment A* (Talk America). Talk America estimates that use of special access "exclusively for interoffice transport would more than double" its cost of service. *Id.* ¶ 14.

148 Tirado Decl. *Attachment B* (XO).

3. Special access pricing is not likely to improve – particularly where access to UNEs no longer is required.

Importantly, there is no reason to believe that ILECs will reduce special access rates in the foreseeable future to be more closely aligned with cost-based UNE prices. Indeed, market evidence indicates that the reverse is true. Over the past few months several ILECs have filed for substantial, across-the-board increases in special access rates.[149] In addition, after the existing rules requiring ILECs to provide high-capacity UNEs were vacated by *USTA II*, some of the Joint Commenters attempted to negotiate "commercial alternatives" with the major ILECs, only to find the ILECs unwilling to offer any meaningful new volume and term special access discount plans, a foreshadowing of what is all but certain to happen if impairment is not found. Thus, in actuality, CLECs are observing a trend showing a *steady increase* in special access pricing – this despite the fact that, as noted herein, ILECs already are realizing monopolistic profit margins averaging 40% or more on the service.[150]

C. ILECs Inevitably Will Use Special Access Pricing To Subject CLECs To A Cost-Price Squeeze.

ILECs have a powerful incentive to subject their CLEC competitors to a classic "cost-price squeeze" and, not surprisingly, have done so with their special access rates.[151] The ILECs are well aware that competitive carriers rely upon the availability of ILEC loop and transport facilities to reach customers, and that competitive carriers must pass through any ILEC loop and

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149 Wigger Decl. ¶ 50, *Attachment 1* (Advanced TelCom); Brasselle Decl. ¶ 12, *Attachment A* (Talk America); Tirado Decl. *Attachment B* (XO); *see also* Sommi Decl. ¶ 13 (Broadview) (explaining that the cost to Broadview of a 15-mile circuit in New York at Verizon's special access rates would amount to *an increase of 220% for the circuit and an increase of 900% in the mileage element*) (emphasis added).

150 *See* Section IV.B.1., *supra.*

151 *See* Wigger Decl. ¶ 54 (Advanced TelCom); Brasselle Decl. ¶ 16 (Talk America); Falvey Decl. ¶ 41 (Xspedius); Tirado Decl. ¶ 48 (XO).

transport charges to their customers in order to compete. If the sole option for CLECs is to purchase special access services which are not price-regulated, the ILECs consequently are able to inflate CLECs' cost of service substantially, resulting in a classic "cost-price squeeze," the ultimate goal and impact of which would be to significantly reduce CLEC market share in the relevant market and ultimately, to force CLECs from the market. As the *MMBW Analysis* concluded:

> RBOCs have taken advantage of pricing flexibility to raise special access rates in the geographic areas no longer subject to price caps. This fact, by itself, proves that the supposed alternatives to ILEC loop and transport are not exerting much of a constraint on prices for these services. Given this experience over the last several years, it is inconceivable that the ILECs would not take the opportunity created by the elimination of UNEs to put the CLECs into a price squeeze by maintaining lower prices on retail services, as their competitors face a large input cost increase.[152]

The Commission itself has consistently found that, where an ILEC has market power over an upstream input needed by competitors in downstream markets, the ILEC has powerful incentives to engage in price and non-price discrimination in the provision of that input to competitors.[153] As the Commission explained in the context of advanced services (which are quickly emerging as a core offering of many CLECs):

> Because incumbent LECs . . . compete with other providers of advanced services, they have an incentive to discriminate against companies that depend on them for evolving types of interconnection and access arrangements necessary to provide new services to consumers. They also have the incentive to limit or con*TRO*l the development of new services to the extent new services compete with their current offerings. In addition,

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152 *MMBW Analysis* at 60, at ¶ 116 (emphases and footnotes deleted).

153 *See USTA II, 359 F.3d* at 576.

> competitors often are totally dependent on incumbent LECs for last mile wireline access to end users.[154]

Similarly, the Commission observed in the context of wireline long distance services that, "as long as the BOCs retain con*TRO*l of local bottleneck facilities, they could potentially engage in improper cost allocation, discrimination, and other anticompetitive conduct to favor their affiliates' in region, interLATA services." [155]

Indeed, the Commission has recognized that "absent appropriate safeguards" a BOC is likely to engage in such exclusionary discrimination.[156] In the context of BOC provision of in-region interexchange services, the FCC held that the risk of such discrimination could be addressed by a combination of separate affiliate requirements, price cap regulation of BOC exchange access services and the "*ability of competing carriers to acquire access through the purchase of unbundled network elements*."[157] In addressing price squeezes in the context of that proceeding, the FCC placed special emphasis on the availability of UNEs. It explained that:

> [w]e agree with commenters that assert that the risk of the BOCs engaging in a price squeeze will be greatly reduced when interLATA competitors gain the ability to purchase access to the BOCs' networks at or near cost. . . . As noted, we believe that the ability of competing carriers to acquire access through the purchase of unbundled elements enables them to avoid originating

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154 See *Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer ConTROl of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14712, ¶ 202 (1999) ("*SBC-Ameritech Merger Order*").

155 *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Second Report and Order*, 12 FCC Rcd. 15756, ¶ 26 (1997) ("*LEC Classification Order*") ¶ 134.

156 *LEC Classification Order*, ¶ 125.

157 *Id.*, ¶126 (emphasis added).

> access charges and thus partially protect themselves against a price squeeze.[158]

Thus, the availability of cost-based UNEs, in the view of the Commission, provided the best protection against exclusionary price discrimination by RBOCs. The FCC specifically acknowledged that above-cost access charges could create opportunities for BOCs to engage in price squeezes, and it rejected the BOCs' argument that price squeeze strategies would be unprofitable.

The question, then, is – in the absence of cost-based UNEs -- whether the regulations applicable to special access are adequate to limit the ILECs' ability to act on their incentive to discriminate against competitors. Quite simply, especially when considered in light of the ILECs' track record under pricing flexibility, they are not. As demonstrated in the studies cited above, the ILECs can and will use their market power to "deny, delay and degrade" new market entry and erosion of their market share.[159] The fact that ILECs may have qualified for pricing flexibility is no indicator that there is competition and thus non impairment in the relevant wireline markets for special access. Neither sufficient regulatory safeguards nor competition actually exist to constrain the ILECs' market power Although the FCC may have imposed regulatory safeguards on the ILECs in other proceedings, there presently are no regulatory safeguards on the ILECs with respect to special access sufficient to constrain ILEC market power and ensure competition in the relevant market.

Elimination of UNEs would exacerbate the danger of ILEC special access price discrimination. The fact that UNEs heretofore have existed as an alternative to special access

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158 *Id.*, ¶ 130.

159 *Phoenix Center Paper* at 4.

services may be said to have *somewhat* curtailed ILEC predatory/abusive practices *vis a vis* special access because, at least until recently, CLECs theoretically had access to UNEs in lieu of special access. Should CLECs be faced with no alternative but the purchase of ILEC tariffed special access services, ILECs inevitably would be free to act on all of their powerful incentives to discriminate without constraint.

Therefore, any delisting of UNEs will have the adverse effect of eliminating the only meaningful source of price competition for special access in most areas and further increasing special access pricing. One must be ever cognizant of the fact that the ILECs profit more from CLECs exiting the market than they do by CLECs purchasing their special access services. As was observed by the *MiCRA Study*:

> If access to DS1 loop and transport UNEs were to be eliminated . . . CLECs using these UNEs would be forced to confront an immediate decision: either to substitute services obtained under the Special Access tariff for DS1 UNEs or to exit the market for provision of services based on these UNEs … [T]he end result of either 'decision' is for the CLEC to exit the small business market.[160]

D. ILEC Claims That CLECs Already Use Special Access To Compete Successfully – And Thus That "Competition" Exists In The Market -- Are Grossly Misleading.

ILEC claims that CLECs are already relying on special access as an alternative to UNEs, and therefore that they are not impaired in the provision of service without UNEs are unfounded and plainly incorrect.[161] Members of the Loop and Transport CLEC Coalition – which together

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160 *MiCRA Study* at 4.

161 *See In re Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers*, CC. No. 1-338 *et seq*., Letter from Christopher M. Heimann, General Attorney, SBC, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug 18, 2004) (on file with the Federal Communications Commission); S*ee also Competing Providers* (*Verizon Ex Parte* at 17-19.)

comprise a large portion of the CLEC industry – use UNEs for the bullk of their ILEC facility needs. As the attached Commenter declaration show, competitive carriers that provide basic local exchange services typically use UNEs between 75% and 100% of the time.[162]

ILECs have asserted that allegedly pervasive use of special access by competitive carriers is s*TRO*ng evidence that wireline CLECs do not require the use of UNEs. Importantly, however, the studies conducted by the ILECs in support of their claims of extensive usage of their special access facilities by competitive carriers are extensively inaccurate[163] and plagued by flawed inputs. As a result, the studies provide an inaccurate portrayal both of the extent of tariffed special access usage by CLECs, and the reasons for same.

1. Use of Special Access by Wireless Carriers is Irrelevant

A primary problem with such studies is that they combine special access usage by all ILEC competitors, including interexchange carriers and CMRS carriers -- neither of which operate in the relevant markets of wireline CLECs.

The use of special access by *wireless* carriers provides no useful evidence of whether *wireline* carriers are able to utilize special access to compete successfully, because CMRS

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162 Wigger Decl. ¶ 52 (Advanced TelCom) ("[o]nly 5% of the DS1 circuits purchased by Advanced TelCom from the ILECs is Special Access."); Sommi Decl. ¶ 14 (Broadview) ("Broadview rarely orders special access."); Brasselle Decl. ¶15 (Talk America) ("We do not have a single T-1 on Special Access that serves our end users. Similarly, less than 10% of our DS3 circuits have been purchased as Special Access.");Tirado Decl. ¶ 43 (XO) ("[l]ess than 25% of the DS1 circuits purchased by XO from the ILECs are Special Access; conversely, more than 75% of such DS1 loops are purchased as UNEs. Similarly, only 23% of our DS3 circuits have been purchased as Special Access."); Falvey Decl. ¶ 36 (Xspedius) ("[o]nly 31% of the DS1 circuits purchased by Xspedius from the ILECs are special access." Further, taking into account the fact that because special access rates are at the same level as UNEs in Tampa, FL, and thus Xspedius has not needed to convert those circuits to UNEs, Xspedius' level of special access purchases for DS1 circuits in actuality is reduced to 23%.).

163 For example, ILECs report UNE orders rejected due to their unlawful "no facilities" policies and consequently (and absent any alternative) provisioned as special access as CLEC special access purchases. Sommi Decl. ¶ 14 (Broadview). This inflates the ILECs' special access figures and provides a distorted picture of the special access market.

providers largely are sheltered from the ILECs' incentives to engage in anticompetitive behavior. First and foremost, unlike wireline CLECs, CMRS carriers do not use ILEC special access services as loop facilities to connect to end user customers, and their cost of dedicated transport represents a very small share of their cost of service. AT&T Wireless, for example, reports that special access costs were less than three percent of the company's total operating costs in 2003.[164] Wireline CLECs face a "vastly different cost structure" in which the cost of loops and transport is a "substantial portion of the total cost of service."[165]

Second, unlike the wireline local exchange and access market, ILEC-affiliated CMRS providers must offer service in the territories of other ILECs, where such other ILECs have their own affiliated CMRS operations. It is clear, therefore, that discriminatory behavior in one region could cause other ILECs to retaliate – a potential that significantly diminishes the incentive of an ILEC to discriminate against CMRS carriers in the region in which the ILEC operates. In contrast, ILECs have not, to any significant degree, sought to enter out-of-region wireline markets, and thus have avoided the threat of retaliation respecting wireline services.

Third, the ILECs' incentives to engage in predatory conduct against unaffiliated CMRS carriers likely are diminished by the financial strength and stability of the five ubiquitous CMRS competitors -- a situation that stands in stark contrast with the competitive wireline industry. Moreover, spectrum cap limits effectively limit the number of competitors in the wireless market. Therefore, CMRS providers, including those in which the ILECs have substantial, if not

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164 *MMBW Analysis* at 56, ¶ 107; for example, for a typical $1,000/month business customer of wireline CLEC integrated DS1 access services, the UNE loop and transport costs average approximately $200/month. That cost jumps to approximately $550/month when special access is substituted.

165 *See id.*, at 57, ¶ 108.

con*TRO*lling holdings, have to operate within a market structure in which there will be, as a practical matter, an established number of largely ubiquitous competitors.

Fourth, the rates of CMRS providers historically have been at or above per minute long-distance rates. As a result, as compared with the wireline market, the high costs of special access have had a less significant impact on CMRS carriers, who typically have been able to assess per-minute rates to customers to recover the costs of special access, than on CLECs.

Finally, the market demand for wireless services has been growing at a staggering pace, while the market for wireline local services is growing only moderately. This makes wireline CLECs far more susceptible to the anticompetitive effects of an ILEC "cost-price squeeze" strategy.[166]

Similarly, long distance carriers are only now becoming vulnerable to the full force of anticompetitive behavior as the Section 272 separate affiliate requirements sunset. Thus any reliance on special access evidence with respect to the development of CMRS (or interexchange) competition under the premise that wireline competitors could do the same is baseless; quite simply and fundamentally, there is no comparison.

2. Wireline CLECs have purchased Special Access for reasons unrelated to the impairment they face

In the absence of few, if any, desirable alternatives, CLECs at times have purchased special access services from ILEC tariffs. To be clear, CLECs are often forced into purchasing loops, transport and EELs as special access circuits because ILEC litigation positions and self-help preclude access to UNEs, or because ILECs have made the purchase of special access a prerequisite to UNEs -- they typically do not opt for special access services by choice. Either

[166] *See id.*

way, this forced "willingness" on the part of CLECs to rely, for a variety of reasons, on special access in the short term until UNEs can be obtained hardly demonstrates "robust competition" and does not serve as a basis for a finding of no impairment.

a. CLECs are forced to order special access due to the ILECs' "no facilities" policies.

CLECs often have been forced to order special access where ILECs have refused to "construct" facilities, including the installation of line cards or other minor elec*TRO*nic components – the so-called "no facilities available" ploy.[167] Verizon, in particular, has adopted this anti-competitive "no facilities available" policy as a means of compelling CLECs to order special access in place of UNEs.[168] Similarly, SBC likewise follows a practice of rejecting CLEC UNE orders under the pretense that there are "no facilities" available and that such requests would involve extensive construction, yet, notably, SBC is more than willing to provision the same circuits when ordered as special access.[169] SBC and Verizon continue to impose their "no facilities" policies on CLECs, refusing to recognize that the FCC's routine network modifications requirements are self effectuating and insisting that CLECs must amend their interconnection agreements to include new non-recurring charges that would double recover costs already included in TELRIC based UNE rates.

b. CLECs are forced to order special access due to ILECs' refusal to combine UNEs.

Additionally, before the FCC ordered ILECs to provide EELs, CLECs were required to order special access in offices where they lacked collocation. Historically ILECs were not

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167 *See TRO*, ¶ 631.

168 Sommi Decl. ¶ 14 (Broadview) ("Since January of 2004 when Broadview first started tracking orders rejected for no facilities, Broadview has seen 29% of its orders denied for no facilities.")

169 Falvey Decl. ¶ 38 (Xspedius).

required to combine UNEs, and, consequently, CLECs that wished to use ILEC facilities to serve end users out of an ILEC central office at which they did not have a collocation arrangement were forced to order such facilities as special access. Even upon reinstatement of the FCC's UNE combinations rules, the ILECs have been intransigent in permitting CLECs to order such combinations.[170] The ILECs have been similarly dilatory with regard to converting special access circuits to stand-alone UNEs.[171]

For example, when requesting conversion from special access to UNE/EEL, some CLECs have experienced endless negotiations and foot dragging, delayed conversion requests, requirements for circuits to be disconnected and reconnected, threats from the ILECs to impose exorbitant conversion charges, and overly long provisioning intervals.[172] In particular, one CLEC, XO, failed, despite numerous attempts over a 12 month period beginning in 2002, to convert 1000 DS1 special access circuits to UNEs due to BellSouth's insistence that the circuits be disconnected and reconnected, and that XO pay per circuit conversion charges that are 30 times higher than BellSouth's allegedly "cost based" rates for conversion of special access circuits to EELs.[173] In addition, many ILECs, including Verizon, continue to impose minimum monthly service commitments on all special access circuits so that CLECs must wait a minimum

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170 Wigger Decl. ¶ 53 (Advanced TelCom); Tirado Decl. ¶44 (XO).

171 Wigger Decl. ¶ 53 (Advanced TelCom); Falvey Decl. ¶38-39 (Xspedius) (stating that it was not until Xspedius filed a complaint with the FCC that SBC agreed to convert circuits and even then, it was only a limited amount of circuits that SBC was willing to convert; moreover, despite the FCC's prohibition on unnecessary charges to convert special access to UNEs, both SBC and BellSouth have imposed expensive nonrecurring and recurring charges to convert Xspedius special access circuits to UNE loops); Tirado Decl. ¶ 45 (XO).

172 *Id.*

173 Tirado Decl. ¶ 45 (XO).

of 90 days before converting a DS1 Special Access circuit to UNE pricing (and a minimum of one year before converting a DS3 Special Access circuit to UNE rates).[174]

c. CLECs are forced to order special access due to ILECs' refusals to "commingle" access services and UNEs.

ILEC refusals to provide UNEs where "commingling" exists also force CLECs to purchase special access. Historically, ILECs have prohibited the commingling of access services and UNEs on the same facilities to serve an end user customer, thus posing yet another barrier to CLEC ordering of UNEs. However, in the *Triennial Review Order*, the Commission explicitly required ILECs to permit requesting carriers to commingle UNEs with tariffed special access services, and directed the ILECs "[t]o perform the necessary functions to effectuate such commingling . . . ."[175]

Notwithstanding this fact, XO, in an effort to further minimize its reliance on special access, sought to implement the *Triennial Review Order's* requirements regarding commingling (and new EEL criteria) by amending its interconnection agreements with ILECs. The only major ILEC with which XO has been successful in negotiating such an amendment is Qwest. Verizon, after failing to engage in any substantive negotiations to implement an amendment based on the *Triennial Review Order's* requirements, filed for consolidated arbitrations across the country with virtually every CLEC with which it had an interconnection agreement, and subsequently placed such arbitrations on hold shortly after the D.C. Circuit issued its *USTA II* decision in early March 2004. XO and other CLECs opposed the abeyance motions filed by Verizon with various state commissions on the grounds that they related to issues unaffected by the *USTA II* decision,

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174 *Id.*

175 *TRO* ¶ 579.

such as the *Triennial Review Order's* commingling, EEL certification, and routine network modification requirements, and thereby requested that the affected state commissions bifurcate the arbitrations so that the parties could resolve such issues. Verizon, not surprisingly, has vehemently opposed this effort.

d. CLECs must order special access to provide non-qualifying services.

Commission rules preclude competitive carriers from ordering UNEs for use exclusively in the provision of "non-qualifying" services.[176] Joint Commenters primarily provide local exchange services, or bundled offerings that include local telecommunications services. However, they also provide non-qualifying services, such as when customers purchase only interexchange services from them.[177] On such occasions, they are ineligible to order UNE facilities, and are compelled to substitute special access services. However, their use of special access to compete in the stand-alone interexchange market provides no evidence that special access can be similarly used to compete successfully in the local services market.

e. Special access is used where price differences are small.

Occasionally, the price differences between comparable UNEs and special access services are not great. There are isolated geographic areas where rates are aligned for some facilities.[178] More commonly, price differences are sometimes small for dedicated facilities with

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176 *Id.* ¶ 135, 140 n.466 (defining "non-qualifying services" as "[t]hose services not traditionally provided exclusively by incumbent ILECs . . .[including] long distance voice services and data services provided on an interexchange basis."

177 Wigger Decl. ¶ 53 (Advanced TelCom); Falvey Decl. ¶ 37 (Xspedius).

178 Falvey Decl. ¶ 36 (Xspedius) (noting that the UNE/EEL rates in Tampa, FL are still set at the same levels as ILEC special access rates "[a]nd it is therefore not worth the hassle that accompanies UNE purchases" to pursue UNEs).

very short mileage transport (since it is the special access mileage charges that often are established far above comparable cost-based UNE rates).[179] Since the ordering and provisioning systems for special access generally are more effective than the systems available for UNEs, CLECs often choose to order special access when rates are in line with UNE pricing.[180]

f. CLECs may be unable to terminate long term special access agreements.

The problems that CLECs have had ordering UNEs from ILECs are well documented. As a result of these problems some CLECs were effectively compelled to enter long term volume and term special access agreements with ILECs to obtain access to critical facilities. Once locked into such agreements, hefty termination penalties require them to place orders for the minimum requirement of special access facilities, even if the choice is otherwise uneconomic.[181]

In summary, the experience of most CLECs has been that ILECs have continued to engage in anti-competitive practices designed to prevent CLECs from ordering UNEs, or converting special access circuits to UNEs, and instead to order and maintain high-capacity circuits as special access. Such actions serve to demonstrate the true reasons as to why CLECs are sometimes compelled to purchase ILEC special access and, as shown by Joint Commenters, why that is not often a genuine choice. As one Joint Commenter notes, "given what CLECs pay and endure to convert circuits to UNEs, it is not surprising that some portion of CLEC T-1 inventories remain on ILEC special access."[182] Any such forced "willingness" of CLECs to rely on special access cannot form a basis for a finding of no impairment.

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179 *MMBW Analysis* at 62, ¶ 119.

180 *Id.*

181 *Id.*

182 Falvey Decl. ¶ 39 (Xspedius).

E. Discounted Special Access Offerings Are Predicated On Acceptance Of Lengthy Term Commitments And Are Designed To Forestall Deployment Of Competitive Services.

Special access pricing typically is predicated on volume and term commitments that effectively serve to lock requesting carriers onto the ILEC's network. Once locked into a term and volume plan, CLECs are unable to transfer traffic onto self-deployed networks or to UNEs without incurring large termination penalties. Thus, although the ILECs' most attractive special access pricing is included as part of such volume and term plans, subscription to such long term deals is unavailable as a practical matter to CLECs that plan to construct their own facilities as conditions permit. The *MMBW Analysis* found that:

> Term and volume commitments come at a cost to the purchasers, which cannot be ignored in comparing the two ways of buying loops and transport. . . . . Volume commitments are also risky and costly to CLECs because they restrict their ability to shift traffic onto newly built facilities.[183]

In short, ILEC volume and term plans function as barrier to future deployment of competitive facilities in a way that is flatly inconsistent with the Commission's oft stated goal of encouraging facilities investment.

Worse yet, the ILECs are using special access volume and terms plans as a means to lock facilities-based CLECs out of the market for wholesale services.[184] Such "exclusionary pricing schemes" are carefully crafted to prevent carriers from migrating traffic to CLECs that would be willing to construct facilities if adequate wholesale demand was available to supplant their own

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183 *MMBW Analysis* at 58, ¶ 110.

184 *See id.* at 58-59, ¶¶ 111-112.

retail traffic. A recent AT&T complaint is a case on point. In its complaint,[185] AT&T cites to two discount pricing plans in BellSouth's federal special access tariff – both of which provide extensive discounts to customers in exchange for lengthy term commitments.[186] Although AT&T notes that the Commission has long approved discounted rate structures that reflect the cost savings inherent in purchases of large volumes of services, AT&T concludes that the BellSouth discount plans do not reflect legitimate cost efficiencies, but rather, *are solely designed to reward customers that forego competitive services*:

> Unlike legitimate volume discounts, the PSIP and TSP do not make the availability of lower charges dependent on the cost-based criteria of the customer's commitment of greater volumes. Because commitments of greater volumes allow services to be provided at lower costs, thus enhancing efficiency and consumer benefits, the Commission has defined legitimate volume discounts as an offering of "reduced per-unit prices for a particular number of units of service." Permissible volume discounts are those that recognize efficiencies and lower costs "associated with larger volumes of traffic." In contrast, the PSIP and TSP offer discounts to customers with small volumes that are willing to commit not to deal with BellSouth's competitors for 90 percent of their prior demand, but deny the discounts to customers with far greater volumes but that wish to deal with BellSouth's competitors (or use their own facilities) for a material portion of their demand.[187]

AT&T goes on to explain that BellSouth's "lock up" incentives require customers to commit to purchase 90-95% of their total telecommunications services from BellSouth on a

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185 *AT&T Corp. v. BellSouth Telecommunications, Inc.*, Formal Complaint of AT&T Corp; File No. E8-04-MD-010 (Jul. 1, 2004) (*AT&T Complaint*).

186 *See, e.g., AT&T Complaint* at 3, 12. The Transport Savings Plan ("TSP") provides substantial discounts to customers if they agree to purchase from BellSouth Special Access services equivalent to 90-95% of their past purchases from BellSouth for at least a five-year period. The Premium Service Incentive Plan ("PSIP") also provides substantial discounts to customers if they agree to purchase from BellSouth Special Access services equivalent to 90-95% of their most recent Special Access purchases from BellSouth for at least a three-year period. *E.g., AT&T Complaint* at 3, 19.

187 *AT&T Complaint*, 29 (citations omitted).

region-wide basis, which effectively prevents customers from purchasing services from local or regional competitive service providers. AT&T concludes that the structure of the "lock up" discount is such that it will always outweigh cost savings that are available from any carrier that does not have the same ubiquitous, region-wide coverage of BellSouth:

> The regional characteristic of the PSIP and TSP now requires that customers choose between (i) accepting the significant discounts associated with the PSIP or TSP for the vast majority of their special access demand, while forgoing significant purchases from CLECs due to the 90 percent commitment requirement, and (ii) paying the much higher, non-volume-based rates for BellSouth services where there is no feasible alternative, but being able to secure lower prices from CLECs where competitive alternatives exist. In light of the steep discounts provided by the PSIP and TSP and the high percentage of retail customer sites served only by BellSouth facilities, customers will find that the former choice is the only rational one. Indeed, the limited number of sites served by any CLEC, compared to BellSouth's ubiquitous special access service, means that no amount of discounting by a CLEC would make it rational for a customer that requires regional service to abandon the PSIP or TSP altogether.[188]

The *MMBW Analysis* confirms that such "exclusionary pricing schemes are recognized by the economics literature and the courts as potentially dangerous to competitive markets."[189]

Thus, ILEC contentions that favorable special access pricing can be obtained by carriers willing to make large volume and term commitments must be discounted, since such volume and term plans are inimical to the Commission's goal of encouraging competitive facilities deployment.

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188 *AT&T Complaint*, 50; *see also Id*., 41.

189 *MMBW Analysis, 59,* ¶ 113.

F. <u>There Is No "Robust" Special Access Based Wireline Market.</u>

The *USTA II* court emphasized that "[c]ompetitors cannot generally be said to be impaired by having to purchase special access services from ILECs rather than leasing the necessary facilities at UNE rates where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic."[190] In a weak attempt to demonstrate the existence of "robust competition" from wireline CLECs that rely on use of special access facilities in place of UNEs, ILECs point to two carriers – neither of whom can be said to be fairly representative of the wider CLEC industry.

In the Verizon Special Access letter, much is made of the notion that Time Warner Telecom ("TWT") uses special access in lieu of UNEs. The suggestion is that TWT's experience is evidence that facilities-based CLECs can successfully utilize Special Access as UNE replacements, and thus CLECs are not impaired without cost-based UNEs. But Verizon carefully ignores several critical distinguishing factors that make clear that TWT's experience is not an appropriate measure of CLEC impairment. First, it is evident that TWT is an affiliate of Time Warner Cable, and thus likely has access to cable loop facilities which are not available to other CLECs.[191] Second, TWT is unusually reliant on carrier revenues, and is not as focused as other CLECs on the competition for end user customers that the Commission has repeatedly stated is its primary goal. Specifically, in its most recent SEC 10Q filing, TWT reported that

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190 *USTA II*, 593 (emphasis added).

191 Kunde Decl. ¶ 17 (Eschelon) ("A single T-1 or even DS3 order from a customer could never economically justify . . . deployment by a CLEC unless the service provider already had invested in a fiber feeder ring that was connected to certain key buildings (anchor tenants) on which long term capacity commitments had already been made by large end user customers. . . . It is precisely these conditions (i.e. existing fiber rings, campus environments, multi-tenant buildings, anchor tenants, etc.) that have allowed Time Warner Telecom to economically justify a certain level of fiber runs to end user customers . . . ."

approximately 51% of its total revenue is derived from carrier/ISP customers, reciprocal compensation, switched access charges and related carrier party revenue.[192] Third, TWT has not yet proven that its reliance on special access can succeed, as it lost approximately $66 million during the first half of 2004 on revenues of $324 million.[193]

The same can be said of another CLEC that ILECs often point to as an example of a competitive carrier that uses special access in place of UNEs – US LEC Corp. ("USL"). USL lost $29 million in 2003 on revenue of $311 million, and analysts are bearish on the company due to its past reliance on revenue derived from reciprocal compensation and switched access charges to CMRS carriers.[194]

G. The FCC Is Justified In Concluding That The Risk Of ILEC Abuse And Resulting Pricing Discrimination In The Relevant Market For Tariffed Special Access Service Preclude Finding Special Access To Be An Economic Alternative To Unbundling.

The language and structure of the 1996 Act demonstrate that Congress intended that competitive providers of such services would be able to obtain essential inputs from ILECs in the form of unbundled high-capacity loops and transport under Section 251(c)(3). Commission precedent and bedrock principles of competition policy confirm that this approach is the *only adequate means* of limiting ILEC opportunities to engage in price and non-price discrimination against their competitors if tariffed special access services are relied upon in lieu of UNEs. Substituting special access for UNEs would leave the ILECs free to accelerate their anticompetitive discriminatory practices, with the result that ILEC dominance would only be

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192 Time Warner Telecom Inc., SEC Form 10-Q, at 2 (filed August 9, 2004).

193 *Id.*

194 David Mildenberg, *Analyst Sees TROuble Ahead at US LEC*, Charlotte Business Journal, Jul. 26, 2004.

further enhanced, absent an obligation on the part of the ILECs to provision unbundled high-capacity loops and transport.

Simply put, and as is overwhelmingly evident from the data and analysis provided by the Joint Commenters herein, the risk of continued and greater ILEC abuse than already exists in the market for special access services makes it impossible for the Commission to justify any finding that the mere availability of tariffed special access facilities should be sufficient such that competitive carriers are not impaired without access to UNEs. As the MBW Analysis concludes, "while the availability of special access is not 'irrelevant' to the impairment standard, it does not alter the conclusion that wireline carriers remain impaired without access to DS1, DS3, and dark fiber loops and transport."[195] Moreover, evidence of both the administrative difficulties inherent in permitting ILECs to use tariffed special access services as a means to avoid unbundling obligations under 251(c)(3), as well as the obvious and well-documented risk of anticompetitive and discriminatory ILEC practices toward CLECs, justifies the creation of a blanket rule that accords no weight to the availability of ILEC tariffed access services when the Commission determines whether wireline carriers are impaired.

In *USTA II*, the D.C. Circuit explicitly recognized that administrative complications "might in principle support a blanket rule treating the availability of ILEC tariffed service as irrelevant to impairment."[196] The Court went on to emphasize that the Commission is free to take into account "[s]uch factors as administrability, risk of ILEC abuse, and the like."[197] As a result, the FCC may consider any such factors in establishing a blanket rule that finds the

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195 *MMBW Analysis* at 62, ¶ 121.

196 *USTA II*, 576.

197 *Id.*, 577.

availability of ILEC special access services to be irrelevant in a determination as to whether CLECs are impaired without access to Section 251(c)(3) unbundled loops and transport. The obvious ILEC incentives to discriminate against CLECs, combined with the FCC's inability to con*TRO*l ILEC special access pricing, merit the creation of such a blanket rule that the mere availability of ILEC tariffed special access is irrelevant to impairment.

Real administrative difficulties arise should ILECs be permitted to use tariffed special access services as a means to avoid unbundling obligations under 251(c)(3). The Commission has no mechanism in place to actively monitor and con*TRO*l federal special access pricing. As shown above, ILECs would have every incentive to use tariffed special access rates *(i.e.*, rates outside of 251(c)(3)) to effect significant price hikes,[198] yet the Commission is not equipped to prevent such conduct. The FCC expressed concern about this very issue in the *UNE Remand Order*, noting that "competitors would have no assurance that the incumbent LEC would not change the tariff in such a manner that the competitive LEC could no longer rely on it to provide the services it seeks to offer."[199]

Indeed, the problems do not stop with the need to regulate special access tariffs rates anew. As the *MMBW Analysis* found, elimination of UNEs would require the FCC to actively regulate rates for ILEC retail services as well:

> If … the Commission were to eliminate the UNE requirements while the ILECs still had the ability and incentive to leverage their upstream market power, this would be inviting the ILECs to "take their best shot" at harming their rivals. The temptation would be irresistible, and the Commission would be forced to inspect the

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198 *See generally ETI Access Study* and *Phoenix Center Paper*.

199 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, 15 FCC Rcd. 3696, 3733, ¶ 69 (1996) ("*UNE Remand Order*").

> retail pricing of the ILECs across an ever-widening array of retail products. This would create an entirely new layer of regulation requiring the assignment of substantial resources by the Commission. A new "Imputation Division" of the Commission would have to look at the detailed price structure of all such retail products, analyze, and also analyze the downstream activities of the ILECs to test whether special access rates were actually being imputed into the final goods prices. This is a nightmare scenario, predestined to failure.[200]

The administrative difficulties extend even to state tariffs. When previously determining that ILEC special access services did not serve as viable alternatives to the ILEC UNEs, the Commission foresaw the difficulties inherent in a system that necessitated continuous scrutiny and oversight of *state* tariff rates, terms and conditions:

> Most services that competitive LECs purchase for resale are contained in state tariffs, and are subject to the states' tariff approval process. Relying on these state-approved tariffs would compromise our ability to determine which network elements must be unbundled pursuant to section 251(d)(2) because we would not be able to evaluate each incumbent LEC retail tariff as a possible alternative for every network element. In addition to being administratively unworkable for us to evaluate every state tariff filed by the incumbent LECs, relying on these tariffs as alternatives to the incumbent LEC's unbundled network elements would create inconsistent unbundling rules among the states, a result that . . . would not promote the development of competition for all consumers.[201]

Additionally, as the *USTA II* court questioned, as an administrative matter, how does the FCC determine at what point the special access rates are high enough to have crossed the impairment threshold, such that impairment is found to exist? This is not a rhetorical question in light of the dramatically upward trend in BOC special access pricing, as described above. Nonetheless, the Commission would have to monitor special access pricing on a regular basis.

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200 *MMBW Analysis* at 61, ¶ 118.

201 *UNE Remand Order*, ¶ 69.

All such issues work against any reliance on special access as a central component of a finding that there is no impairment for high-capacity loops and transport. Competition is not yet sufficient to drive ILEC special access prices toward cost, and as a practical matter, no administrative oversight of tariffed special access and resulting ILEC pricing and provisioning abuses is probable. Therefore, consistent with the *USTA II* decision, the Commission should establish a "blanket rule" that accords no weight to the availability of ILEC tariffed special access service when the Commission determine whether wireline carriers are impaired.

V. DEDICATED TRANSPORT

A. Background

1. The FCC's findings

In the *TRO*, the Commission, by a 5-0 vote, found that "competing carriers face substantial sunk costs and other barriers to self-deploy facilities and that competitive facilities are not available in a majority of locations, especially non-urban areas."[202] The Commission explained that when competitive carriers self-deploy transport facilities, they typically deploy fiber rings that may connect to several ILEC central offices in a market.[203] These rings are used primarily to aggregate end user traffic for backhaul to the CLEC switch.[204]

Deployment of transport facilities "is an expensive and time-consuming process for competitors, requiring substantial fixed and sunk costs."[205] These costs include (1) the cost of collocation, (2) the cost of fiber, (3) the cost of laying the fiber and (4) the cost of the equipment

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202 *TRO*, ¶ 360.

203 *Id.*, ¶ 370; *see also* Abate Decl. ¶ 11 (SNIP LINK) (20-mile fiber ring reaches two LATAs).

204 *TRO*, 370.

205 *Id.*, ¶ 371.

used to "light" the fiber.[206] In addition, the Commission found that "the record indicates that obtaining rights-of-way delays entry and imposes [additional] sunk costs" on competitive LECs.[207] The Commission examined these costs by capacity level, and found them to be significant for DS1, DS3 and dark fiber transport.

With respect to DS1 transport, the FCC found that "competing carriers generally cannot self-provision DS1 transport."[208] A carrier requiring only a DS1 capacity between two end points typically cannot justify the high fixed and sunk costs of self-providing "just that DS1 circuit."[209] The Commission noted that the carrier faces the same fixed and sunk costs as a carrier deploying a higher capacity circuit or dark fiber but that the carrier requiring a DS1 "faces substantially higher incremental costs across its customer base than a carrier requesting higher capacity transport."[210] As a result the Commission found that, deployment of DSI transport cannot be justified as an economic or practical matter.

With respect to DS3 transport, the Commission noted that, on the cost side, the costs of self-deploying transport facilities do not vary significantly from deployment for purposes of other capacities.[211] Although this level of capacity indicates that a carrier is aggregating a significant amount of traffic, a carrier seeking to deploy a DS3 faces the same fixed and sunk costs, such as trenching and attaching to poles, that are involved in deploying any fiber facilities. Yet, carriers are not able to deploy DS3 transport economically because, due to scale economies,

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206 *Id.*

207 *Id.*

208 *Id.*, ¶ 391.

209 *Id.*

210 *Id.*

211 *Id.*, ¶ 386.

carriers serving a DS3 level of demand are unable to recover the costs of deployment over a reasonable time.[212]

With respect to dark fiber, the Commission found that deployment of dark fiber involved unique operational characteristics that distinguish it from lit fiber.[213] Although users of dark fiber provide their own op*TRO*nics to activate the dark fiber strand, the record indicates that a substantial part of the costs of deploying transport facilities is in the sunk cost of burying or deploying the fiber.[214] Therefore, users of dark fiber faced impairment without access to ILEC dark fiber

Further, with respect to the availability of wholesale transport, the Commission noted that substantial economies of scale apply in the transport market. Although the economics of transport may lend itself to wholesale provisioning, the Commission found that use of a third party transport provider imposes significant costs on a requesting carrier.[215] This results because a competing transport provider typically does not have the scope to mirror the market that the requesting carrier serves, causing a requesting carrier to have to make arrangements with multiple carriers. The need to make arrangements with multiple carriers raises the requesting carrier's costs, including the need to establish cross-connects when transport is accessible through a third party's collocation arrangement. A multi-vendor environment also makes service quality and testing for maintenance and repair more difficult to maintain.[216]

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212 *Id.*

213 *Id.*, ¶ 381.

214 *Id.*

215 *Id.*

216 *Id.*, ¶ 373.

2. The *USTA II* decision

In *USTA II*, the court voiced two concerns specific to the FCC's transport analysis. First, with respect to the route-specific analysis of dedicated transport, the court held that the agency cannot "simply ignore facilities deployment along similar routes when assessing impairment."[217] Second, discussing wireless providers' rights of access to dedicated transport, the court questioned whether the Commission had appropriately weighed the relevance of ILEC special access services in its impairment analysis.[218]

Both of these concerns are addressed elsewhere in these comments. For present purposes, the *USTA II* discussion of dedicated transport has significance in that the court did not question any of the underlying factual findings the Commission made concerning the impairment that CLECs face. Rather, the court's concerns go to the weight to be assigned to certain factors or the level of aggregation of the Commission's approach. The Commission can address these concerns in an by making moderate changes to its impairment tests and simplifying the data collection in certain circumstances.

3. The inquiry in perspective

It is important to place the Commission's DS1, DS3 and dark fiber tests in proper perspective. In the *TRO*, the Commission already identified the most significant instance in which CLECs are not impaired – in the deployment of OCn transport facilities.[219] Moreover, for DS3 transport, the Commission also implemented a "cap" on the number of DS3s that a carrier may obtain on any route. Specifically, the Commission held that CLECs would not be impaired

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217 *USTA II*, 359 F.3d at 575.

218 *Id.*, 575-77.

219 *TRO*, ¶ 389.

if they required more than 12 DS3s of capacity on a given route.[220] As the record demonstrated, CLECs can and do deploy transport when their needs reach these levels. These findings have significance for the impairment analysis in two respects.

First, the FCC already has significantly restricted the ability of CLECs to obtain UNEs. The Commission's nationwide finding of non-impairment for OCn transport – coupled with the cap on DS3 transport UNEs -- already embodies the "limiting standard" that the Supreme Court instructed the Commission to identify.[221] The findings capture the vast majority of instances where transport facilities "though not literally ubiquitous [are] significantly deployed on a competitive basis."[222] Looking at the Commission's transport role as a whole, a significant portion of the task of making "nuanced" findings of impairment has already been performed.

Second, these findings have the effect of narrowing the relevant inquiry for purposes of impairment findings with respect to lower capacities. If CLECs are not impaired in the deployment of OCn services, then there is no need to inquire whether CLECs have deployed and are using facilities at these capacities. Because deployment costs do not vary significantly by capacity, but the opportunity to recover these costs does vary by capacity, evidence of OCn deployment is not probative evidence that it is economic for another CLEC to deploy facilities on the same route solely to serve a DS1 or DS3 customer. Put another way, the Commission's inquiry is whether, assuming a requesting courier needs *only* the DS1 of DS3 capacity requested – and not more -- does that CLEC face impairment in self-deploying or purchasing the facility at

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220 *Id.*

221 *See Iowa Utilities Board*, 525 U.S. at 388.

222 *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422 (D.C. Cir 2002) ("*USTA I*"); *see also USTA II*, 359 F.3d at 574.

the relevant capacity. Deployment of OCn level facilities used on OCn capacity does not help the Commission determine whether the requesting carrier is impaired at the DS1 level.

The primary problem with the evidence that the ILECs submitted in the states was that it relied on this faulty "one size fits all" assumption. The ILECs did not attempt to demonstrate that CLECs had deployed and were actually using facilities at the relevant capacities. They based their cases on (1) the assertion of deployment at a higher capacity and (2) the assumption that CLECs could channelize down to a lower capacity.[223] This resulted in the ILECs asserting non-impairment based in many instances on deployment made to serve - OCn capacities. And it appears that the ILECs will do the same in this proceeding.[224] Indeed, none of the maps that the ILECs have submitted in the record thus far have attempted to identify the capacity levels at which the CLECs are using the facilities. This evidence is not very helpful to the Commission, which is attempting to determine where CLECs are impaired for purposes of serving the customer *at a particular capacity.*

B. <u>Proposed Transport Tests</u>

Joint Commenters s*TRO*ngly prefer to use their own facilities (as would virtually any CLEC). But due to the economic realities discussed above, very often that just is not possible at this time. The truth is that the Joint Commenters very rarely, if ever, can justify the self-deployment of transport on the routes where they have traffic.[225] This result is a function of both

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223 *See QSI Analysis* at 17 (QSI removed data from CLECs that deployed at OCn or 12 DS3 level).

224 *See e.g., SBC Telecommunications, Inc. Ex Parte,* CC Docket Nos. 01-338, 96-98 and 98-147 (filed Aug. 18, 2004) (attaching maps of CLEC fiber deployment).

225 Advanced TelCom explains that, although years ago "in a much different market environment," it was able to deploy 25 of its 40 existing transport routes, today it would not be able to do so. Wigger Decl., ¶ 33 (Advanced TelCom) (emphasis in original). In addition, Xspedius and XO state that it they are very unlikely to self-deploy DS1 transport given the cost-revenue ratios. Falvey Decl., ¶ 29 (Oct. 4, 2004)

. . . *Continued*

"capital constraints"[226] and uncertain traffic volumes, which means uncertain recoupment of costs.[227] The Joint Commenters have found that they are able to purchase interoffice transport from other CLECs on between [seven] and [35] percent of their routes.[228] Joint Commenters will use self-provided or competitive facilities where those facilities are reasonably available.

In the vast majority of instances, however, Joint Commenters must purchase interoffice transport from the ILECs. Simply put, the Joint Commenters' ability to deliver competitive telecommunications services depends upon their ability to continue obtaining ILEC transport facilities on those routes at economic, cost-based rates. For this reason, it is critical that the FCC define its impairment tests in a way that captures, as closely as possible, the instances where CLECs are not impaired, but does not create "false positives" by finding non-impairment where CLECs are impaired.

The Coalition's proposed tests are described below.

1. DS1 Transport and DS1 EELs

For DS1 loops, DS1 transport and DS1 loop/transport combinations (*i.e.*, non-multiplexed DS1 EELs), the evidence overwhelmingly demonstrates that requesting carriers seeking to serve DS1 enterprise customers face extremely high economic and operational

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(Xspedius); Tirado Decl., ¶ 35 (Oct. 1, 2004) (XO). SNiP LiNK LLC explains that, in general, its "ability to construct facilities for transport purposes is very limited." Abate Decl., ¶ 10 (Oct. 1, 2004) (SNiPLiNK)

226 Kunde Decl., ¶ 6 (Oct. 1, 2004) (Eschelon). *See also* Falvey Decl. ¶¶ 28, 30 (Xspedius); Tirado Decl. ¶¶ 33, 36 (XO).

227 "Capacity requirements generally must exceed three (3) DS3's to a collocation cage to cost justify deploying fiber to that cage." Sommi Decl., ¶ 5 (Oct. 1, 2004) (Broadview). *See also* Falvey Decl. ¶ 30 (Xspedius); Tirado Decl. ¶ 36 (XO); Brasselle Decl., ¶ 7 (Oct. 1, 2004) (Talk America) ("we lack the consistent traffic volumes required to construct our own interoffice facilities").

228 *See* Wigger Decl., ¶ 48 (asserting that Advanced Telecom has been able to purchase interoffice transport from CLECs on 7% of its total system routes; *see* Sommi Decl., ¶ 7 (Broadview) (estimating that Broadview is only able to obtain transport from alternate vendors 25% of the time; *see* Brasselle Decl., ¶ 10 (Talk America) (noting that Talk America has been able to purchase interoffice transport from other CLECs in 30 routes (representing 35% of its system routes).

barriers to deploying DS1 facilities to serve these customers. These high entry barriers are coupled with much lower revenue opportunities and the inability to recoup costs via long term contracts. As a result, requesting carriers face impairment nationwide for DS1 loops, DS1 transport and DS1 EELs.

In the *TRO*, all five Commissioners agreed that competitive LECs are impaired nationwide without DS1 UNE loops. As the Commission stated, " [t]he record shows that requesting carriers seeking to serve DS1 enterprise customers face extremely high economic and operational barriers in deploying DS1 loops to serve these customers."[229] The Commission determined that the "much lower revenue opportunities" available from selling services to small businesses "make it economically infeasible for competitive LECs to deploy DS1 loops, which require the same significant sunk and fixed costs of higher capacity loops." [230] The Commission went on to emphasize that " revenues generated from small and medium enterprise customers are not sufficient to make self-deploying DS1 loops economically feasible from a cost-recovery perspective,"[231] and further that "[c]ompetitive LECs do not have the ability to recover sunk costs in self deploying DS1 loops."[232] Nor could competitive LECs look elsewhere to purchase DS1 loops, as the Commission found " scant evidence" of wholesale alternatives for DS1 loops."[233]

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229 *TRO, ¶ 325*

230 *Id*.

231 *Id., ¶ 326.*

232 *Id*.

233 *TRO,* ¶ 325.

These findings were not difficult for the Commission to make. The evidence of DS1 loop impairment in the record was overwhelming and largely unrebutted. Indeed, as the Commission observed, the incumbent LECs themselves admitted that impairment exists for DS1 loops and such facilities merited more lenient treatment than other UNEs at issue.[234] Such a powerful and uncon*TRO*verted record provides ample basis for the Commission to re-affirm its prior findings in this proceeding.

A finding of nationwide impairment is consistent with the experience of the Joint Commenters. As explained in the attached declarations, the Joint Commenters make significant use (where not blocked by ILEC intransigence) of DS1 loops combined with DS1 transport, a configuration commonly referred to as DS1 Enhanced Extended Links/Loops ("DS1 EELs"). Carriers report that few, if any, alternate providers that offer DS1 transport in their service areas.[235] Carriers that themselves wholesale transport from an ILEC central office to carrier POPs report that they ordinarily do not offer DS1 transport due to the high costs and low revenues associated with wholesale DS1 transport.[236]

Moreover, Joint Commenters report that deployment of transport is not economical unless the carrier has a need for multiple DS3s on the particular route. Given that self-deployment ordinarily requires multiple DS3s to justify, obviously it would *never* be economic for a CLEC to self deploy interoffice transport facilities simply to provide DS1 level transport, as

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234 *Id.*, ¶ *325, 960 (citing to* SBC Comments and SBC Reply Comments)

235 *See* Abate Decl. ¶ 19; (SNiP LiNK), Brasselle Decl. ¶ 9. (Talk America).

236 *See* Wigger Decl., ¶ 37(Advanced TelCom).

the attached declarations of Xspedius and XO demonstrate.[237] Joint Commenters are not aware of any company that has constructed interoffice facilities simply to self provision transport at the DS1 level. [238] In the state proceedings, the ILECs typically conceded that no CLEC would deploy transport facilities solely to serve a DS1 customer.[239]

Finally, the stud by QSI Consulting also confirms that CLECs rarely deploy loops and transport at the DS-1 level. The QSI Analysis was conducted after the release of the *TRO* decision and analyzed the availability of CLEC owned loops and transport in 14 states including New York, California, Texas, Florida and Illinois. Significantly, the study found that only 36 buildings in the 14 states surveyed had two or more carriers offering wholesale loops at the DS-1 capacity level.[240] This number is far below the 724 buildings claimed by the ILECs in the state *Triennial Review Order* proceedings and is consistent with the actual experience of CLECs searching for alternate service providers.[241] Likewise, with respect to wholesale transport, the study showed the availability of 49 routes in the 14 states surveyed on which two or more CLECs acknowledge providing DS1 transport.[242] Again, this is a far cry from the over 2,000

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237 "Xspedius has never constructed interoffice facilities simply to self provision transport at the DS1 level, and I cannot imagine a situation in which we could do so economically." Falvey Decl. ¶ 29 (Xspedius). *See also* Tirado Decl. ¶ 35 (XO).

238 "We are not aware of any alternate providers that offer DS1 transport in our service areas." Brasselle Decl. ¶ 9 (Talk America). *See also* Kunde Decl. ¶ 9 (Eschelon) ("[T]he Commission must examine the marketplace reality that non-ILEC providers of transport are simply not yet available in many areas.").

239 Investigation Into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements, Pennsylvania Public Service Commission Docket No. I-00030099, Cross Examination Of Carlos M. Peduto II, Verizon, Hearing Transcript at 86, 1.8 (Jan. 26, 2004) (admitting that "typically carriers don't deploy fiber to a location to serve only a DS-1").

240 *See* QSI Analysis at 13.

241 *See id*.

242 *See id*., 19.

routes claimed by the ILECs (excluding the 4,000 routes claimed by Verizon in New York),[243] and a clear demonstration that competitive carriers rarely deploy wholesale DS-1 facilities and generally do not have access to alternate providers of loops or transport at the DS-1 level.

2. DS3 Transport and Dark Fiber

As the Commission found in the *TRO*, building backbone fiber optic transport facilities is an incredibly expensive undertaking. The costs of self-deploying transport facilities include collocation costs, the cost of fiber, the cost of physically deploying the fiber, the cost of op*TRO*nics necessary to light the fiber, and the cost of obtaining right-of-way for the fiber deployment.[244] The op*TRO*nics that must be placed in a collocation arrangement to provide interoffice transport include optical path panels (to terminate and cross connect the fiber facility), optical multiplexers, and power distribution (*e.g.*, power filtering and fuses) equipment. Although the aggregate cost of deploying fiber for use as interoffice transport can vary substantially based upon density and topography (*i.e.*, urban construction typically is more costly than rural deployment), Joint Commenters have reported their costs of placing fiber underground in a range from , in the case of Xspedius, $110,880 to $211,200 per mile,[245] or in XO's case, $400,00 to $700,00 per mile.[246] Advanced TelCom estimates the costs to be, on a per-linear foot basis, $50 to $75 per foot.[247] In total, deploying transport can require capital of up to $400,000

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243 *See id*., 18.

244 *TRO*, ¶ 371. *See also* Tirado Decl. ¶ 33 (XO); Falvey Decl. ¶ 28 (Xspedius); Brasselle Decl. ¶ 6 (Talk America). SNiP LiNK explains in some detail the barriers that rights-of-way, pole attachments, and municipal permits pose to deploying facilities. Abate Decl. ¶¶ 13-16 (SNiP LiNK).

245 Falvey Decl. ¶ 28 (Xspedius).

246 Tirado Decl. ¶ 33 (XO).

247 Wigger Decl. ¶ 34 (Advanced TelCom).

per mile.[248] Placing fiber on existing poles can be less expensive, but costs still can range from costs still range from $42,000 per mile,[249] or an average of $15 to $20 per linear foot.[250] Transport costs are sunk costs since the facility cannot be moved to another location should a carrier decide to exit a market.

Constructing interoffice transport fiber facilities also is very time-consuming. We estimate that it normally takes approximately 6-9 months[251] to obtain a right-of-way (sometimes up to one year),[252] collocation and equipment; and it takes several additional months to actually build the fiber, construct the collocations, and install/test the equipment. This aggregate delay of more than a year provides the ILECs with significant "first mover" advantages over CLECs.[253] While fiber can be built in rural areas at rates up to several miles per day, in the urban and suburban areas, CLECs normally can expect to build at a daily rate of at most 500 feet per day, and only 100 feet within a business district.[254]

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248 Wigger Decl. ¶ 34 (Advanced TelCom).

249 Tirado Decl. ¶ 33 (XO).

250 Wigger Decl. ¶ 34 (Advanced TelCom).

251 Tirado Decl. ¶ 34 (XO) ("it normally takes approximately 6 months to obtain the rights-of-way"). Advanced TelCom estimates that for one route it takes 6 to 9 months to perform feasibility studies, obtain the right-of-way and license, and obtain equipment. Wigger Decl. ¶ 35 (Advanced TelCom).

252 For SNiP LiNK, "at one critical time in the deployment of its network, more than 80% of these applications had been pending for over 11 months." Abate Decl. ¶ 15 (SNiP LiNK). Xspedius has, with regard to loops, been forced to engage in protracted litigation over rights-of-way against "blatantly discriminatory franchise regimes," which expended considerable time and resources. Falvey Decl. ¶ 22 (Xspedius). David Kunde provides an apt assessment of the problem, which is in part due to "the tolerance of municipal governments for additional street cuts" which, due to "years of such cuts by cable companies, electric companies, water and sewer authorities, ILECs, and CLECs – is at an all time low." Kunde Decl. ¶ 11 (Eschelon).

253 Tirado Decl. ¶ 34 (XO); Wigger Decl. ¶ 35 (Advanced TelCom).

254 Tirado Decl. ¶ 34 (XO). Advanced TelCom has been able to find vendors that can build as much as ½ mile in one day, depending on the location. Wigger Decl. ¶ 35 (Advanced TelCom).

Given the extraordinary cost of constructing interoffice transport facilities, it simply is not economic to build unless a CLEC has accumulated a very large volume of traffic on a particular route. Specifically, Joint Commenters have found that, as a general matter, the Commission was correct in finding that construction does not make economic sense until a CLEC accumulates a minimum of 10-18 DS3s worth of traffic on that route. [255] Consequently, with respect to DS3 transport and dark fiber, requesting carriers will face impairment in the vast majority of instances.

USTA II found fault with the Commission's nationwide finding of impairment, however, because the possibility of exceptions to the rule existed. Although some exceptions to impairment will exist for DS3 and dark fiber transport, these are likely to be relatively isolated circumstances, justified by lower barriers to entry or higher opportunities to recover costs than in a typical situation. The Loop and Transport CLEC Coalition is sensitive to the administrative burdens associated with looking for these few needles in a haystack of routes. In order to avoid over-taxing the FCC's resources, Joint Commenters recommend that the Commission adopt reasonable resource-conserving criteria to group routes whre the barriers to entry are similar, so that a route-specific approach can be applied most efficiently. Specifically, for ease of administration, the FCC may group similar routes together for an impairment analysis (but it may not group routes that do not share common characteristics). The Commission could accomplish this objective by grouping DS3 and dark fiber transport routes into three categories.

[255] Wigger Decl. ¶ 37 (Advanced TelCom) (requires a minimum of 15 DS3s worth of traffic to justify build); Tirado Decl. ¶ 35 (XO) (requires a minimum of 9 to 12 DS3s worth of traffic);

a. Top 50 MSAs

In the first group, the FCC should find non-impairment on routes between large urban central offices with the following characteristics: (1) the two end points of the route are in the same LATA in a top 50 MSA, (2) at least four fiber-based collocators have established operational collocations at both ends of the route and (3) each of the end points serves a central office with at least 50,000 switched access business lines (indicating a level of aggregate demand that makes wholesale service likely to exist).[256]

It will not be surprising to see that the construction of interoffice facilities by multiple CLECs occurs only on the very densest traffic routes. A prime example would be routes between two ILEC access tandems. A second example would be a route between two ILEC central offices where both such offices serve very large concentrations of business lines (more than approximately 50,000 VGE business lines on each end).[257] This is precisely what the extensive factual record in the *TRO* showed. As the Commission noted, "indicia of widespread fiber deployment is most prominent in the largest me*TRO*politan areas and connections to the largest incumbent LEC wire centers."[258] In fact, the state records confirmed that multiple competitive deployment is likely to be present only on a few routes per state. QSI's analysis of 14 state proceedings showed that only 55 transport routes (out of our 5,500 routes reviewed) had

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256 For these purposes, "business lines" mean switched access grade equivalents ("VGES"), determined using a methodology consistent with the Commission's ARMIS rules, that are assigned to business customers.

257 For example, XO states that it can afford to deploy transport only on "the very densest traffic routes," which it estimates to be routes between two ILEC central offices that each serve 50,000 voice-grade equivalent business lines. Tirado Decl. ¶ 38 (XO). Advanced TelCom takes a similar approach. Wigger Decl. ¶ 44 (Advanced TelCom).

258 *TRO*, ¶ 378 n. 1159.

three or more carriers self-provisioning DS3 capacity transport.[259] Although the ILECs did not identify these routes by size of the end office, it is likely that this deployment occurred only in the wire centers with the highest volume of traffic between them.

b. Small end offices

Conversely, in the second group, the FCC should find impairment for all routes where at least one end point serves a central office with fewer than 25,000 business lines. For these routes, requesting carriers are not likely to be able to overcome the barriers to deploying DS3 transport or dark fiber.

Not surprisingly, competitive wholesale CLEC transport products almost never are available on low traffic density routes.[260] This is consistent with the general lack of challenges of transport impairment the ILECs made in the state *TRO* proceedings. In many cases, ILECs chose not to put on a transport case at all. Qwest, for example, presented a transport case in only one state, the State of Washington. Verizon did not present a transport case in two of the Verizon East states, and declined to present a case in many of its Verizon West states, including North Carolina.[261] Although this decision may have been made for many reasons, including reasons of available resources, the fact that the ILECs apparently did not see the cost/benefit of presenting a case implicitly concedes that the instances where non-impairment existed (and therefore the ILEC would receive a benefit) would be rare.

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259 *QSI Analysis* at 17, Table 5.

260 *E.g.,* Abate Decl. ¶ 18 (SNiP LiNK) ("[W]e found that wholesale alternatives for dedicated transport were very limited.") Kunde Decl. ¶ 6 (Eschelon((fewer than 60% of Eschelon Collocations served via alternate transport providers.

261 Verizon also did not provide data in Maine or New Hampshire.

Even where the ILECs chose to put on a case, they typically only placed a small percentage of the total routes in the state in issue. Verizon for example, challenged 899 routes in Pennsylvania, and 194 in Massachusetts.[262] In each case, Verizon noted that the number of routes it placed in issue was fewer than [3] percent of the total transport routes in the state. In Massachusetts, the number of rates challenged was fewer than 1 percent of its total rates.[263] These routes were concentrated in the larger urban areas, with few if any routes challenged between end offices with only a few business subscribers.

c. <u>All other routes</u>

For routes not meeting either of these characteristics, the FCC is not able to make an impairment finding without examining the extent of competitive deployment on the particular route. For these routes, the FCC should collect the information necessary to conduct a trigger analysis, although it may simplify application of the triggers in order to take into account the court's concerns. The FCC should find impairment on these routes unless (1) at least five fiber-based collocators have established active collocations at both ends of the route, and (2) at least two of these fiber-based collocators self-certificates as a wholesale provider of transport to or from both end points.

Joint Commenters believe that the Commission's two-part triggers would accurately identify impairment for this category of routes. We propose a test that differs from the triggers in recognition that proper application of the triggers required factual information that may be

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262 *See Supplemental Direct Testimony of Harold E. West, III and Carlos Michael Peduto, II,* Pensnsylvania PUC Docket No I-00030099 (Dec. 19, 2003 (testifying that the "combined date showes 899 dirct routes …")*; Direct Testimony of John Conroyand John White*, Massachusetts Department of Telecommunications and Energy, Docket No. 03-60, Pg. 38 (Nov. 14, 2003) (testifying that Verizon MA is challenging only 194 routes (less than one percent)

263 *See id.*

difficult for the Commission to collect under its ordinary processes. In order to make the triggers easier to apply, the Commission could modify them to focus more closely on the presence of fiber-based deployment on the route. The presence of fiber-based deployment is not as reliable as the triggers analysis because, for example, the presence of fiber-based collocations does not indicate whether the carrier has in fact connected the two end points of the route. Nevertheless, we submit this trigger as a proxy at least to identify the potential existence of non-impairment on the route.

Given that the use of fiber-based collocators is less reliable (though easier to collect), two modifications to the triggers test are necessary. First, the number of fiber-based collocators required must be increased. This increase is necessary to allow for the possibility that one or more of the fiber based collocators may not actually have facilities connecting the route and thus may be falsely identified as a competitive supplier. The presence of fiber based collocators should be reliable and should verifiable by the Commission and the CLECs. The Coalition recommends the FCC require CLECs to identify the offices in which they have fiber based collocations through the annual Form 477 reporting requirement. The Commission could then publish a list with all of the routes where 5 or more collocators were present on both ends. Alternatively, if ILEC fiber data is to be used, the ILEC should publish this list on its wholesale web-site along with the names of the carriers present on the route. CLEC's should have the opportunity to verify information and to challenge the inclusion of a route on the list.

Second, in addition to requiring the presence of the requisite number of collocators on the route, the Commission should maintain a wholesale component to the test. In accordance with the *TRO* triggers, the test should require that two of the fiber-based collocators actually be in the

business of providing wholesale transport to carriers on routes such as this. Wholesalers should be self-identified, since it is in the interest of a true wholesaler to make that fact known.

As an alternative to collecting this information in this proceeding, the Commission could establish a self-executing trigger implemented via certifications during the UNE ordering process. For example, the Commission could require the ILECs to post a list of the transport routes where five or more fiber-based carriers had active collocations at both ends of the route.[264] ILECs could use this list as a basis for rejecting UNE DS3 or dark fiber transport orders on routes identified on the list. If an ILEC rejects an order based on the presence of these collocators, the ILEC should provide the requesting carrier with the names of the fiber-based collocators identified as having fiber-based collocations on that route. A CLEC would be free to contact those carriers to verify the information posted by the ILEC. In addition, if a CLEC finds that none of the entities identified is willing to wholesale transport to the CLEC, then the test would not be satisfied (because of the lack of a wholesale component). In that circumstance, the CLEC should be permitted to certify that none of the identified fiber providers offered wholesale services and re-submit the order to the ILEC, which the ILEC would be required to fulfill as a UNE.

C. <u>Entrance Facilities</u>

The D.C. Circuit has remanded the Commission's definition of dedicated transport — specifically the exclusion of entrance facilities — on the ground that it "appears to have little or no footing in the statutory definition [47 U.S.C. § 153(29)]," and as a factual matter "the record

[264] This list could be posted in a secure site accessible only by carriers ordering UNEs from the ILEC, such as on each ILEC's wholesale web page.

[was] too obscure" to affirm. 359 F.3d at 586. On remand, the Commission is required to facilitate "further development of the record to allow proper judicial review."[265]

Entrance facilities, as they have come to be known, are transport facilities that carry traffic between an ILEC office and a CLEC's equipment, such as a switch.[266] As a functional matter, however, entrance facilities are no different from any other transport facility, because, like all transport, they are "use[d] for transmission" to and from ILEC offices.[267] Thus, because the Commission's attempt to cull these facilities out of the definition of transport was rejected by the *USTA II* court, the Coalition suggests that the Commission now engage in traditional impairment analysis, as it had done in the *UNE Remand Order*[268], rather than simply re-visit prior definitional methods.

The Coalition also notes that the D.C. Circuit expressed reservations that entrance facilities meet the impairment test, stating that they "appears" that these facilities "*exist* exclusively for the convenience of the CLECs," but "CLECs do not themselves provide them."[269] This situation seemed "anomalous" to the court. *Id*. Entrance facility impairment is not in fact anomalous, once it is understood that their deployment requires the same capital resources as any other type of transport, and invariably involves as much difficulty. It therefore is entirely expected that CLECs do not deploy entrance facilities themselves.

For these reasons, the Coalition recommends that entrance facilities be subject to an analysis similar to that applicable to dedicated transport generally: whether there is sufficient

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265 *USTA II*, 359 F.3d at 594.

266 *See TRO*, ¶ 361.

267 *Id*.

268 15 FCC Rcd. at 3852, ¶ 348.

269 *USTA II*, 359 F.3d at 586.

evidence of self-deployment of, or a competitive market for, the provision of transport between the closest ILEC central office (servicng wire center of the CLEC office and CLEC point of presence. And as we have earlier phrased it, the analysis should regard only the characteristics of the "ILEC side" of the transport route.

The Commission should adopt a trigger for entrance facilities that will determine whether they meet the impairment standard in a given market. For example, entrance facilities should be available from a central office in the top 50 MSAs if the office serves fewer than 50,000 business lines ***or*** three or fewer fiber-based collocators have active collocations in the office.

VI. ENTERPRISE LOOPS

As reflected in the *Triennial Review Order*, the discussion of enterprise market Loops requires discrete treatment of DS1, DS3 and Dark Fiber Loop UNEs. The following sections begin with a discussion of the unique status of DS1 Loops, and demonstrate that the finding of national impairment for DS1 Loop UNES made by the Commission in the *Triennial Review Order* remains valid and has not been subject to vacatur by the *USTA II* decision. The following sections show that the Commission has before it a vast factual record – including factual determinations from the Triennial Review proceeding, findings in other Commission orders, and new evidence presented by industry analysts and CLECs – which supports the reaffirmation of a national finding of impairment for DS1, DS3 and Dark Fiber Loops, with some limited exceptions.

A. Contrary to Incumbent LEC Assertions, *USTA II* Did Not Vacate The Commission's National Finding of Impairment for DS1 Loops

In their joint filing seeking a writ of mandamus from the D.C. Circuit Court of Appeals, USTA, Verizon and Qwest assert that the *USTA II* decision vacated the Commission's rules

involving DS1 and other high-capacity UNE Loops.[270] In attempting to support this assertion, the petitioners argue that "this Court clearly stated that it was vacating *all* of the Commission's delegations of impairment determinations to the states," and note some similarities in the way appellants briefed both loop and transport issues.[271]

In a recent letter to Chairman Powell, Verizon attempts to elaborate on its appellate assertion by offering two arguments. First, Verizon cites the D.C. Circuit Court's language vacating the Commission's unbundling requirements for "transmission facilities dedicated to a single customer or carrier," and asserts that this is a "definition that includes both high-capacity loops and transport."[272] Second, Verizon notes that the D.C. Circuit vacatur is limited to "portions of the order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements," but argues that the Commission delegated to the states the impairment analysis for all loop UNEs, including DS1 Loops.[273] Verizon concludes that the *USTA II* decision therefore has the effect of vacating all Loop UNEs.

In fact, the citations proffered by USTA, Verizon and Qwest confirm that DS1 Loop UNEs have not been vacated. The *USTA Mandamus Petition* and the *Verizon 7/19/04 letter* simply state the obvious – that the D.C. Circuit vacated the Commission's referral of impairment

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270 *United States Telecom Ass'n v. FCC,* United States Telecom Association, the Verizon telephone companies, and Qwest Communications, International Inc., Petition for a Writ of Mandamus to Enforce the Mandate of this Court, filed in the United States Court of Appeals for the District of Columbia Circuit, at 4 n.5, Case Nos. 00-1012, *et al*., (Aug. 23, 2004), ("*USTA Mandamus Petition*").

271 *USTA Mandamus Petition* at 4 n.5, (citing *USTA II*, 359 F.3d at 568).

272 Letter from Michael E. Glover, Senior Vice President and Deputy General Counsel, Verizon, to Michael E. Powell, Chairman, FCC at 2 (Jul. 19, 2004) (on file with the FCC in CC Docket Nos. 01-338, 96-78 and 98-141) ("*Verizon 7/19/04 letter*").

273 *Verizon 7/19/04 letter* at 2, (citing *USTA II*, 359 F.3d at 568, and *TRO*, ¶ 327).

conclusions to state regulators. But the incumbent LECs' attempt to extrapolate from this ruling the vacatur of DS1 Loop UNE rules is wholly unsupportable.

There can be no mistaking the unambiguous determination of the *Triennial Review Order* regarding DS1 Loop UNEs: "We find that requesting carriers generally are impaired without access to unbundled DS1 loops."[274] In making this finding, the Commission reached the definitive conclusion that competitive LECs cannot cost-effectively provision their own DS1 loops: "[c]ompetitive LECs do not have the ability to recover sunk costs in self-deploying DS1 loops."[275] Indeed, the Commission found the record before it so compelling on this issue, that the Commission did not refer consideration of the self-provisioning trigger to the states for consideration, but instead made a final, nationwide determination of impairment on these grounds.[276] On the issue of the wholesale provider trigger, the Commission found that "the record indicates little evidence of wholesale alternative DS1 loop capacity . . . ."[277] It did note that there was a possibility that this trigger could be met on some specific routes, however, and referred that determination to the states.[278]

The *USTA II* decision did not vacate the Commission's nationwide finding of impairment based on the self-provisioning trigger, nor its finding that the record lacked adequate evidence for it to make a finding of non-impairment based on the wholesale trigger, and those conclusions by the Commission remain in effect. In fact, the *USTA II* decision's vacatur of the referral of

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274 *TRO*, ¶ 325.

275 *TRO*, ¶ 326.

276 "Because the record does not demonstrate that carriers can economically self-provision at the DS1 level, we do not delegate to the states the authority to consider DS1 loop impairment on a location-specific basis based on a self-provisioning trigger." *TRO*, ¶ 327.

277 *Id.*

278 *Id.*

impairment analysis to the states effectively means that these findings by the Commission are final and uncontested – the only vehicle for overturning the Commission's nationwide finding of impairment for DS1 loops has been eliminated. The *USTA II* decision therefore perpetuates the nationwide carve out of DS1 Loop UNEs.

The ILECs raise one other argument in an attempt to support their assertion that all Loop UNEs have been vacated by *USTA II*: They effectively argue that the D.C. Circuit Court does not know the difference between Transport and Loop UNEs, and that when the court vacated the Commission's rules regarding Dedicated Transport UNEs, it thought it was including high-capacity Loop UNEs as well. The plain language of the *USTA II* decision, however, belies these assertions.

First, the court's analysis in *USTA II* is organized into discrete categories for Dedicated Transport and Broadband Loops. The Broadband Loop discussion is further broken down into a discussion of Hybrid Loops, Fiber-to-the-home ("FTTH") Loops and Line Sharing. The structure of the *USTA II* decision therefore evidences no confusion between Transport and Loop functions.

Second, the *Triennial Review Order's* substantive discussion and findings – including its impairment findings – regarding DS1, DS3 and Dark Fiber Loops are contained in paragraphs 311-341 of the *Order*. With one non-substantive exception,[279] none of those 30 paragraphs are cited anywhere in the *USTA II* decision, and the court did not discuss any of the factual determinations or conclusions reached in those parts of the *Order*. The *USTA II* decision is in

[279] The *USTA II* decision cites paragraph 320 of the *TRO Order* once. In doing so, however, it is simply citing to comments made by CLECs, and considering those arguments in its discussion of the Commission's rules that substantially deregulate fiber-to-the-home loops. *USTA II*, 359 F.3d at 583.

fact quite clear – the court expressly addressed Hybrid and FTTH loops and Line Sharing, and did not otherwise address the Commission's rules regarding enterprise Loop UNEs.

The plain reading of the *USTA II* decision and the Commission's express findings in the *Triennial Review Order* therefore confirm that the Commission's national finding of impairment for DS1 Loops has not been vacated by the court, and remains in effect. As discussed below, this finding may be modified in a limited number of instances when the Commission conducts its own impairment analysis under the wholesale trigger. However, until the Commission does so, its national impairment conclusion remains in effect.

B. The Commission Is Fully Empowered to Reiterate Its National Finding of Impairment for DS1, DS3 and Dark Fiber Loop UNEs, Based On Previously Submitted and New Data.

In crafting its permanent rules regarding enterprise Loop UNEs, the Commission has a vast amount of factual data and relevant precedent upon which to draw. The following sections discuss: submissions by industry analysts and competitive carriers, and recent Commission decisions, that demonstrate incumbent LEC monopoly con*TRO*l over loop facilities, and support the conclusion that competitive alternatives generally do not exist; testimony and data from the record of the *Triennial Review Order* that prompted the Commission to make a finding of national impairment for DS1, DS3 and Dark Fiber Loops; evidence assembled from state regulators during the course of the Triennial Review proceedings that they have undertaken; and new testimony and data from industry analysts and competitive carriers. This record provides compelling evidence to support a reaffirmation of the Commission's nationwide finding of impairment for DS1, DS3 and Dark Fiber Loops, with some limited exceptions.

1. Numerous independent industry studies and filings before the Commission demonstrate that there are no competitive

alternatives to incumbent LEC loops, and support a national finding of impairment

In **Section ___,** *infra*, we discuss several industry studies and filings now before the Commission that examine incumbent LEC pricing practices for Special Access services, all of which demonstrate that incumbent LECs maintain market power over loops. A study conducted by Economics and Technology, Inc. ("ETI"), which was filed with the Commission last month, reviews prices for Special Access Services provided by BellSouth, SBC, Verizon and Qwest (the BOCs"). The ETI Study shows that: 1) the BOCs are the exclusive providers of DS1 and DS3 services to roughly 98% of all business premises; 2) in cases where the BOCs have been granted pricing flexibility for their Special Access services, they have increased the prices of the services by almost 10% for DS1s, and almost 6% for DS3s; and 3) BOCs are realizing an average rate of return of over 43% on their Special Access services.[280]

The *ETI Study's* calculation of BOCs' supranormal rates of return on Special Access are validated by a separate study conducted by four economists, who's 2003 study computes an average rate of return of over 37% on BOC Special Access services.[281] The computation of price increases following a grant of pricing flexibility is validated by a separate analysis published by the Phoenix Center, which demonstrates that the BOCs have raised their rates for DS1 service by as much as 20%, and their rates for DS3 service by as much as 12% after receiving pricing flexibility.[282]

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280 *ETI Study.*

281 Paul N. Rappoport, Lester D. Taylor, Arthur S. Menko, Thomas L. Brand: "Macroeconomic Benefits from a Reduction in Special Access Pricing," at 4 and Appendix 3 (2003).

282 *Phoenix Center Paper*.

Finally, a recent complaint filed with the Commission by AT&T against BellSouth charges that BellSouth is engaging in anticompetitive pricing by providing heavy discounts for DS1 and DS3 customers that agree that they will purchase 90-95% of their total telecommunications services from BellSouth on a region-wide basis.[283] The AT&T complaint demonstrates that these discounts have nothing to do with cost savings or efficiencies that are related to large volume or long term purchases, but that BellSouth is awarding these discounts purely on the basis of a customer's willingness to buy service exclusively from BellSouth.

These studies and complaints all show the same thing – the BOCs face no market discipline in setting their rates for Special Access services. Indeed, supracompetitive rates of return, the ability to raise rates at will, and the ability to provide discounts that are not related to cost all demonstrate that the BOCs are exercising monopoly con*TRO*l over their loops. These practices are classic examples of market power that can only be exercised in the absence of competition, and demonstrate that there are no competitive alternatives to BOC-owned DS1 and DS3 loops.

2. The Commission's own analyses in its *Access Charge Reform* proceedings demonstrate that no competitive alternatives to ILEC loops exist, and support a national finding of impairment

Three years ago, in its *CLEC Access Charge Order*,[284] this Commission for the first time imposed rate regulation on competitive LECs. The rationale for this extension of regulatory oversight was that the competitive LECs exercised monopoly con*TRO*l over the loops they

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283 *AT&T Complaint*.

284 *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (*CLEC Access Charge Order*).

purchased from the ILECs.[285] In reaching this conclusion, the Commission found that competitive LECs used loops to serve two sets of customers – IXCs and end user customers. The Commission found that, once a competitive LEC obtained a loop, IXCs were forced to use that loop if they needed to reach the end user customer, and that the competitive LEC exercised monopoly power over that loop in its dealings with the IXC: "[W]e conclude that it is necessary to constrain the extent to which CLECs can exercise their monopoly power and recover an excessive share of their costs from their IXC access customers – and through them, the long distance market generally."[286] As to the end user customer, the Commission found that the competitive LEC did not exercise monopoly con*TRO*l over the loop as it related to its end user customer: "[U]nlike IXCs, they [end users] have competitive alternatives in the market in which they purchase CLEC access service: In any market where a CLEC operates, there is, by definition, at least one alternative provider – the ILEC."[287]

The Commission reiterated this finding in May of this year when it released its order on reconsideration of the *CLEC Access Charge Order*.[288] In that *Order*, the Commission reaffirmed its earlier findings, and established a new rule regulating access charges that competitive LECs may charge when they act as a transiting carrier: "[A]n IXC may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier

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285 *Id*., ¶ 39.

286 *Id.*

287 *Id*., ¶ 38.

288 Acc*ess Charge Reform*, Eighth Report and Order and Fifth Order on Reconsideration, FCC 04-110, CC Docket No. 96-262 (2004)(*CLEC Access Charge Recon Order*).

and it is necessary to constrain the ability of competitive LECs to exercise this monopoly power."[289]

The Commission's conclusions in its orders regulating competitive LEC access charges track closely with the analyses of industry analysts and competitive carriers. The Commission found it necessary to regulate competitive LEC rates because the local loop – and the access to the end user customer it provides – confers monopoly power that allows the recovery of above-market rates from IXCs. Importantly, the only reason the Commission did not find similar monopoly power in providing service to the end user customer, is because the incumbent LEC was the omni-present other carrier. Under the Commission's own analysis, the ILECs that own the loops also exercise market power with respect to the IXC customer that uses the loop. Moreover, if the competitive LEC is forced off the loop – by, for example, the elimination of UNE pricing and the subsequent doubling of loop prices – the incumbent LEC will exercise monopoly con*TRO*l over the end user customer served by that loop as well. Thus, the Commission's own analyses – reiterated as recently as four months ago, make clear that incumbent LECs have monopoly con*TRO*l over their loops. By definition, there is no competitive alternative to incumbent LEC loops, and this finding compels a nationwide finding of impairment for DS1, DS3 and Dark Fiber Loop UNEs.

3. A Vast Record Supports the Reaffirmation of a National Impairment Finding for DS1, DS3 and Dark Fiber Loop UNEs, with Limited Exceptions.

The Commission has before it an enormous amount of information – including the record of the Triennial Review proceeding, factual data amassed by state regulators, and new data filed

[289] *Id.*, ¶ 17.

in the instant proceeding by industry analysts and competitive carriers. This voluminous record presents a compelling case for reaffirming a national finding of impairment for DS1, DS3 and Dark Fiber Loop UNEs, with limited exceptions.

a. The Record of the *Triennial Review* Proceeding DS1 Loop UNEs

In the *Triennial Review Order*, the Commission conducted an impairment analysis for unbundled DS1 Loops, and found "that requesting carriers generally are impaired without access to unbundled DS1 loops."[290] In making this determination, the Commission cited extensively to the record as the basis for the following conclusions:

- Based on the record evidence, the Commission decisively concluded that CLECs are unable to self-provision DS1 loops.
- The Commission noted that the record identified no carriers that self-provisioned DS1 loops. In fact, the Commission noted that the two instances of loop self-provisioning that were reflected in the record showed that the carriers deployed OCn-capacity facilities. The lowest capacity OC circuit – OC3 – provides enough capacity to provision 84 DS1 lines.[291] In reaching this conclusion, the Commission relied on the declaration of MCI/Worldcom witness Slocum, appended to comments filed by MCI,[292] and comments by AT&T. The Joint Commenters ask the Commission to take notice of the Slocum Declaration. The Commission also noted that "incumbent LECs recognize a distinction between provisioning DS1 level loops and other higher capacity loops."[293]
- The Commission found that the record demonstrated that competitive LEC customers served by DS1 Loops: 1) provide much lower revenue opportunities than larger customers, 2) generally resist long-term contracts, 3) experience higher rates of customer

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290 *TRO*, ¶ 325.

291 An OC3 circuit carries the equivalent of three DS3s, and a DS3 circuit carries the equivalent of 28 DS1s. H. Newton, Newton's Telecom Dictionary, 281, 605 (16th ed. 2000).

292 The Commission cites to the Slocum Declaration, which is appended to the MCI/WorldCom comments filed in CC Docket No. 96-98 on June 11, 2001. The Slocum Declaration is proprietary, and no part of its text is appended to the public version of the MCI filing. As a result, it is impossible for the Joint Commenters to re-in*TRO*duce that declaration into the docket of the instant proceeding. The Joint Commenters therefore ask the Commission to take notice of the Slocum Declaration, as though it were appended to these comments.

293 *TRO*, ¶ 325 & n.960 (citing comments and reply comments of SBC).

turnover, or "churn."[294] The Commission cited numerous competitive LEC comments, and affidavits submitted by TDS witness Jackson and NuVox witness Cadieux. These affidavits are appended at Attachment 1.

- In reviewing this combination of high cost and low revenue associated with DS1-based competitive services, the Commission concluded unequivocally: "competitive LECs do not have the ability to recover dunk costs in self-deploying DS1 loops."[295] The Commission found the record evidence so compelling that it made this ruling dispositive of the issue, and did not delegate to the states the authority to consider DS1 loop impairment based on a self-provisioning trigger.[296]

- The Commission found that the record provides no evidence of the availability of wholesale DS1 loops.

- On the issue of competitive wholesale alternatives to incumbent LEC DS1 UNE loops, the Commission found that "the record indicates little evidence of wholesale alternative DS1 loop capacity."[297] It therefore referred this issue to the states, to determine on a route-specific basis whether wholesale alternatives existed.

The *Triennial Review Order* therefore found that the massive record in that proceeding provided conclusive evidence that competitive LECs could not self-deploy their own DS1 loops, and that no evidence in existed in the record to support a finding that competitive wholesale DS1 loops were available. From these facts, the Commission concluded that: "The record shows that requesting carriers seeking to serve DS1 enterprise customers face extremely high economic and operational barriers in deploying DS1 loops to serve these customers."[298] This evidence supported the Commission's nationwide finding of impairment for DS1 Loop UNEs in the Order, and supports a reaffirmation of that finding now, as informed by an impairment analysis conducted on a route-specific basis. As discussed in subsequent sections, new data submitted in

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294 *Id.*, ¶¶ 325-26 & n.961.

295 *Id.*, ¶ 326.

296 *Id.*, ¶ 327.

297 *Id.*, ¶ 327.

298 *Id.*, ¶ 325.

the instant proceeding, and form other sources, supports a national finding of impairment for DS1 Loop UNEs, with some limited exceptions.

DS3 Loop UNEs

The *Triennial Review Order* cites extensively from the record in that proceeding, and cited various sources as providing convincing evidence that it is not cost effective for competitive LECs to self-provision DS3 loops unless a given location has sufficient demand for three DS3 circuits or more, and that other barriers prevent self-deployment, including difficulties in accessing rights-of-way and building access.[299] The Commission then concluded that: "We make a national finding that requesting carriers are impaired on a customer-location-specific basis without access to unbundled DS3 loops."[300] In reaching this conclusion, the Commission relied on affidavits from KMC Communications witness Michael Duke and SNiP LiNK witness Joseph Polito, and ex parte letters submitted by AT&T. These documents are appended to this pleading as Attachment 2**.**

After considering these sources, as well as comments submitted in the Triennial Review proceeding, the Commission expressly rejected incumbent LEC arguments for a broad finding of non-impairment for DS3 loops:

> In finding that competitive carriers are impaired without unbundled access to DS3 loops, we disagree with incumbent LECs' claims that market evidence of DS3 deployment in certain situations demonstrates that, in *all* situations, traffic and revenue potential justify a nationwide finding of DS3 non-impairment. The limited record evidence we have of self-deployment does not permit such broad extrapolation.[301]

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299 *Id*,. ¶ 320.

300 *Id*.

301 *Id.*, ¶ 323 (emphasis in original).

The record of the Triennial Review proceeding therefore provides substantial evidence of impairment, and lacked sufficient evidence for a broad finding of non-impairment. These findings remain compelling, and without more, support a reiteration of the Commission's national finding of impairment for up to two DS3 Loop UNEs to a single location, subject to a review of location-specific data. As discussed in subsequent sections, new data from sources filed in the instant docket support a broad finding of impairment for DS3 Loop UNEs, with some limited exceptions.

Dark Fiber Loop UNEs

The Triennial Review Order similarly cited to an expansive list of comments and affidavits in conducting its analysis of Dark Fiber Loop UNEs. The Commission reached the following conclusions:

> We find on a national basis that requesting carriers are impaired at most customer locations without access to dark fiber loops.[302]
>
> * * * * *
>
> Because it is generally not economically feasible to deploy duplicate fiber loop facilities, the record reflects that a number of facilities-based competitive LECs rely on incumbent LEC unbundled dark fiber to provision "last mile" services to small and medium-sized customers, particularly in rural, unserved, or underserved areas of the country.[303]
>
> * * * * *
>
> In most areas, competing carriers are unable to self-deploy and have no alternative to the incumbent LEC's facility.[304]

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302 *Id.*, ¶ 311.

303 *Id.*, ¶ 313.

304 *Id.*, ¶ 314.

The Commission cited to ex parte letters from Dominion Telecom, Norlight Communications, OnFiber Communications, El Paso Networks and Conversent Communications in reaching these conclusions. These letters are appended to these comments as Attachment 3. The Commission relied on these facts to support a national finding of impairment, subject to possible modification after a self-provisioning analysis was conducted on a route-specific basis.[305] The record remains an extensive source of compelling data that precludes a national finding of non-impairment, and that supports a national finding of impairment, based on new data, as discussed below.

b. Data from State *TRO* Proceedings

QSI Consulting, Inc. has conducted a survey of impairment analyses performed by state regulators in *TRO* Proceedings conducted across the country. The *QSI Analysis* examines discovery data submitted in response to requests made by state regulators, incumbent LECs and competitive LECs in 14 states,[306] and applies the self-provisioning and/or wholesale triggers established in the *Triennial Review Order*, as appropriate.

For DS1 Loops, the *QSI Analysis* accepted the Commission's conclusion that it is not practically feasible for competitive carriers to self-provision their own loops. Applying the wholesale service trigger on a route-specific basis, the study shows that, in the 14 states analyzed, 36 buildings should be removed from DS1 Loop unbundling requirements.[307]

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305 *TRO*, ¶ 314.

306 The state records examined for loop data in the *QSI Analysis* are from proceedings conducted by the regulatory commissions of California, Florida, Georgia, Illinois, Indiana, Michigan, Missouri, New York, Ohio, Oklahoma, Tennessee, Texas, Washington State and Wisconsin. *QSI Analysis*, 2, 6, 8.

307 *QSI Analysis*, 2-3, 13-14.

For DS3 Loops, the *QSI Analysis* applied both the self-provisioning and wholesale triggers on a route-specific basis. The study concludes that, in the 14 states analyzed, 49 buildings should be removed from the DS3 pursuant to the wholesale trigger, and 130 buildings should be removed pursuant to the self-provisioning trigger.[308]

For Dark Fiber Loops, the *QSI Analysis* followed the direction of the *Triennial Review Order*, and applied only a self-provisioning test. The study concludes that, in the 14 states analyzed, no buildings should be removed pursuant to the self-provisioning trigger [309]

In addition to the review of data submitted in the 14 states discussed above, the *QSI Analysis* notes that "Verizon and Qwest declined to propose any building locations in their respective states" for purposes of conducting a route-specific impairment analysis for enterprise loops.[310] As a result, those incumbent LECs have provided no data on which to rebut the showings of impairment made by competitive carriers in those states.

The QSI Analysis presents a compelling argument for a national finding of impairment for Dark Fiber Loop UNEs, and a finding of impairment for DS1 and DS3 Loop UNEs, with the exception of the 215 specific routes identified.

c. New Data and Testimony

In addition to the extensive record of the Triennial Review proceeding and the subsequent data amassed by state regulators in their own proceedings, new and equally compelling data and testimony are submitted with these comments. This Section summarizes this information, all of which is appended to these comments.

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308 *QSI Analysis*, 2, 11-14.

309 *QSI Analysis*, 2, 11-12.

310 *QSI Analysis*, 10.

Data From the Most Recent Local Competition Report

The Commission's most recent Local Telephone Competition report, which reflects industry data current as of year end 2003,[311] provides a further proof that incumbent LECs continue to hold a monopoly over local loops, and that CLECs face extraordinary obstacles in provisioning their own loop facilities. That report shows that, nationwide, there is a total of 181.4 million switched access lines, provisioned by both incumbent and competitive carriers. Of this total, 29.6 million lines are provided by competitive carriers. Of this total number of competitive switched access lines, 23% – or 6.8 million lines – are owned by the competitive carriers. The remainder of the competitive carriers' lines are obtained by reselling incumbent LEC services, or purchasing UNE Loops from the incumbents. Of the 6.8 million switched access lines owned by competitive carriers, 3.2 million lines are owned by cable companies.[312] As a result, competitive LECs own 3.6 million of their own lines. This figure represents just 1.98% of the total switched access lines in the country.

This figure, based on the most recent data collected by the Commission's Industry Analysis and Technology Division, is consistent with prior Commission findings of the incumbent LECs' continuing dominance of the local loop market. It also lends further support to the economic studies conducted in the ETI Study, and the Phoenix Center Paper, which charge

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311 Local Telephone Competition, Status as of December 31, 2003, Industry Analysis and Technology Division, Wireline Competition Bureau, June 2004 (released June 18, 2004).

312 The 3.6 million line figure was calculated by subtracting the 3.2 million lines owned by cable operators from the 6.8 million total number of competitive carrier-owned lines. This calculation reflects the assumption that all cable access lines are owned by the cable companies, as opposed to reflecting resale or UNE lines.

the incumbent LECs with Special Access pricing practices that can only be accomplished by monopolists, in the absence of market discipline. The fact that CLECs have self-provisioned such a miniscule number of loops is fully consistent with the Commission's nationwide finding of impairment for DS1 loops, and its finding of impairment for DS3 and Dark Fiber loops, subject to further route-specific analysis. These figures are also fully consistent with the Declarations of industry witnesses regarding the barriers that incumbent LECs face in their attempts to deploy their own loops. These Declarations are attached to these Comments, and are summarized in the immediately following section.

Declarations of Industry Representatives

Advanced Telcom: Declaration of Dan J. Wigger

Advanced TelCom, Inc. ("ATI") witness Dan J. Wigger identifies the substantial investment that ATI has made in network facilities: Seven circuit switches operating over 24 SONET-based fiber rings, comprised of nearly 100 miles of fiber deployed and operated by Advanced Telcom and approximately 500 miles of leased dark fiber. ATI provides services over these facilities to more than 18,000 customers in the West and Northwest.[313] Mr. Wigger notes that it is his company's preference to avoid using incumbent LEC facilities wherever possible, but notes that capital markets are closed to funding of new competitive LEC networks, and so continued availability of UNE Loops is essential to the maintenance of local service competition.[314] His testimony states the following:

[313] Wigger Decl., ¶¶ 2-3, 15-16 (Oct. 1, 2004) (Advanced TelCom).

[314] *Id.*, ¶ 5.

- The majority of ATI's customers are small and medium sized businesses. The large majority of these customers require access at the DS1 or voice grade level; 70% of new non-resale customers require connections at the DS1 level.[315]

- ATI uses both UNE Loops and EELs, and has made a substantial investment in central office collocation arrangements – ATI operates 35 collocation arrangements, and estimates that it incurs costs of approximately $325,000 for the first three years of operation at each site.[316]

- Because of the cost of collocating in incumbent LEC central offices, it is not economical for ATI to serve customers with less than six voice lines or six-to-12 mixed voice and data lines. Approximately 65-70% of ATI's customers are served by DS1 UNE loops.[317]

- ATI has deployed a small number of its own loops, or fiber laterals, to commercial buildings, although it has not built any such laterals in the last three years or more.[318]

    - Construction of laterals is extremely high – with an average cost of $37,000 - $50,000 if provided to multiple buildings, and considerably more if to a single building – and can only be justified for very large customers.[319]

    - Negotiation of ROW licenses, building access agreements and franchises, when possible, are time consuming (taking a minimum of four months) and expensive, and often present a complete barrier to deployment.[320]

    - The average ATI customer is a small or medium sized business, and is frequently located in a single-tenant building. The investment in building laterals to such a customer would take approximately three years to recover.[321]

    - As a result, ATI's policy is not to build laterals unless: the customer takes a minimum of DS3 service and is located within 500 feet of the ATI fiber ring, or a minimum of OC-3 service and is located within a half-mile of the ATI fiber ring.[322]

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315 *Id.*, ¶¶ 7-8.

316 *Id.* ¶ 12.

317 *Id.*, ¶¶ 13-14.

318 Wigger Decl., ¶ 19.

319 *Id.*, ¶ 19, 21.

320 *Id.*, ¶ 20, 22.

321 *Id.*, ¶ 21.

322 *Id.*, ¶¶ 23-24.

- Wholesale loop alternatives are almost non-existent. The only exception in ATI's service area is in the city of Takoma, Washington, where a competitive fiber provider offers DS1 access to a limited number of buildings that are on its network.[323]

- Cable television companies do not provide alternative UNE loops, and to ATI's knowledge, no cable company offers wholesale customer access in ATI's service area. Cable companies generally do not build to the business customers that ATI serves, and even if they do, they have not designed their networks to provide business-grade, high-capacity service.[324]

Mr. Wigger concludes that there are no viable substitutes for DS1 and DS3 UNE Loops in the areas served by ATI.

Eschelon: Declaration of David A. Kunde

Eschelon Telecom, Inc. witness David Kunde describes Eschelon as a facilities-based competitive LEC that provides voice and data services to over 35,000 customers in the West and Northwest.[325] Mr. Kunde starts by noting that it would be Eschelon's preference to self-provision all of its network, or alternatively, to purchase network elements from sources other than incumbent LECs, but that these choices are not available at present.[326] Mr. Kunde notes that Eschelon's typical customers are small and medium sized businesses, consisting of users of analog services, typically with six to seven lines, and users of DS1-based services, averaging 16 lines. Mr. Kunde states that it is not economically feasible to self-deploy loops to serve such a customer base.[327]

KMC: Declaration of Mike Duke

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323 Wigger Decl., ¶ 24.

324 *Id.*, ¶¶ 30-32.

325 Kunde Decl., ¶ 3.

326 *See id.*, ¶ 6.

327 *Id*, ¶¶ 14, 17.

KMC Telecom witness Mike Duke describes in detail the KMC business plan, which has always been that of a facilities-based – KMC has spent over one billion dollars deploying over 2,000 route miles of fiber.[328] While KMC has deployed its own loop connections to end users in limited instances where such deployment is economically and operationally feasible, it has encountered substantial obstacles that prevent it from deploying its own loops on a broader basis. These include:

- Municipal franchises, private rights of way ("ROW") and building access. Obtaining municipal franchises can be costly and time-consuming, and obtaining private ROWs and access to the buildings that house KMC's customers may be wholly unavailable, or cost-prohibitive.[329]

- The costs of constructing loops are such that it is not cost effective under any circumstances to build loops to customers that are located miles from the KMC backbone network.[330]

- For customers that are closer to the network, the cost of building loops makes it uneconomical to self-provision loops unless the customer purchases a bare minimum of 3 DS3s.[331]

- In addition to these cost considerations, self-provisioning loops takes substantial time – typically 3-6 months – and such delay cannot be tolerated by many customers.[332]

Mr. Duke concludes that this combination of cost and operational impediments has made it impossible for KMC to self-provision more than one-half of one percent of the high-capacity loops it uses.[333]

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328 Duke Decl., ¶ 5 (Oct. 4, 2004) (KMC)

329 *Id.*, ¶ 7.

330 *Id.*, ¶ 8.

331 *Id.*, ¶¶ 8, 10.

332 *Id.*, ¶ 9.

333 *Id.*, ¶ 10.

Finally, Mr. Duke testifies that it is operationally impossible for KMC to provide wholesale loop services to other competitive LECs. Mr. Duke notes that KMC did not plan to provide wholesale loop services when it constructed its network, and as a result, the KMC network is not sized and configured to do so.[334] KMC has also not deployed the back office systems that would be required for such a wholesale business model.[335] Finally, KMC's loops connect directly to the KMC backbone, and not to incumbent LEC central offices, as most retail carriers would require.[336] As Mr. Duke's testimony makes clear, even for a CLEC that is as facilities-focused as KMC, economic and operational considerations make self-provisioning – and wholesaling – loops inviable.

SNiP LiNK: Declaration of Anthony Abate

SNiP LiNK, LLC witness Anthony Abate discusses the issue of loop self-deployment from the perspective of a small, privately-held facilities-based competitive LEC, and confirms that SNiP LiNK has found it economically impossible to deploy any loops – it is completely dependent on high-capacity Loop UNEs from incumbent LECs to reach its customers.[337] In describing SNiP LiNK's experience in constructing its fiber ring, Mr. Abate notes that obtaining ROWs was a substantial barrier to entry, and a process that is heavily skewed in favor of the incumbent LEC.[338] Mr. Abate also notes that obtaining necessary pole attachments – predominantly from Verizon – also proved a considerable barrier, with over 80% of Verizon

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334 *Id.*, ¶ 20, 22-23.

335 *Id.*, ¶ 24.

336 *Id.*, ¶ 21.

337 Abate Decl., ¶¶ 4, 9 (Oct. 1, 2004) (SNiP LiNK).

338 *Id.*, ¶¶ 13, 14.

applications pending for over *11 months*.[339] Mr. Abate concludes that it is not economical for SNiP LiNK to deploy its own loops under virtually any circumstances.[340]

XO: Declaration of Wil Tirado

XO Communications, Inc. witness Wil Tirado describes the need for access to high-capacity UNE Loops from the perspective of the country's largest competitive LEC.[341] XO has invested massively in network facilities, operating almost 150 class five switches, and fiber ring networks consisting of 7,136 route miles and 884,827 fiber miles, over which it provides service to more than 180,000 business customers.[342] Mr. Tirado demonstrates that, even for a competitive carrier as large as XO, with very limited exceptions, competitive carriers are fundamentally impaired in their ability to provide competitive telecommunications services without access to high-capacity UNE Loops from incumbent LECs, for the following reasons:

- XO serves small- and medium-sized business customers. Of XO's approximately 180,000 customers, about 80% take service on a DS1 level. The remaining 20% take service on DS3 level.[343]
- To compete effectively, XO must offer service at competitive prices. As a result, it operates on very thin margins, and cannot afford to offer any service below cost.[344]
- Although XO has invested approximately $5 billion to establish me*TRO* fiber rings that serve 70 me*TRO*politan areas, the rings connect directly to only 2,164 buildings – about 1% of the addressable market. The cost of building lateral fiber connections to additional buildings is immensely expensive, and cost-prohibitive in most cases.[345]

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339 *Id.*, ¶¶ 15, 16.

340 *Id.*, ¶¶ 5-7, 9.

341 Tirado Decl.,¶ 2 (Oct. 1, 2004) (XO)

342 *Id.*, ¶¶ 2, 12.

343 *Id.*, ¶¶ 5-6.

344 *Id.*, ¶¶ 7-8.

345 *Id.*, ¶¶ 12, 15-17.

- The average "lateral" needed to reach from the XO backbone to a customer building costs approximately $220,000 per building. This does not include the cost of municipal franchises, private ROWs, and building access – if such rights of access are available at all.[346]

  - In addition to cost, the construction of laterals is extremely time consuming, typically requiring four to six months.[347]

  - The cost, delay, and access problems associated with the construction of laterals has forced XO to adopt a policy of not pursue such construction unless combined customer demand in a building reaches at least three DS3s.[348]

  - Mr. Tirado provides a Cash Flow Analysis chart demonstrating the very limited circumstances under which lateral construction is economically feasible. He concludes that it is almost never feasible to self-deploy laterals at the DS1 level. He further notes testimony of other competitive carriers, including AT&T, MCI, Nuvox and KMC who have provided similar testimony.[349]

- Mr. Tirado explains that fixed wireless is not a viable substitute for wireline connectivity to a customer premises. XO has invested nearly $1 billion in purchasing LMDS spectrum, and has made extensive attempts to roll out fixed wireless loop-based service. These attempts have failed to date, as have similar attempts by Teligent and WinStar. While XO remains confident that the technology will allow effective deployment of fixed wireless loops at some time in the future, it is not a viable option now.[350]

- Mr. Tirado also explains that cable television facilities cannot replace loop UNEs, because most cable companies do not serve the buildings that house the business customers that are XO's target market. In those rare instances where cable companies do serve such buildings, their networks are not designed to meet the needs of business users.[351]

- Finally, Mr. Tirado explains that incumbent LEC Special Access services are not a viable substitute for high-capacity Loop UNEs:

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346 *Id.*, ¶¶ 17.

347 *Id.*, ¶ 18.

348 *Id.*, ¶ 20.

349 *Id.*, ¶ 21.

350 *Id.*, ¶¶ 22-29.

351 *Id.*, ¶¶ 30-32.

- ILEC Special Access rates have risen dramatically since 1996, as reflected in the incumbent LECs' profit margins, which averaged 8.25% in 1996, and average 40% today.[352]

- Special Access rates for DS1 and DS3 connections commonly run 20% - 300% above DS1 and DS3 UNE Loop rates. This rate differential is not ameliorated by volume and term discounts for Special Access services.[353]

- If XO is forced to obtain its connections to its customer's buildings by purchasing incumbent LEC Special Access services, its margins on its DS1 and DS3 services would be completely wiped out. This is a classic anticompetitive "price squeeze."[354]

- XO purchases the vast majority of its DS1 and DS3 loop connections from incumbent LECs as UNEs. Contrary to the assertions by some incumbent LECs that competitive LECs purchase the majority of their loop facilities as Special Access, XO purchases 75% of its DS1 customer connections as Loop UNEs, and 77% of its DS3 connections.

Mr. Tirado's Declaration thereby demonstrates that continued availability of DS1 and DS3 loop UNEs is essential to XO's ability to serve its customers, and that viable alternatives do not exist.

Xspedius: Declaration of James C. Falvey

Xspedius Communications, LLC witness James Falvey notes that Xspedius is a facilities-based competitive carrier which has deployed 3,400 route miles of fiber and 38 switches, and serves over 23,000 customers, predominantly small and medium sized businesses.[355] At the same time, Xspedius is aware of the danger of speculative building, and will not engage in new network construction unless it justified by actual customer demand.[356] Mr. Falvey provides the following information:

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352 *Id.*, ¶ 41.

353 *Id.*, ¶ 42, and Attachment B.

354 *Id.*, ¶ 43, 49-50.

355 Falvey Decl., ¶¶ 3, 6, 15 (Oct. 1, 2004) (Xspedius)

356 *Id.*, ¶ 5.

- Xspedius serves the majority of its customers with DS1 connections, although it also has a substantial number of UNE-P customers, which are served at the DS0 level.[357]

- Xspedius has built its own fiber networks, typically fiber rings, consisting of 3,400 route miles of fiber in 20 states. It currently has 600 buildings directly connected to these networks via its own laterals – a very limited concentration of building access.[358]

  - The low number of on-net buildings reflects the fact that construction of laterals is very expensive, costing anywhere from $110,880 to $211,200 per mile.[359] Building laterals to buildings more than a mile away from the Xspedius network is cost-prohibitive, and is not even considered.[360]

  - In addition to construction costs, obtaining ROWs, municipal franchises and building access rights is always costly and time-consuming, and sometimes is simply impossible. Xspedius has spent hundreds of thousands of dollars litigating discriminatory franchise rules in several municipalities.[361]

  - Even when other impediments are resolved, construction of a lateral typically takes 10-12 months, and often takes much longer. Most customers are unwilling to accept such delay.[362]

  - As a result of the foregoing considerations, it is Xspedius' policy not to construct laterals unless customer demand exceeds 3 DS3s, at a bare minimum. It is virtually never cost effective to build a lateral to add customers with DS1-level demand.[363]

- DS1 loop alternatives are not available from competitive providers in the Xspedius service area, and point-to-point wireless applications cannot deliver the carrier-grade quality that Xspedius requires. Therefore, there are no wholesale or wireless alternatives to UNE Loops.[364]

- Special Access is not an alternative to UNE Loops. The services are grossly overpriced, generating a 40% margin for the incumbent LECs. The reason Xspedius purchases Special Access instead of UNEs is because it is forced to. Incumbent LECs have refused

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357 *Id.*, ¶ 6.

358 *Id.*, ¶ 17.

359 *Id.*, ¶ 18.

360 *Id.*, ¶ 20.

361 Falvey Decl., ¶ 19.

362 *Id.*, ¶ 21.

363 *Id.*, ¶¶ 22-23.

364 *Id.*, ¶¶ 23-24.

> to provision UNE Loops based on numerous arguments: assertions that "no facilities are available;" refusals to combine UNE Loops and Transport; refusing to convert Special Access circuits to EELs; threats of exorbitant circuit termination or conversion charges; refusals to commingle UNEs with access services; and arguments that the intended use was for "non-qualifying" services. Mr. Falvey cites several specific examples of such denials.[365]

The Declarations and data summarized above, and submitted with these Comments, provide compelling evidence that competitive LECs are impaired without access to high-capacity loop UNEs. They demonstrate that the Commission's impairment findings from the *Triennial Review Order* were initially correct, and should be reaffirmed in the instant proceeding.

d. Conclusion: The Record Supports Reaffirmation of a National Impairment Finding for DS1, DS3 and Dark Fiber Loop UNEs, With Some Limited Exceptions

The above analysis of factual determinations made by the Commission in the Triennial Review Order, confirm that this Commission was largely correct in making its national impairment findings for DS1, DS3 and Dark Fiber loop UNEs. The review of additional information subsequently assembled by state regulatory bodies, and testimony and studies filed in the instant proceeding, demonstrate that, in conducting its own granular impairment analysis, as required by the *USTA II* decision, the Commission may reinstate those national impairment findings, with some limited exceptions.

Specifically, as identified in the *QSI Analysis*, the Commission should:

- Reiterate its national finding of impairment for DS1 loop UNEs for areas served by Verizon and Qwest, and for areas served by SBC and BellSouth, with the possible exception of the 36 specific routes identified in the state Triennial Review data.

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365 *Id.*, ¶¶ 33-37, 40.

- Reiterate its national finding of impairment for DS3 loop UNEs for areas served by Verizon and Qwest, and for areas served by SBC and BellSouth, with the possible exception of the 179 specific routes identified in the state Triennial Review data.
- Reiterate its national finding of impairment for Dark Fiber loops, without exception.

VII. ADDITIONAL CLARIFICATIONS TO PROMOTE FACILITIES-BASED COMPETITION

Spurred on by the activist *USTA II* decision, the ILECs have launched a new offensive against facilities-based local competition. Their goal is to roll back competition to the pre-1996 Act era, where competition was limited to a niche market that imposed only a minor nuisance on the massive cash machine that is incumbent carrier local exchange service. Such an outcome would cost small and medium sized businesses $5 billion annually, des*TRO*y tens of billions of dollars in investments in telecommunications facilities and deal a crippling blow to the deployment of advanced telecommunications capabilities. The Commission cannot sit back and allow competition to be dismantled in this manner.

Now is the time for the Commission to back up its often stated commitment to facilities-based competition with actions that foster such competition. The Commission must fulfill its promise to promote competition with actions – *in this proceeding* – that meaningfully advance the ability of new entrants to provide the kind of competition the 1996 Act was intended to foster, both to business and residential customers. The Commission should make a pact, with customers, with the investment community and with itself as trustee of the 1996 Act, to promote competition in residential and small business telecommunications. This pact would contain five key promises to telecommunications consumers everywhere:

- That the new "business class dialtone" – DS1 loops and DS1 EELs – will be made available nationwide as UNEs;

- That DS3 transport will be available nationwide, either through multiple competitive supply, or lacking that, through network elements;
- That loop/transport combinations and routine network modifications will be available on a nondiscriminatory basis, whether the customer selects a CLEC or an ILEC as its service provider;
- That the Section 271 bargain will be fulfilled and 271 checklist items will be unbundled at reasonable, cost-based rates, regardless of the impairment determination under Section 251; and
- That DS1 UNE loops will provide an unimpeded 1.544 Mbps connection to the customer premises that meets all the technical standards of an existing DS1 UNE, regardless of the technology used by the ILEC to deploy hybrid loops. The quality of the DS1 loop provided to CLECs must be equivalent to the quality of a DS1 UNE that is provisioned to CLECs today, and to the quality of a DS1 Special Access Channel Termination.

These five promises are critical to placing facilities-based competition on a firm footing for the future. Action in this proceeding is necessary to turn the Commission's rhetoric into reality

A. The Commission Should Eliminate the "High Capacity EEL Eligibility Criteria"

Application of the impairment tests adopted in this proceeding and the availability of traditional enforcement mechanisms that suffice for all other FCC rules render unnecessary the High Capacity EEL Eligibility Criteria and compel their elimination. Although the current rules represent an improvement over the exceedingly complex and over-inclusive rules they replaced, these rules (which are complex and unduly burdensome in their own right) only serve to aid incumbent LEC efforts to impede access to EELs where impairment has been found to exist. The Commission repeatedly has found that such access is essential to the development of facilities-based competition. This is especially true in the small- to medium-sized business customer segment, where facilities-based competitive LECs have in*TRO*duced customers to the benefits of broadband provided over DS1-level UNEs and EELs.

Yet, the EEL use restrictions and subsequent eligibility requirements have provided incumbent LECs with tools for gaming the access requirements that the Commission has found so essential. Verizon, for example, claims that no collocation provisioned under its federal tariff satisfies the collocation requirement found in the eligibility criteria. BellSouth, meanwhile, raises rivals' costs and impedes meaningful access to EELs with vexatious EEL audit litigation. The short of it is that the rules, which were adopted in large measure to address incumbent LECs claims that gaming by competitive LECs was theoretically possible, have resulted in incumbent LEC gaming that is actual, rather than theoretical. The costs imposed by these rules are substantial and unnecessary, as the concerns that they were intended to address are already addressed fully by application of the impairment test and the availability of robust enforcement mechanisms to ensure compliance with the UNE access rules. Thus, the Commission should act now to eliminate its High Capacity EEL Eligibility Criteria.

1. Unencumbered Access to EELs Is Essential to the Development of Facilities-Based Competition

The Commission steadfastly and correctly has found that combinations of loops, transport and associated multiplexing (needed when a lower capacity loop is connected to a higher capacity transport segment) are essential to the development of facilities-based competition.[366] These findings remain true to this day. These loop and transport combinations, now commonly known as enhanced extended links (EELs) allow competitive LECs to expand the reach of their own networks to customers subtending incumbent LEC end offices in which the competitive LEC has no collocated facilities. Through the use of EELs, competitive LECs are able to serve a greater number of consumers and they are able to do so more efficiently and cost effectively.

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[366] *TRO*, ¶ 576.

EELs reduce the need for inefficient collocation in end offices where a competitive LEC's customer base would not cost-justify the deployment of collocated equipment. EELs also provide an effective means of ameliorating the detrimental effects of collocation space availability constraints and the delays associated with even the best provisioning intervals.[367]

Loop and Transport Coalition members depend on EELs to bring competitive services to the broadest addressable customer base possible. Increased market addressability yields greater penetration, density and revenues needed to justify the deployment of additional facilities and more robust and innovative product offerings. EELs are instrumental to the success of Coalition members' popular integrated T1s and other product offerings which have pioneered the delivery of broadband to the small and medium sized businesses that are at the heart of the American economy. As with DSL, the roll-out of integrated T1 products demonstrates that competition spurs innovation and benefits for consumers and forces the incumbent LECs to respond with their own competitive product offerings.[368] EELs are an integral part of this 1996 Act success story.

Indeed, EELs have allowed competitive LECs to extend and expand the success of integrated T1 products and other voice and data products, and in so doing, have forced incumbents LECs to respond with better services and better values for consumers. The incumbent LECs, however, resent having to respond with new products in some cases and with old products at lower margins in others. The incumbent LECs see EELs as a paramount threat to their spectacularly profitable special access business – a business that has grown in large

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367 *Id.*

368 *Id.*

measure based on a strategy of (often unlawfully) making UNEs unattractive or simply unavailable.

As part of that broader strategy, the incumbent LECs, chief among them the BOCs, have had significant success in hobbling competitors' access to EELs. After the "thou shall not tear apart" rule (rule 315(b)) was finally restored, the Commission required incumbent LECs to honor competitive LEC requests to convert special access circuits to EELs.[369] This access, however, was compromised as the Commission agreed to saddle all competitive LECs with the downside of a deal cut between some of the largest non-BOC IXCs and the BOCs. The result was a "temporary" EEL use restriction which, to a large extent, remains in place five years later.[370]

The temporary "significant amount of local service" use restriction adopted in the *Supplemental Order* and *Supplemental Order Clarification* applied (and in many cases, still applies) to those circuits converted from special access to UNE EELs. The Commission adopted a scheme of three so-called "safe harbors" by which competitive LECs could certify compliance with the use restriction. Since the adoption of that regime, the courts restored other FCC rules that now permit competitive LECs to order "new" EELs directly, without having to order special access first.[371]

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369 *UNE Remand Order*, ¶ 480.

370 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 96-98, 15 FCC Rcd 1760 (rel. Nov. 24, 1999) ("*Supplemental Order*"); *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 96-98, 15 FCC Rcd 9587 (rel. June 2, 2000) ("*Supplemental Order Clarification*").

371 *Iowa Util. Bd. v. FCC*, 301 F.3d 957 (8th Cir. 2002) (vacating those portions of the court's prevision decision that invalidated 47 C.F.R. 51.315(c)-(f) (additional combinations)).

2. EEL Use and Eligibility Restrictions Are Not Justified

In the *Triennial Review Order*, the Commission decided correctly that the "significant amount of local service" use restriction and the system of "safe harbors" applicable to conversions of special access to EELs needed to be retired.[372] The use restriction unduly discriminated against competitive LECs and gave the incumbent LECs an unfair advantage, as their own use of similar circuits was not restricted. The justifications supplied for the restrictions were based on rhetoric rather than fact and simply could not bear the weight placed upon them. The safe harbor proxies were recognized to be administratively burdensome, if not unworkable.[373]

The Commission, however, adopted a new regime of "eligibility criteria" applicable to both converted high-capacity EEL circuits, new high-capacity EELs and combinations of high-capacity UNE loops and special access circuits, which had not previously been considered EELs.[374] Although the new high-capacity EEL eligibility criteria hold the promise of being decidedly more administrable, especially as compared to the confounding and complex measurement requirements contained in the old safe harbors, they were unnecessary when adopted and they are patently unnecessary now.

3. Application of the Impairment Test and Enforcement Will Address Any Concerns that the Commission Previously Set Forth to Address through its Eligibility Criteria

In this proceeding, the Commission will decide where impairment exists and entitles competitive LECs to UNEs and where it does not. Where competitive LECs are entitled to

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372 *TRO*, ¶ 577.

373 *TRO*, n. 1830.

374 *Id.*, ¶ 591.

access UNEs, such access should not be encumbered by complex regulations that can create a drag on competitive LECs' ability to use EELs to offer products and services in competition with those offered by the incumbent LECs, their affiliates and strategic partners.

Application of the impairment test(s) adopted in this proceeding and the associated rules regarding access to UNEs effectively should address any concerns that the Commission previously set forth to address through its eligibility criteria. The Commission should adopt and allow time for the new rules to be incorporated into interconnection agreements prior to assessing whether those rules are susceptible to gaming. The Commission also must allow time for implementation of the rules, so that it can assess what problems, if any, develop and determine whether available enforcement mechanisms, including its own, are effective in addressing such problems without the need for additional regulation. At this point in time, however, there is no reason to believe that the Commission's section 208 complaint process will not prove adequate for addressing incumbent LEC accusations of competitive LEC violations of the FCC's UNE access rules.

4. The EEL Eligibility Criteria Are Needless Regulations With High Costs and No Discernable Benefits

As explained above, Commission susceptibility to unsupported and theoretical incumbent LEC charges of gaming of EELs access by competitive LECs has led to needless regulation in the form of the original EEL use restriction and the more recent EEL eligibility criteria. These needless and unduly expansive regulations have resulted not only in unnecessary implementation and compliance disputes and costs, but also in needless, resource draining audit requests, audits and a substantial amount of litigation. The costs imposed (needlessly) on competitive LECs by these unnecessary regulations have been substantial. Verizon, for example, blocks access by

claiming that no collocation provisioned under its federal tariff satisfies the collocation requirement found in the eligibility criteria. BellSouth, meanwhile, raises rivals' costs and impedes meaningful access to EELs with vexatious EEL audit litigation. BellSouth alone has pursued dozens of audit requests in states throughout its service territory.[375] In so doing, BellSouth routinely insists on flouting FCC EEL audit requirements. This has resulted in about a dozen state commission complaint proceedings and additional appellate court proceedings. Notably, not one of these complaint proceedings involves a legacy IXC and every one involves a competitive LEC focused on serving small and medium-sized business customers.[376]

The Commission would do well to remove that regulatory overhang, the unnecessary costs associated with its implementation, and the resulting litigation drain that has a disparate impact on competitive LECs. The Commission also should be mindful that these needless regulations tax the resources of the state commissions, as well. In any event, the Commission should not regulate to solve problems that have not been proven (and cannot at this juncture be proven) to exist.

B. The Commission Should Clarify Its Routine Network Modification Rules To Prohibit ILECs From Engaging In Discriminatory Practices

The validity of the Commission's routine network modification rules is now settled.[377] To ensure that these rules are implemented promptly, further Commission action is necessary.

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375 BellSouth has sought unauthorized audits of NuVox, NewSouth, XO, Xspedius and other competitive LECs.

376 There are ongoing complaint cases initiated by BellSouth against NuVox, NewSouth, XO and ITC^DeltaCom. Complaint cases are pending in Georgia, Florida, Kentucky, North Carolina, South Carolina and Tennessee, as well as in federal and state court in Georgia, where BellSouth appealed a Georgia Commission EEL audit decision involving NuVox. Several of these cases have been ongoing for years and BellSouth seems eminently content to keep raising its rivals costs with such litigation.

377 *USTA II*, 359 F.2d at 577-78.

First, the Commission should make clear in this proceeding that its discussion of ILEC obligations to perform routine network modifications on behalf of requesting carriers did *not* constitute a new rule or change in law, but rather was merely a clarification of an existing rule and the ILECs' associated responsibilities. Consequently, efforts by certain ILECs to amend existing interconnection agreements to impose new or additional charges, terms and conditions for such arrangements in response to the *TRO* decision are unwarranted and explicitly should be prohibited. Second, the Commission should clarify that the ILECs' cost of providing routine network modifications are (or at least should be) already included in the recurring TELRIC-based rates for unbundled high-capacity loops. Finally, the Commission should clarify that the ILECs may not impose a separate charge on competitive carriers for routine network modifications if they do not charge their own customers for such services in comparable circumstances.

1. The Commission Should Declare In This Proceeding That Its Conclusions Regarding Routine Network Modifications Were A Clarification Of The ILECs' Existing Obligations And Not A New Rule

The Commission should make clear in this proceeding that its conclusion in the *TRO* requiring ILECs to perform routine network modifications to high-capacity loops on behalf of requesting carriers is not a new rule, but rather clarification of an existing rule and the ILECs' associated obligations. Clarification of the Commission's intent is necessary in this instance because of current efforts by certain ILECs to delay compliance with obligations on the ground that the parties must amend existing interconnection agreements to incorporate these "new" rules.

In recent months, several ILECs, including Verizon, have attempted to impose new and additional charges for performing routine network modifications on the basis that it is a new service ordered by the Commission in the *Triennial Review Order*. As the Commission made clear in the *TRO*, however, nothing could be further from reality. The Commission's primary purpose in analyzing the ILECs' routine network modification requirements was to clarify the ILECs' obligations with respect to such modifications in order to "provide competitive carriers with greater certainty as to the availability of unbundled high-capacity loops and other facilities throughout the country."[378] In fact, in concluding that "incumbent LECs, in provisioning high-capacity loop facilities to competitors, must make the same routine modifications to their existing loop facilities that they make for their own customers, the Commission explicitly noted that it was "*clarify[ing]* the scope of the loop unbundling obligation" in response to the requests of competitive carriers.[379] Importantly, the Commission never stated or implied that it was adopting a new rule or imposing new or different obligations upon the ILECs.

Several state commissions have similarly interpreted the Commission's conclusions regarding routine network modifications as merely an explanation of the ILECs' pre-existing obligations. For example, the arbitrator in the Rhode Island consolidated arbitration proceeding initiated by Verizon concluded that the "FCC did not impose a new obligation on [ILECs] to undertake routine network modifications for CLECs," but "merely resolved the con*TRO*versy as to whether [the ILECs] had to perform routine network modifications for CLECs and then adopted rules to clarify exactly what constituted a routine network modification and associated

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378 *TRO*, ¶ 632.

379 *Id.*, ¶ 633 (emphasis added).

obligations".[380] In reaching this conclusion, the arbitrator posed a question that must be answered in this proceeding: "[i]f the *TRO* really did constitute a change of law and created a completely new legal obligation for VZ-RI [and other ILECs], the question must be asked as to why, for so many years, did VZ-RI [and other ILECs] make routine network modifications at TELRIC rates?" The Coalition submits that the answer to this question is very simple: the ILECs provided such services (to the extent that they complied with their statutory obligations) because they were required to by existing law and that law was not changed by the Commission in the *TRO*. Consequently, the Commission should clarify in this proceeding that the ILECs' obligation to perform routine network modifications is not the result of new or amended rule and, thus, does not trigger the need for modified or additional terms, conditions, or rates for such services.

2. Costs for Routine Network Modifications Must Be Incorporated Into ILECs' TELRIC-Based Rates

The Commission should also clarify that any such costs for routine network modifications already are (or at least should be) incorporated into the ILECs' TELRIC-based rates for unbundled high-capacity loops. The Coalition submits that such a clarification will assist carriers to deter one of the ILECs' more recent anti-competitive schemes – to require CLECs to pay additional fees for doing work already built into existing rates. Moreover, clarification of the pricing requirements will address the Commission's concerns regarding the ILECs' double recovery of costs associated with routine network modification.[381]

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380 *See Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreement with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Rhode Island to Implement the Triennial Review Order*, Procedural Arbitration Decision, Docket No 3588 (April 9, 2004).

381 *TRO*, ¶ 640.

Clarification of the appropriate pricing requirements is also necessary in this instance because certain ILECs are unscrupulously using the Commission's clarification in the *TRO* to levy new and additional charges for routine network modification to unbundled network loops. In some cases, certain carriers are attempting to impose fees as high as $1,000 to perform such "routine" modifications. To prevent such ILECs from using the Commission's clarification in the *TRO* as a vehicle to increase rates and double recover costs for providing routine network modifications, the Commission should clarify that any costs related to routine network modifications must be incorporated into the ILECs TELRIC-based rates for unbundled high-capacity loops.

3. The ILECs May Charge Competitive Carriers For Routine Network Modifications Only If Similarly-Situated Retail Customers Are Charged

Finally, the Commission should make clear that ILECs may charge a separate fee for routine network modification only if they charge their own retail customers for such services in comparable situations. One of the underlying objectives in the Commission's rules governing routine network modification is a prohibition against discriminatory practices. Section 251 also prohibits discrimination in the provision of unbundled network elements. If competitive carriers are required to pay for and include in its rates costs for network elements that are not incurred by the ILECs retail customers, they will never be able to effectively compete for such customers. Accordingly, the Commission should clarify that the ILECs may not provide routine network modifications free of charge to its own retail customer, while charging competitive carriers non-recurring fees or higher fees. To do so makes it nearly impossible for competitive carriers to charge rates for unbundled loops that are competitive with the ILECs.

C. The Commission Must Reaffirm The BOCs' Separate Unbundling Obligations Under Section 271 And Specify the Rates and Standards For Section 271 Network Elements In This Proceeding

As discussed herein, the Commission should find that CLECs are impaired without unbundled access to DS1, DS3 and dark fiber loops and transport under Section 251(c)(3). However, assuming *arguendo*, the Commission removes some or all of these categories of loops and transport from the list of UNEs that must be made available under section 251 in some or all geographic markets, the BOCs remain subject to a separate and ongoing obligation to provide unbundled access and interconnection to these network elements under section 271. Section 271 imposes unbundling obligations independent of those in section 251(c)(3), obligations that are *not* conditioned on the presence of impairment. This conclusion already has been upheld by the D.C. Circuit in *USTA II* and is the only one that can be squared with the plain language of the 1996 Act.[382]

Given that the Commission is considering in this proceeding the prospect that certain UNEs it mandated in the now-partially vacated *Triennial Review Order* are no longer required to be unbundled under section 251, the situation demands that the Commission provide greater clarification regarding the service and pricing standards applicable to section 271 network elements, and it must do so *in this proceeding*. In the *Triennial Review Order*, the Commission declared that section 271 network elements must be made available at rates, terms and conditions that are just, reasonable and nondiscriminatory consistent with the standards articulated under sections 201 and 202 of the Act, but did not elaborate further as to what this standard entails or

[382] *USTA II*, 359 F.3d at 588 ("even in the absence of impairment, BOCs must unbundled local loops, local transport, local switching and call-related databases in order to enter the interLATA market").

how it should be applied in the section 271 context. The Commission should do so now, and must do so if it is going to delist any of the UNEs subject to the *Interim Order and NPRM*.

Understandably, until recently, there was no real urgency for the Commission to expound upon the actual standards to be applied to section 271 network elements.[383] However, current market and regulatory conditions create the risk that "precipitate elimination of [obligations to unbundled switching, enterprise market loops and transport] could destabilize the market."[384] The industry looks to the Commission to provide clarification and to ensure stability in the event the agency finds non-impairment for any element currently provided as a UNE.

The Commission must address these issues now, *before* any delisting of DS1, DS3, and dark fiber loops and transport under section 251 can take effect. In earlier statements, the Commission suggested that it would depend upon the enforcement process to produce the appropriate rates, terms and conditions for section 271 network elements.[385] The Loop and Transport CLEC Coalition submit that a "wait and see" approach would be profoundly unwise. The Commission should use this remand proceeding to detail the scope of the BOCs' section 271 obligations. This is particularly urgent because the BOCs are enjoying the tremendous benefit of the section 271 bargain – to the tune of millions of dollars in long distance revenues monthly. They must accept the rest of the bargain as well – and provide checklist unbundling as mandated by the Act.

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383 In the *TRO*, the FCC delisted OCn loops and transport and other next-generation loops. See *TRO* at ¶¶ 272-97, 315. To date, the purchase of OCn loops and transport, or their equivalent, and next-generation loops under Section 271 has been limited. However, these too are subject to the independent unbundling obligations under Section 271, and the Commission should make any rules applicable to Section 271 elements adopted in this proceeding applicable to Section 271 loops and transport element unbundling obligations generally.

384 *Interim Order and NPRM*, ¶ 28.

385 *See Id.*, ¶ 664.

1. Section 271 imposes a separate obligation, even where non-impairment exists

This proposition is not subject to debate. Section 271 of the 1996 Act imposes upon the BOCs a general obligation to provide the unbundled network elements required by the Commission under Section 251(c)(3) *and* separate and specific obligations to provide loops, transport, switching, signaling and call-related databases under section 271(c)(2)(B). Specifically, section 271(c)(2)(B) requires the BOCs to provide access and interconnection to all items listed on the competitive checklist, including:

- Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.
- Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.
- Local switching unbundled from transport, local loop, transmission, or other services.
- Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.[386]

The BOCs not only are required to meet the competitive checklist items during the section 271 application process, they also are required to remain in compliance with these requirements after approval has been granted. In particular, section 271(d)(6) requires the BOCs to continue to satisfy the conditions required for approval of its section 271 application.[387] Congress' sole objective in enacting section 271 was to provide the BOCs with an incentive to open their local markets and bottleneck facilities to competition, as a *quid pro quo* and prerequisite to obtaining long distance authority. This exchange was not a one time thing, frozen

[386] 47 U.S.C. § 271(c)(2)(B) (iv), (v), vi) and (x).

[387] 47 U.S.C. § 271(d)(6)(A) ("If *at any time after the approval* of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for approval . . .") (emphasis added).

in time, but a continuing and ongoing bargain which requires that the BOCs meet the 271 standard even as regulatory and other conditions may change.

The BOCs' separate and continuing unbundling obligations under section 271 have been affirmed by both the Commission and the courts. Most recently, in the *Triennial Review Order*, the Commission stated that it "continue[s] to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251."[388] The Commission's interpretation of the BOCs' 271 unbundling obligations was upheld by the *USTA II* court, which described the Commission's decision with respect to section 271 to mean that "even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching, and call-related databases in order to enter the interLATA market."[389]

2. The Commission must establish minimum standards and requirements for 271 compliant loops and transport

To the extent the FCC does not find impairment for any DS1, DS3, or dark fiber elements in any relevant geographic market, the Commission should establish the minimum requirements for section 271-compliant loop and transport elements (as well as local switching and call-related databases), including pricing standards.[390] Until the Commission does so, the only approved rates, terms and conditions for these elements are the standards for service and pricing applicable to section 251(c)(3) network elements.

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388 *TRO*, ¶ 654-655. The Commission reasoned that "Checklist items 4, 5, 6 and 10 separately impose access requirements regarding loops, transport, switching and signaling, without mentioning section 251" and that [h]ad Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2."

389 *USTA II*, 588 (citing *TRO*).

390 For purposes of these comments, the Coalition focuses on loops and transport only.

In the past, for all practical purposes, the Commission has not needed to look closely at section 271 unbundling obligations. The presumption, although not always stated, was that checklist item number 2, requiring nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1), duplicated the independent unbundling obligations for loops, transport and switching. And because the BOCs explicitly relied on their offering of section 251(c)(3) UNEs to meet their checklist obligations for items 4, 5, 6 and 10, the Commission simply had no need to evaluate and articulate in detail whether and how the section 271 unbundling obligation differs from the standard imposed under section 251(c)(3). As a result, the scope of the section 271 unbundling requirements has not yet been defined by the Commission.

BOC-provided loops and transport continue to be critical to competitive carriers' provision of local and advanced telecommunications services, and ensuring their availability is an essential condition to BOC-provided in-region interLATA services. This binary nature compels the Commission to define the BOCs' unbundling obligations under section 271 as central pillars of any pro-competitive policy and the agency's enforcement against section 271 backsliding.

The Loop and Transport CLEC Coalition concurs with the Commission's assessment in the *Triennial Review Order* that section 271 network elements should be made available on rates, terms, and conditions that are just, reasonable and nondiscriminatory. However, the Commission must bring certainty to the local and advanced services market by providing concrete detail as to how the BOCs may meet this requirement consistent with their section 271 obligations and the benefits they have received under its provisions.

The Commission articulated very general compliance requirements in the orders granting section 271 approval. With respect to loops, the Commission stated that in order to provide local loops in compliance with checklist item 4, a BOC must demonstrate that it furnishes loops (1) in quantities demanded by competitors, (2) at an acceptable level of quality and (3) in a non-discriminatory manner.[391] Likewise, with regard to unbundled local transport, the Commission simply has required that BOCs provide both dedicated and shared transport to local carriers.[392] Importantly, the Commission has not distinguished between the loops and transport required under section 271 and those provided under section 251 and has generally applied the same provisioning and quality standards to the elements provided under both statutory provisions.

Although the standards set forth by the Commission provide general guidance, experience demonstrates that the BOCs must receive explicit details as to their unbundling obligations or they will interpret them to be non-existent or substantially diminished from what is required under the 1996 Act. Accordingly, the Commission must specify that the BOCs remain obligated to unbundle DS1, DS3, OCn and dark fiber loops and transport under section 271. The Commission already has equated BOCs' provision of these particular network elements under section 251(c)(3)as being compliant with section 271 in various decisions.[393] It should codify this finding in this order.

a. As with section 251 elements, the Commission should establish pricing standards for section 271

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391 *See e.g., In the Matter of Application by Verizon Maryland, Inc., Verizon Washington, D.C., Inc., Verizon West Virginia Inc, Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington, D.C. and West Virginia*, Memorandum Opinion and Order, 18 FCC Rcd 5212, 5438 at ¶ 48-49 (2003).

392 *See id.*

393 *See e.g., id.*; *Michigan Section 271 Order* at 19095.

network elements with final rates to be
implemented through interconnection agreements

A principal issue for the Commission to decide with respect to the BOCs' independent section 271 unbundling obligations is the rates at which such network elements are to be offered. The Commission has the requisite authority to prescribe rates under Section 205 of the Act, which permits the Commission "to prescribe just and reasonable charges" for services provided by carriers under the Act. Because high-capacity dedicated transport and loops are required to be made available under section 271 of the Act (a federal statute), the Commission has at least concurrent authority under the Act to establish pricing standards or, in the alternative, a proxy on an interim basis, for loops and transport.

Although the Commission thus far has declined to set pricing standards for other section 271 items removed from the section 251 unbundling requirements (*i.e.*, operator services and directory assistance), the importance of loops and transport to local competition and the competitive carriers' ability to provide local service necessitates that the Commission prescribe a pricing standard for such network elements once the transition period expires and for new customers to which the transition rates are not available. In the *TRO*, the Commission articulated that the just, reasonable and nondiscriminatory pricing standard would apply to network elements made available pursuant to section 271 of the 1996 Act.[394] The Commission, however, refrained from adopting a specific inquiry or analysis for making a determination of justness and reasonableness for section 271 network elements under sections 201 and 202, and instead expressed a preference for making such determinations on a case-by-case basis.[395] While a case-

[394] *TRO*, ¶ 656.

[395] *Id.*, ¶ 664.

by-case approach may be appropriate for general retail services subject to sections 201 and 202, it is not adequate in this instance where the BOCs enjoy substantial benefits under section 271 and are fast making in-roads into the long distance market.[396].

As the Commission acknowledged in the *Triennial Review Order*, the BOCs, if left unchecked, are likely to subject section 271 high-capacity services and facilities to their interstate special access tariffs.[397] The BOCs' special access rates, however, are exorbitant, bear no relationship to costs, and are not constrained by market forces. Indeed, the Commission itself largely reached the same conclusion in the *Triennial Review Order*, when it concluded that the presence of ILEC tariffed special access was largely irrelevant to an impairment analysis, a position the Loop and Transport CLEC Coalition urges the Commission to reiterate in this proceeding. As a result, tariffed special access rates are not "just and reasonable" for section 271 elements and should not be allowed by the Commission, even during an interim period.

Simply relying upon special access in the interim period is inappropriate because it is highly unlikely the Commission, after full investigation, will find the section 271 obligations applicable to BOCs are as lenient as those that apply to other carriers not subject to section 271. The BOCs' section 271 unbundling obligations are the result of a *quid pro quo* in which under the "*quid*" the BOCs agreed to open their entire networks and provide access to certain enumerated network elements and facilities in exchange for the "*quo*," the highly coveted in-region long distance service authority. Congress, however, intended section 271 to be the

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396 The *USTA II* decision was a "last straw" for some carriers such as AT&T, which announced plans to stop promoting its local and long distance services to residential end users. *See Lesley Cavley, AT&T to End Residential Marketing*, USA Today (Jul. 22, 2004); *Dawn Kawarroto and Ben Charney, AT&T Drops Hunt for Residential Customers*, CNET News.com, (Jul. 22, 2004).

397 *See id.*

primary tool for encouraging the BOCs to open their *entire* networks to competition. To simply apply the generic 201 and 202 standards on these obligations would all but render section 271 meaningless. The general requirement to provide retail service in accordance with sections 201 and 202 already existed prior to the 1996 Act, and applied to all carriers. Thus, the BOCs would not be required to do anything different than it otherwise would have been obligated to do had it not received in-region long distance service authority.

In addition, a case-by-case approach of developing rates will almost certainly result in extensive litigation or enforcement actions between parties unable to negotiate a commercial rate. The BOCs and competitive carriers already are at a standstill with respect to the appropriate rates, terms and conditions for elements no longer subject to unbundling requirements under 251 as a result of the *Triennial Review Order*. It is not likely that they will rapidly reach agreement with competitors on standards for loops and transport, which are critical components to local service. Thus, rather than take a "wait-and-see" tactic, the Commission should seek to remove unnecessary conflict and uncertainty from the market. This will best be accomplished by setting a specific and detailed pricing standard for section 271 compliant rates.

Once a more detailed pricing standard is established, the states, subject to the review authority of the FCC, should set the prices for network elements made available pursuant to section 271. This approach mirrors that used by the Commission using the TELRIC methodology under section 251 and would be equally as effective in this instance. It is also comparable to the section 271 authorization process itself whereby the states review and approve, and where necessary arbitrate, the interconnection agreements to which the BOCS pointed in seeking section 271 authority. Further, prior to FCC review of the section 271 applications, the states made comprehensive reviews upon which the FCC heavily relied in

reaching their own decisions. Consequently, significant roles by the state commissions in prescribing rates for section 271 network elements, provided the Commission retains review authority over state-established rates, does not divest the Commission of its authority to prescribe rates for section 271 elements under the Act and therefore does not run afoul of *USTA II*. Rather, it places initial setting actual rates in the hands of the parties most familiar with state-specific costing issues and regulation -- the state regulatory commissions.

b. TELRIC must remain the pricing standard for section 271 network elements until final rates are set

To the extent the Commission does not have sufficient information to set permanent pricing rules for Section 271 unbundled elements as a result of this proceeding, or the states have not yet set rates, the Commission should establish a proxy, to be used by BOCs until permanent pricing rules are established.[398] At least initially, the Commission should require the BOCs to continue providing the section 271 checklist items at TELRIC rates. The Commission recognized in adopting interim UNE rules when initiating this rulemaking that the obligation to provide unbundled switching, loops and transport has been in place for several years and the precipitous elimination of these UNEs could destabilize the market.[399] The same concerns are present with respect to pricing for those elements. To permit the BOCs to suddenly shift to pricing flexibility (*i.e.*, tariffed special access rates) -- especially when such flexibility may not be justified after further examination -- provides the BOCs with powerful incentives and

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398 Although the Coalition requests that the Commission direct the states to set rates based on a prescribed pricing standards, the Commission has recognized the states may set rates independently without Commission approval. *See Provision of Directory Listing Information under the Communications Act of 1934, as Amended*, 16 FCC Rcd 2743 (2001).

399 *Interim Order and NPRM*, ¶ 28.

opportunities to engage in price discrimination, and in particular price squeezes, to cripple competitive carriers that rely on the section 271 network elements to enter the local market. This result not only harms competitive carriers, but also the consumers who rely on them to provide competitively-priced services.

Moreover, because the Commission has never engaged in ratemaking for section 271 checklist items, it is prudent to maintain the TELRIC rate, which already has been subject to Commission scrutiny and deemed to be "just and reasonable," until the Commission can conduct a proceeding to determine what a "just and reasonable" pricing standard should be under section 271. By implementing this "soft landing" approach, the Commission can avoid forcing CLECs to scramble in a "thin" market to obtain alternate network element sources and/or redevelop business plans on the fly. This approach also shields consumers from sharp and sudden rate increases as a result of carriers' increased costs for local service elements and decreases the likelihood that consumers will be forced to seek new or alternative service providers in the event competitive carriers are no longer able to continue providing service at an acceptable rate, if at all. Finally, this approach alleviates the risk that BOCs may backslide on their section 271 unbundling obligations during the interim period before final rules are set.

3. The BOCs have an obligation under the Act to commingle section 251 and 271 network elements

The Commission must require the BOCs to combine section 271 elements with each other and with section 251 elements at no additional charge to the requesting carrier. The *Triennial Review Order* explicitly required incumbent local exchange carriers to permit commingling of UNEs and UNE combinations with other wholesale facilities and services,

including any network elements unbundled pursuant to section 271.[400] That obligation remains in place and *USTA II* provides no basis for changing it.

Consistent with this requirement, the Commission required BOCs to demonstrate compliance with the Act's commingling requirements as a precondition to meeting the requirements of item 2 on the competitive checklist. Indeed, in the "Statutory Requirements Appendix" attached to each Commission order granting BOCs in-region interLATA authority, the Commission explains that "[b]ecause the use of combinations of UNEs is an important strategy for entry into the local telecommunications market, as well as an obligation under the requirements of section 271 [it must] examine[] section 271 applications to determine whether competitive carriers are able to combine network elements as required by the Act and the Commission regulations."[401] To the end, the Commission has determined that "[i]n order to comply with the requirements of checklist item 2, a BOC must show that it is offering [n]ondiscriminatory access to network elements in accordance with section 251(c)(3)."[402] Section 251(c)(3) requires an ILEC to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory."[403] This provision also prohibits BOCs from separating already combined network elements made available under section 251(c)(3). Moreover, there is nothing in the Act restricting a BOC's obligation to combine of network elements under 251(c)(3) UNE and a network element made available under section 271 of the Act.

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400 *See TRO*,¶ 584.

401 *See, e.g., Michigan Section 271 Order,* Appendix C, ¶ 44.

402 *Id.*, ¶ 43 (internal quotations omitted).

403 47 U.S.C. § 251(c)(3).

Consequently, the Commission must continue to require BOC to combine (or not separate) section 251 UNEs with section 271 network elements in the manner required by the 1996 Act.

CLECs must also be allowed to combine section 271 unbundled elements with each other. As noted by the *USTA II* court,[404] the basis of the BOCs' section 271 commingling obligations is the Act's general prohibition against carrier practices that directly or indirectly give undue or unreasonable preference or advantage to any person or subject any person to undue or unreasonable prejudice or disadvantage.[405] The Commission recognized the Act's requirements for commingling in the *Triennial Review Order*, stating that section 251(c)(3) requires ILECs to "provide unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide a telecommunications service."[406] Consequently, because the BOCs provide no limitations or restrictions on their ability to combine section 251 and 271 network elements in order to meet their customers' needs, the same commingling opportunities must be provided to competitive carriers. Any other result violates the nondiscrimination requirements of section 202(b).

4. The Commission must reject BellSouth's Preemption Petition

The Commission must reject BellSouth's Emergency Petition in Docket 04-245, which requests that the Commission preempt state commissions from regulating the rates, terms and

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404 In *USTA II*, the court acknowledged that the independent unbundling requirements under section 271 of the Act are governed by the nondiscrimination obligations set forth in section 202 of the Act. *See USTA II* at 590.

405 47 U.S.C. § 202(a).

406 47 C.F.R. § 51.315; *TRO*,¶ 573.

conditions for network elements that must be made available under section 271 of the Act.[407] Specifically, in its Emergency Petition, among other things, BellSouth requests the Commission to declare that it, and not state commissions, has sole authority under the Act to enforce the provisions of section 271. Although BellSouth is correct in that the FCC has jurisdiction to set rates (or pricing standards) for section 271 network elements, its jurisdiction is not preclusive of state rate-setting. The states have the authority (and the responsibility) through the section 252(b) arbitration process to effectuate compliance with any FCC pricing standards applicable to section 271 network elements. Moreover, as the Commission concluded in a decision regarding rates for directory assistance services provided pursuant to section 271, the states also have the authority to set rates for section 271 network elements where the FCC fails to do so.[408]

The Act makes clear that the BOCs must offer each network element required by the section 271(c)(2)(B) competitive checklist either through interconnection agreements or Statements of Generally Available Terms and Conditions ("SGATs") where interconnection has not been sought. Specifically, section 271(c)(2)(A) states:

> A Bell operating company meets the requirements of this paragraph if, within the state for which authorization is sought –
>
> > (i)(I) such company is providing access and interconnection pursuant to one or more agreement described in paragraph (1)(A) [governing interconnection agreement], or (II) such

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407 *See In the Matter of BellSouth Emergency Petition for Declaratory Rule and Preemption of State Action*, WC Docket No. 04-245 (filed Jul. 1, 2004). *See also Interim Order and NPRM*, ¶ 13, n. 42 (incorporating BellSouth's Preemption Petition into the record).

408 *See Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, 16 FCC Rcd 2736, ¶ 39 (2001). In this decision, the Commission considered whether it should adopt for directory assistance (which was delisted as a UNE in the *UNE Remand Order*) the same methodology it had adopted for subscriber list information services. The Commission declined to adopt the subscriber line information rate structure for directory assistance, but did not preempt state commissions from doing so, and noted that it would adopt as its own any state-prescribed rates for directory assistance, which would then be subject to the Act's justness and reasonableness requirements.

> company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [an SGAT], and
>
> (ii) such access and interconnection of subparagraph (B) [the competitive checklist].

These interconnection agreements, in turn, are subject to the same review process under section 252 as other network elements (*i.e.*, those that must be made available under section 251). To that end, section 271(c)(1) of the Act states:

> AGREEMENT OR STATEMENT – A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.
>
> (A) PRESENCE OF A FACILITIES-BASED COMPETITOR – A Bell operating company meets the requirement of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers.[409]

Because section 271 network elements are required to be offered pursuant to interconnection agreements and states have the authority to decide what is contained in those agreements, there is no question that a state commission may approve rates contained in those agreements or resolve a dispute between carriers concerning such rates provided that it complies with any pricing standards set by the Commission. Indeed, BellSouth initially requested that the rates for local switching be included in the interconnection agreement at issue in its Emergency Petition, thereby conceding that such rates are not only appropriate content for agreements subject to state

[409] 47 U.S.C. § 271(c)(1)(A).

approval, but are subject to state-con*TRO*lled arbitrations where the parties cannot agree as to terms.

Moreover, the Commission has neither asserted exclusive jurisdiction over such network elements nor curtailed the states' ability to establish rates for such network elements. The Commission could have asserted exclusive jurisdiction over section 271 network elements in the *Triennial Review Order*, but chose not to do so. Instead, the Commission articulated a "just and reasonable" standard to be applied to the rates for section 271 network elements – much like it did with regard to the TELRIC standard applicable to section 251 network elements – and left it to the states to determine whether the prices for network elements made available pursuant to section 271 are consistent with that pricing standard. The Commission's delegation of the rate-making role to the states as suggested above would put an end to any discussion that it intends to (or can) preempt state action in this area, and remove any possible chilling effect for state commission to promptly review such matters pursuant to their arbitration and approval obligations under Section 252 of the 1996 Act.

State authority also arises to the extent that the states require unbundling under state law under section 251(d)(3). Specifically, section 251(d)(3) prohibits the Commission from precluding a state commission from enforcing any "regulation, order, or policy of a State commission that – (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part."[410] Because section 271 imposes federal unbundling obligations, a state unbundling obligation that

[410] 47 U.S.C. § 251(d)(3).

parallels the federal obligation would not be inconsistent with Title II. Under that same authority, states can establish rates for the elements they require to be unbundled. As in the case of other network elements unbundled pursuant to section 251(c)(3), the states are permitted to establish rates using the TELRIC methodology established and required by the Commission.

Finally, as stated above, the Coalition encourages the Commission to establish pricing standards for section 271 network elements and direct the states to set the actual rates. By doing so, the Commission would not be preempting the states or unduly delegating its ratemaking responsibilities to the states. Rather, the Commission would be facilitating local competition by establishing a uniform pricing standard which must be used by all BOCs as they transition to their section 271 unbundling obligations and which will ensure efficient enforcement of the BOCs' section 271 anti-backsliding obligations.

D. The Commission Must Clarify that Its Hybrid Loop and Fiber to the Home Rules Do Not Circumvent The Statutory Impairment Test

This section discusses the inherent vagueness of the Commission's rules that eliminate the unbundling requirement for certain fiber-based loops, and the danger that overbroad interpretation of those rules could substantially reduce the availability of high-capacity enterprise loops, even in cases where impairment has been found. This potential outcome is unquestionably inconsistent with the stated goals of the majority of Commissioners that voted the rules, and clarification is necessary to prevent unintended consequences.

1. The Broadband Deregulation Rules

The *Triennial Review Order* established rules that substantially deregulate fiber-based facilities deployed by incumbent LECs. Codified at 47 C.F.R. §§ 51.319(a)(1, 2 & 3), these rules govern Fiber-to-the-Home ("FTTH") loops and hybrid fiber/copper loops (together, the

"Broadband Deregulation rules").[411] These rules have proven to be unclear since their adoption, and have generated substantive errata,[412] an order on reconsideration,[413] and numerous petitions for clarification and reconsideration. The instant proceeding provides the Commission with an opportunity to address these issues and to bring clarity to the extent to which the deregulation of incumbent LEC fiber facilities impacts the availability of unbundled loop UNEs. Specifically, the Commission must confirm its stated intention that its Broadband Deregulation rules will not have the effect of eliminating unbundled DS1 and DS3 loops absent an affirmative finding of non-impairment.

The Commission's Broadband Deregulation rules are intended to provide new incentives for incumbent LECs to deploy fiber and packet-switching technology in the loop. Briefly, ILECs are relieved of the obligation to provide unbundled fiber-based mass market loops to their competitors under certain conditions. For newly-built FTTH loops, incumbent LECs are not required to unbundle any part of the loop; and for FTTH loops that are already in service, incumbent LECs are required only to unbundle a low-bandwidth channel for a single voice circuit.[414] For fiber/copper "hybrid" loops, incumbent LECs must continue to offer as UNEs the "features, functions and capabilities" that are based on "Time Division Multiplexing," or "TDM," but are not obligated to unbundle any other features, functions or capabilities of the

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411 *See USTA II*, 359 F.3d at 582, 584.

412 *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Errata, CC Docket No. 01-338, FCC 03-227 (rel. Sept. 17, 2003) ("*Errata Order*").

413 *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, CC Docket No. 01-338, FCC 04-191 (rel. Aug. 9, 2003) ("*Recon Order*").

414 ILECs are completely relieved of any obligation to unbundle FTTH mass market loops if there is a copper loop available that runs to the same customer location. If not, for FTTH mass market loops that have already been constructed, ILECs must provide an unbundled 64 kilobit circuit (equivalent to a single telephone line). For new FTTH construction of mass market loops, there is no unbundling requirement in any case.

loop.[415] These Broadband Deregulation rules were adopted solely for mass market loops,[416] for the purpose of promoting incumbent LEC deployment of "broadband services to the mass market."[417]

Regulation based on specific types of plant and technologies, such as fiber versus copper and TDM versus non-TDM functions is a novel concept that has never before been used as a basis for telecom regulation. For this reason, it is an inherently vague standard and, as discussed below, is susceptible to overbroad interpretation. The Commission must take this opportunity to state unequivocally that its Broadband Deregulation rules will not have the unintended consequence restricting the availability of DS1 or DS3 loop UNEs, absent a finding of non-impairment.

2. The Potential for Overbroad Interpretation

The potential of overbroad interpretation of the Broadband Deregulation rules has already been demonstrated by an erratum and order on reconsideration issued by the Commission, and is further evidenced by two pending petitions for further consideration. In its *Errata* to the *Triennial Review Order*, the Commission changed the definition of Fiber-to-the-Home from a fiber connection to a "residential unit" to an "end user's customer premises."[418] Purportedly, this change in language was non-substantive, but as discussed below, incumbent LECs are attempting to interpret this rule change as having the effect of eliminating high-capacity enterprise loop UNEs.

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415 *TRO*, ¶ 296.

416 *TRO*, § VI(A)(4)(a)(v)(b), and *passim*.

417 *TRO*, ¶ 272.

418 *Errata Order*, ¶¶ 37, 38.

In reconsidering the *Triennial Review Order*, the Commission expanded its definition of "Fiber-to-the-Home" to include fiber loops serving multiple dwelling units ("MDUs") that are "predominately residential."[419] While this change in itself is not objectionable, it becomes objectionable if incumbent LECs are able to use this broadening of the definition of FTTH to eliminate high-capacity enterprise loop UNEs. Many businesses are located in the lower floors of residential MDUs, and the expansion of the FTTH rules should not have the unintended consequence of eliminating high-capacity enterprise UNE loops that are currently available to competitive LECs at those locations.

The problems of overbroad interpretation of the Broadband Deregulation rules are illustrated by two pending petitions for reconsideration. First, BellSouth has filed a petition for reconsideration, effectively asking the Commission to expand the definition of FTTH to Fiber-to-the-Curb.[420] The BellSouth petition also asks the Commission to "clarify" that incumbent LECs do not need to install or maintain TDM-based equipment in their hybrid loops – a clarification that appears designed to allow BellSouth to deny high-capacity loop UNEs by choosing to deploy equipment that does not provide "TDM" circuits.

A similar issue is raised in a petition for clarification filed late last year by SureWest Communications.[421] Among other things, that petition asks the Commission to "clarify" that its FTTH rules eliminate unbundling obligations for enterprise loops as well as mass market loops.

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419 *Recon Order*, ¶¶ 7, 8 and *passim*.

420 Review of section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, BellSouth Corporation, Petition for Clarification and/or Partial Reconsideration, filed in CC Docket No. 01-338 on October 2, 2003.

421 Review of section 251Unbundling Obligations of Incumbent Local Exchange Carriers, SureWest Communications, Petition for Clarification and Partial Reconsideration, CC Docket No. 01-338 (Oct. 2, 2003).

More broadly, the petition asks the Commission to "clarify" that, if an incumbent LEC deploys packet-switching equipment, and replaces equipment that has been used to provide "TDM" based DS1 or DS3 loop UNEs to CLECs, that such action would not run afoul of the Broadband Deregulation rules. This petition is clearly designed to allow incumbent LECs to eliminate existing DS1 and DS3 enterprise loop UNEs by deploying network equipment that does not meet their definition of providing a "TDM-based" circuit.

These petitions are a predictable outgrowth of a regulatory scheme that is inherently vague, and impossible to monitor and implement. The central flaw of the Commission's decision to unbundle only the "TDM" function of loops is that TDM is an early stage technology that is the technical underpinning for most of today's advanced packet technologies. Time Division Multiplexing is employed by traditional multiplexers to aggregate both analog and digital voice traffic onto DS1 copper loop and transport facilities. It is also used to aggregate such traffic onto DS3 fiber loop and transport facilities. In addition, the "clocking" function performed by TDM – assigning millisecond time slots that set up sampling intervals, define bit rates, and perform other network con*TRO*l functions – are used by packet, frame or cell technologies, such as Frame Relay, Synchronous Optical Network ("SONET") and Internet Protocol ("IP"). As a result, "TDM systems, originally designed for voice service, will continue to be adapted for voice, data, video, and integrated applications."[422]

Most ILEC hybrid fiber/copper loop systems are now provisioned over Digital Loop Carrier ("DLC") systems deployed in remote terminals. This equipment is generally designed to be as versatile as possible, and to generate a variety of different services, from individual voice

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[422] J. Pecar, R. O'Connor & D. Garbin, *Telecommunications Factbook* 50, (1993).

grade lines to high-capacity data channels. In the remote terminal, these services are defined by line cards that are inserted into the DLC, and that are physically connected to the copper distribution plant that runs to the customer premises. A typical DLC system may accommodate line cards for analog or digital voice, DSL-based services, SONET services, ATM-based services, Internet Protocol-based services, or others. In such an environment, a regulatory scheme that requires unbundling of TDM functions, but not non-TDM functions is not practicable.

For example, 1.544 Mbps access lines now are provisioned over TDM, ISDN, ATM,[423] ADSL, HDSL, IDSL, Frame Relay, Cell Relay,[424] SONET,[425] and other technologies. The incumbent LECs started to deploy ATM technology in their networks in the 1980s; Frame Relay was in*TRO*duced in ILEC networks in the early 1990s; and DSL has been deployed by ILECs for years: indeed, a substantial number of incumbent LEC enterprise special access DS1 loops are currently provisioned over HDSL, and have been for the better part of a decade. All of these are used to provide DS1 and DS3 services – and UNE loops – today, and so constitute "legacy" facilities. The incumbent LECs have not needed incentives to deploy these facilities in the past – at least not to business users, which have had DS1 and other high-capacity services available to them almost ubiquitously for decades.

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423 "ATM scales in capacity, from the low end of T1 (1.5Mbps) up to OC-48 (2.5 Gbps) . . . ." International Engineering Consortium, *On-Line Education: Voice Telephony over Asynchronous Transfer Mode (VToA)*, http://www.iec.org/online/tutorials/vtoa/tipic05.html?Next.x=40&Next.y-14.

424 1.544 Mbps connections currently are provided by ILECs over Frame Relay, SMDS-based Cell Relay, ATM-based Cell Relay – all using Layer 1 protocols. J. Pecar, R. O'Connor, D. Garbin, *Telecommunications Factbook* 292 (1993).

425 *SONET* is used to provide 1.544 Mbps transport to end user locations. See J. Pecar, R. O'Connor, D. Garbin, *Telecommunications Factbook* 294 (1993).

If the Commission does not clarify its Broadband Deregulation rules, incumbent LECs will continue to argue that their deployment of packet switching capabilities and other "advanced" technologies have eliminated their obligation to offer DS1 and DS3 enterprise loop UNEs – both for existing plant, and for new deployments – without the need for an impairment analysis, and despite the fact that these UNEs reflect an underlying TDM functionality. As discussed below, such an outcome is clearly contrary to the stated intent of the Commission, and cannot be allowed.

3. It Is the Stated Intent of the Majority of Commissioners Who Voted the Broadband Deregulation Rules to Maintain the Availability of High Capacity Enterprise Loop UNEs

The Broadband Deregulation Rules were voted by a three-member majority of the Commission, consisting of Chairman Powell, Commissioner Abernathy and Commissioner Martin. Chairman Powell explained that these rules are not intended to eliminate the high-capacity loops that have consistently been available to competitive LECs:

> In hybrid copper-fiber networks, the Commission has determined that incumbent LECs are not required to unbundled packet-switching functionality provided over these facilities; <u>but competitors will continue to receive access to high-capacity loops</u> provided over incumbent LEC Time Division Multiplexing ("TDM") networks.[426]
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> * * * * *
>
> In so doing, <u>we require incumbent LECs to unbundle legacy</u> technologies such as HDSL while removing barriers to the deployment of innovative advanced elec*TRO*nics such as Passive Optical Networking ("PON") components.[427]

Commissioner Martin, another member of the majority, voiced a similar intent:

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426 *TRO*, Separate Statement of Chairman Michael K. Powell Approving In Part and Dissenting In Part, at 1 (emphasis added).

427 *Id.*, Separate Statement of Chairman Michael K. Powell Approving In Part and Dissenting In Part, at 1 n.1 (emphasis added).

> I believe that the Commission should freeze the service capacity level that must be made available on new or upgraded facilities to the service capacity level provided by the ILEC prior to the new investment in a hybrid facility. For example, under this approach competitors receiving access capacity at 1.544 mbs per second using pre-existing ILEC facilities would be able to continue to receive such access capacity at the same bit rate under newly deployed hybrid facilities.[428]

Commissioner Abernathy, the third member of the majority, stated:

> I am persuaded that the best approach, which we have adopted today, is to preserve existing access rights but refrain from imposing new unbundling obligations on upgraded hybrid loops. . . . [C]ompetitive LECs will retain the very same access to high-capacity loops (DS1s and DS3s), subject to the impairment analysis set forth in the order, that they have today.[429]

These sentiments are reflected in the language of the *Triennial Review Order* itself, which states:

> We recognize that providing unbundled access to hybrid loops served by . . . Integrated DLC systems, may require incumbent LECs to implement policies, practices, and procedures different from those used to provide access to loops served by Universal DLC systems. … Even still, we require incumbent LECs to provide requesting carriers access to a transmission path over hybrid loops served by Integrated DLC systems. We recognize that in most cases this will be either through a spare copper facility or through the availability of Universal DLC systems.[430]

These statements provide an unequivocal confirmation that the majority who voted the Broadband Deregulation rules did not intend for them to eliminate competitive LECs' access to high-capacity enterprise UNE loops, and was not intended to circumvent the impairment analysis required by the Communications Act. As noted above, the incumbent LECs' urban SONET networks and near-ubiquitous hybrid loops are legacy architectures that long predate the issuance

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428 *Id.*, Separate Statement of Commissioner Kevin J. Martin, at 9 (attached Remarks by Commissioner Kevin J. Martin 20th Annual PLI/FCBA Telecom Conference, December 12, 2002) (emphasis added).

429 Press Statement of Commissioner Kathleen Q. Abernathy at 2, CC Docket No. 01-338 (Feb. 20, 2003) (emphasis added).

430 *TRO*, ¶ 297 (footnotes omitted).

of the *Triennial Review Order*. As discussed below, the Commission now needs to clarify that its Broadband Deregulation rules comply with their stated intent.

4. The Commission Must Clarify that High Capacity Loop UNEs Will Continue To Be Available to Competitive LECs that Serve Enterprise Customers

In order to ensure that the stated intent of the majority who voted the Broadband Deregulation rules is realized, the Commission should make the following clarifications in its permanent UNE rules:

- UNE loops that provide capacity of 1.544 Mbps (DS1) or 44.736 Mbps (DS3) are "TDM-based" UNEs, regardless of whether other technologies are deployed in the loop.

- An unbundled UNE loop providing 1.544 Mbps connectivity to enterprise user locations will remain available pursuant to the national finding of impairment, regardless of the underlying technology used in the loop by the incumbent LEC. Such loop UNEs will deliver the same quality of service and comply with the same technical standards as the incumbent LECs' DS1 Special Access services.

- The Broadband Deregulation rules do not act to eliminate DS3 or Dark Fiber loop UNEs used to serve enterprise customers. Only a finding of non-impairment can do so.

- Where DS3 loop UNEs are available pursuant to a finding of impairment, such loop UNEs will deliver the same quality of service and comply with the same technical standards as the incumbent LECs' DS3 Special Access services.

- DS1 loop UNEs – and DS3 and Dark Fiber loop UNEs, subject to a finding of impairment – will continue to be available in all locations where the incumbent LEC offers DS1 and DS3 Special Access channel termination services to enterprise customers.

- High capacity loop UNEs will continue to be available to serve enterprise customers located in primarily residential multiple dwelling units or multiple tenant buildings.

In making such clarifying statements, Commission will ensure that the Broadband Deregulation rules do not have the unintended consequence of supplanting the statutory impairment analysis in determining the availability of loop UNEs, and will fulfill the stated

purpose of continuing to provide competitive LECs with access to unbundled high-capacity loops provisioned over the incumbent LECs' enterprise loop facilities.

VIII. OTHER ISSUES RAISED IN THE NPRM

A. The Commission's Pricing Proposal for the Post-*USTA II* "Transition Period" Lacks Clear Authority and Will Substantially Injure Competition

The Commission's Transition Period (which follows the Interim Rules), characterized as a "proposal" (*Interim Ordre and Rule NPRM at* ¶ 29*)*,[431] should not be adopted. More specifically, the proposed 15% rate hike, to be applied across the board to all enterprise loops and all transport in the event the FCC has not issued final rules, is an unnecessary and harmful regime to impose on the struggling competitive sector. It is of questionable legal foundation, bears little relation to the nuanced approach to unbundling demanded by *USTA II*, and is so onerous as to be tantamount to total repeal of unbundling obligations for the transport and enterprise loop UNEs. The Loop and Transport CLEC Coalition therefore suggests that the more sound result would be for the Commission to abandon the Transition Proposal entirely and release its final rules prior to March 13, 2005, when the Interim Rules will expire.[432]

1. It is unclear whether the Commission has the authority to manipulate UNE rates in this manner.

The Commission's proposal for the Transition Period would raise the price of all enterprise loops and dedicated transport by (1) 15% over the rate paid for that element under

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431 *See also* Case 00-1012 Opposition of Respondents to Petition for Writ of Mandamus, at 7 , et al. (Sept. 16, 2004) ("Under the Commission's proposal, in the absence of a Commission ruling requiring the unbundling of a particular element under section 251(c)(3), ILECs would be required for six months after the interim period to continue to lease the elements in question, but at a Commission-prescribed rate that is higher than the current rate.") (citing *Interim Order and NPRM,* ¶ 29).

432 The Interim Rules became effective on the date of publication in the Federal Register, *Interim Order and NRPM,* ¶16, which was September 13, 2004. Thus, the Interim Rules, in which all UNEs must continue to be provided under existing terms and conditions, begins September 13 and ends March 13, 2005.

agreement as of June 15, 2004, or (2) 15% over the State Commission rate in effect on June 15, 2004.[433] These rate increases would apply in the absence of Commission final rules adopted in response to the NPRM. In effect, if the Commission were to adopt this proposal, it would be setting UNE rates for these elements. It is not clear, however, that the agency has authority to set any specific rate for unbundled network elements under section 251.

Once before, in the *Local Competition First Report and Order,*[434] the FCC attempted to set specific rates for unbundled network elements. There, the Commission adopted proxy rates, intended to act as "price ceilings or price ranges,"[435] that applied to loops, switching, and other elements in order to assist "the states in conducting initial rate arbitrations" and to "enable competitors to enter the local exchange market."[436] The Eighth Circuit of course vacated those proxies, along with almost all of the Commission's pricing rules,[437] on the ground that "no provision in section 251 authorizes the FCC to regulate the rates of local phone service."[438]

In *Iowa Utilities Board,* the Supreme Court reversed the Eighth Circuit's jurisdictional analysis.[439] Although the court did not address specifically the FCC's proxy rates, the court did reiterate the authority of State Commissions to set final UNE rates, which it found complemented, rather than precluded, the Commission's authority to fashion a general rate-

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433 *Interim Order and NPRM,* ¶ 29.

434 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd. 14999, 15883-15917 ¶¶ 767-836 (1996).

435 *Id.,*. at 15891 ¶ 782.

436 *Id.,* at 15891 ¶ 782.

437 *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 819 n.39 (8th Cir. 1997).

438 *Id.*, 120 F.3d at 795.

439 *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

setting methodology.[440] After the Eighth Circuit on remand reversed the FCC's proxy rates and TELRIC methodology on substantive grounds, the Supreme Court again took up the issue in *Verizon v. FCC.* [441] In *Verizon,* the court reinstated the TELRIC rules, but provided further indication that Congress assigned the UNE rate-setting function only to State Commissions. (The reversal of the FCC's proxy rates, which had expired, was not appealed.) In analyzing the pricing provisions of Section 252, the court acknowledged that Congress's "approach was deliberate, through a hybrid jurisdictional scheme with the FCC setting a basic, default methodology for use in setting rates when carriers fail to agree, *but leaving it to state utility commissions to set the actual rates*."[442] The Commission's Transition Period pricing proposal would appear to be at odds with these opinions.

The fact that the 15% rate increase is an interim measure may not insulate it from scrutiny. For although the Eighth Circuit in *CompTel* upheld a Commission rate order under the 1996 Act,[443] the situation there was different. *CompTel* reviewed an interim rule permitting LECs to recover two legacy charges: a common carrier line charge ("CCLC") and a transport interconnection charge ("TIC"), on top of TELRIC rates. The CCLC was designed to "recover part of the allocated interstate costs" that LECs incur in providing service to end users, and the

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440 "The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in § 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates." 525 U.S. at 384.

441 *Verizon Commun., Inc. v.FCC,* 535 U.S. 467 (2002).

442 535 U.S. at 469 (emphasis added). The Court also noted that "[a]s to pricing, the Act provides that when incumbent and requesting carriers fail to agree, state commissions will set a 'just and reasonable' and 'nondiscriminatory' rate for interconnection or the lease of network elements."

443 *Competitive Telecomm. Ass'n v. FCC,* 117 F.3d 1068 (8th Cir. 1997) ("*CompTel*").

TIC was applied only to interstate traffic passing through their switches.[444] These charges were not applied to the costs of UNE provisioning. Moreover, they were upheld by the Eighth Circuit largely on the ground that they temporarily would protect universal service funding as the Commission winnowed away implicit subsidies as required by Section 254.[445] *CompTel* accordingly is not dispositive of whether the Transition Period prices are authorized under the 1996 Act. In the face of the *Iowa Utilities* opinions summarized herein, it would seem that deference would not be accorded, and the federal UNE rate increases vulnerable to appeal.

2. A blanket 15% rate hike, which applies without a specific impairment analysis, does not comport with the court of Appeals' clear instructions in *USTA I* and *II*.

The proposed 15 percent rate increase applies, according to the language of the *Interim Order and Rules NPRM*, to all enterprise loop and all dedicated transport.[446] It does so without regard to whether these facilities are subject to greater relative impairment in some places than in others, or whether the relative ratebases of different areas will enable CLECs to bear a cost increase. At bottom, it is a rule that lacks any "nuance," or any "concrete" analysis of "specific markets or market categories,"[447] and therefore contravenes the D.C. Circuit's consistent instruction that unbundling-related rules must be more than a "blanket" fiat.[448] The Commission has, in this very order, expressed its unwillingness to make this mistake.[449]

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444 *Local Competition*, First Report and Order, 11 FCC Rcd. at 15499 at 15863, ¶ 718. *See also* 117 F.3d at 1073.

445 117 F.3d at 1074.

446 *Interim Order and NPRM*, ¶ 29.

447 *USTA I*, 290 F.3d at 462, 425. *See also USTA II*, 359 F.3d at 562-63 (summarizing *USTA I*).

448 *USTA I*, 290 F.3d at 425-26 (quoting *Iowa Utils. Bd.*, 525 U.S. at 390).

449 "Thus, we seek comment, including evidence at a granular level, on which specific network elements the Commission should require incumbent LECs to make available as UNEs in which specific markets,

. . . *Continued*

This problem is not mitigated by the fact that the Commission would allow State Commissions to override the 15% hike in a one-sided manner. That permission, which is conditioned upon the State's setting a *higher* rate than the federal Transition Period rate,[450] leaves no room for States to determine, in accordance with their own unbundling[451] and rate-setting authority,[452] that a "nuanced" approach to transport and enterprise loop rates requires a lower rate. Thus, the Commission's proposal again contravenes the notion that unbundling must be analyzed on less than a nationwide basis.

3. Competition cannot withstand the proposed 15% increase in price for all enterprise loops and all transport.

The proposed rate increase would have a severely debilitating effect on CLECs, especially when coupled with the no-new-customers restriction also included in the Transition Period.[453] The increased costs of service under these twin rules would be tantamount to removing these elements from the UNE list altogether. Almost no competitor could absorb the impact on a nationwide basis.

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consistent with *USTA II*, and how the Commission should make these determinations." *Interim Order and NPRM* ¶ 11.

450 *Interim Order and NPRM* ¶ 29.

451 47 U.S.C. § 252(e)(3) (preserving State Commission authority to enforce state law with respect to interconnection agreements). *See also Iowa Utils. Bd.*, 525 U.S. at 380-81 (states retain jurisdiction to identify UNEs).

452 *See supra* at 151 & n.452.

453 "With respect to all elements at issue here, this transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates." *Interim Order and NPRM* ¶ 29. *Compare id*. at n.59 ("During this interim period, and only during this six-month period, these rates, terms and conditions must also be made available for provision of service to a competitive LEC's new customers.").

This proposal would increase CLEC costs dramatically. First, CLEC costs of serving existing customers would go up at least 15% immediately on a nationwide basis.[454] Secondly, every single instance of customer churn will result in non-UNE access rates for all facilities. As the Coalition has explained at length, special access rates are not constrained by competitive forces and create a real danger of anticompetitive price squeezes. *See* Sections V.C.-V.E., *supra*. The cost of serving new customers will skyrocket. Even the s*TRO*ngest CLECs would be severely, if not fatally, impacted by these new rates. Thus, the Transition Period rates are unlikely to "mitigate the rate shock" that may — or may not — come later.

For all these reasons, the Commission should not adopt the Transition Period as a matter of federal law. Rather, it should endeavor to set permanent unbundling rules during this Interim Period, thus obviating the need for the proposed Transition Period entirely[*]. To do otherwise, and decide today that rate increases will be warranted in six months, simply pre-judges the outcome of this proceeding, without the requisite evidence or analysis. As such, that decision would be vulnerable to another appeal, causing still further regulatory uncertainty, which is exactly the opposite result from what the Commission seeks.[455]

B. <u>Filing Requirements for Interconnection Agreements</u>

The Commission has sought comment on whether "commercially negotiated agreements for access to network elements" must be governed by Section 251 or some other provision of the

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[454] Switching will go up $1.00 per month per customer. *Interim Order and NPRM* ¶ 29. This increase could amount to a 15% or more increase from existing rates. Thus, the three elements that form the bulk of local facilities — loops, transport, and switching — will all incur a flash-cut price increase.

[*] The Coalition does not agree that the proposed rate increase is an appropriate "transition" should the FCC find non-impairment with respect to the particular element.

[455] *See Interim Order and NPRM* ¶ 10 (seeking an "orderly transition"), ¶ 16 (noting "the pressing need for market certainty").

Act.[456] This issue is presently the subject of three ILEC petitions that request a Commission ruling that so-called "non-Section 251" contracts are exempt from state review and publication.[457] These petitions, however, have no sound legal or policy basis and should expressly be denied in the Commission's forthcoming unbundling order. For to permit ILECs to shield CLEC agreements from State Commission scrutiny and the obligations of Section 252(i) would directly contravene Congress's intent in two ways: first, by removing agreements from the requisite public review; second, by unlawfully preempting states' concurrent jurisdiction over agreements with which Congress expressly endowed them.

1. Section 252's plain language and Commission precedent require the filing of all ILEC agreements with CLECs.

The ILECs request that, to varying degrees, their agreements with CLECs be held exempt from Section 252 filing requirements. BellSouth asks broadly that all "Non-251 Agreements" be found exempt, but provides little specificity as to what such agreements contain.[458] Possibly this term includes any agreement that BellSouth has negotiated since the release of *USTA II*.[459] SBC is more reserved in its request, explaining that only the provisions of agreements directly addressing Section 251 requirements should be filed.[460] Verizon, in its comments supporting SBC, does not echo that bifurcated approach and would seem to support an exemption for entire

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456 *Interim Order and NPRM*, ¶ 13.

457 *See id.;* SBC Communications Inc. Emergency Petition for Declaratory Ruling. Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations, SBC Communications Inc. Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations WC Docket No. 04-172, (May 2, 2004) ("*SBC Petition*"); BellSouth Emergency Petition for Declaratory Ruling (May 27, 2004) ("*BellSouth Petition*").

458 *BellSouth Petition* at 3-5.

459 *See id.*, 2 (discussing BellSouth's voluntary, good faith negotiations with CLECs" since *USTA II*).

460 *SBC Petition* at 8.

agreements.[461] Whatever the degree of relief that is sought, however, Section 252 and Commission precedent do not support it.

Section 252 of the 1996 Act provides, in pertinent part, that

> (a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATION
>
> (1) Voluntary negotiations. — Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.
>
> * * * *
>
> (e) APPROVAL BY STATE COMMISSION
>
> (1) Approval required Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.
>
> * * * *

[461] *Interim Order and NPRM, SBC Petition*, Comments of the Verizon Telephone Companies at 2 *See* WC Docket No. 04-172, (May 13, 2004) (arguing that filing negotiated agreements gives "carriers the ability to pluck isolated terms" from such agreements), 5 (agreements for elements not subject to Section 251(c) unbundling should not be subject to state review).("*Verizon Comments*")

These sections are unambiguous in requiring that all agreements related to local interconnection must be filed with the appropriate State Commission. It states that "*[a]ny* interconnection agreement *adopted by negotiation* or arbitration shall be submitted for approval to the State commission[.]" An interconnection agreement is "a binding agreement" involving "interconnection, services, or network elements," that is negotiated after a request made "pursuant to section 251" and may be executed "without regard to the standards set forth in subsections (b) and (c) of section 251." Thus, by its plain language, Section 252 precludes the relief sought by the pending petitions — all agreements between ILECs and CLECs that involve local interconnection must be filed.

The ILECs' attempt to avert Section 252 as a matter of statutory interpretation are unavailing. They place heavy reliance on the phrase "pursuant to section 251" as demonstrating that only agreements for the provision of the elements affirmed in *USTA II* should be filed.[462] This phrase, however, does not compel that conclusion. First, Section 252 refers to "a request for negotiation … pursuant to section 251" and sets the phrase off by a comma. 47 U.S.C. § 252(a)(1). "Section 251" thus modifies the "request," and not the resulting contract terms. Second, Section 252 also states that the resulting "binding agreement" may be executed "*without regard to the standards sets forth in*" Sections 251(b) or (c). *Id*. § 252(a)(1) (emphasis added). This language indicates that all contracts between ILECs and CLECs that regard "interconnection, services, or network elements" — regardless of whether compelled by the rules implementing Section 251 — are subject to Section 252. SBC's attempt to avoid the "without regard to" clause by distinguishing between provisions that "deviate from the 'standards' set

[462] *SBC Petition*, 7-8; *BellSouth Petition*, 4; *Verizon Comments*, 6-7.

forth in subsections (b) and (c)" and provisions that "fall outside" is fruitless. There is no discernible test that would differentiate these purported categories; the argument rests wholly on semantics.

In addition, the Commission's list of agreements that fall within Section 252 is expansive. It has held, in response to Qwest's 2002 petition for a declaratory ruling that negotiated agreements need not be filed, that agreements creating an "ongoing obligation" that "pertain[s] to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation" constitute "interconnection agreements."[463] By any measure, this definition is extremely far-reaching. Indeed, it is difficult to conceive of any contract between an ILEC and a CLEC that does not "pertain to" or "relate to" any of these subjects.[464] Thus, as one commenter to the SBC Petition aptly queried, if agreements do not fall within this category, "[w]ell, then what *are* they?"[465] The ILECs have provided no coherent explanation or example to clarify exactly what kind of agreement or provision would not meet the FCC's definition and would thus warrant relief from Section 252.

For this reason, SBC's more measured approach, whereby only the sections of an agreement directly governed by Section 251 must be filed, is no less *TRO*ubling. Apparently the Commission is expected to trust SBC that it will parse its agreements appropriately.[466] Yet

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463 *Qwest MO&O*, 17 FCC Rcd. at 19341 ¶ 8.

464 The FCC has excepted minute categories of documents from this group, such as agreements for re*TRO*active consideration and publicly filed terms for dispute resolution. *Id*., 17 FCC at 19340 ¶¶ 8-9.

465 WC Docket 04-172, Opposition of Safe-T Coalition to SBC's Emergency Petition at 3 *see* pg. 150 (May 10, 2004) ("*Safe-T Opposition*") (emphasis in original).

466 *See Safe-T Opposition*, 6-7 (May 10, 2004).

neither SBC, nor BellSouth, nor Verizon can explain in anything more than vague tautologies what they believe must be filed. Their argument is simply that terms falling under Section 251 will be filed, and terms that are outside Section 251 will not. This new regime, SBC contends, will somehow result in "the elimination of regulatory uncertainty and of regulatory costs."[467] In actuality, it would constitute "abdication of regulatory authority to the regulated."[468] It would permit ILECs to determine their own regulatory obligations.

In addition to the clear statutory prohibition on the ILECs' request, shielding agreements from State Commission review is, according to the Commission, "potentially anticompetitive" as a matter of policy.[469] It "undermines the effectiveness of the Act"[470] and "shows a disregard for Congress's goals of opening local market to competition."[471] In particular, it interferes with CLEC rights under Section 251(i) to adopt, or "opt in to," previously executed agreements that have been filed and approved at a State Commission. This right, which unfortunately was substantially abridged in a recent Commission order[472] remains intact and cannot be exercised if agreements are not publicized. As such, Congress's goal that CLECs be able to avail themselves

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467 *SBC Petition* at 14.

468 *USA Group Loan Svcs. v. Riley*, 82 F.3d 708, 725 (7th Cir. 1996).

469 *Qwest Corporation Apparent Liability for Forfeiture*, File No. EB-03-1H-0265, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd. 5169 ¶ 2 (2004) ("*Qwest NAL*")

470 *Id.*, *Qwest NAL*, 19 FCC Rcd. at 5169 ¶ 2.

471 *Id.*, 19 FCC Rcd. at 5170 ¶ 3.

472 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers Second Report and Order*, CC Docket No. 01-338, FCC 04-164 (rel. Jul. 13, 2004), published at 69 Fed. Reg. 43762 (Jul. 21, 2004) ("*All-or-Nothing Order*"). This order has been appealed. *See, New Edge Network, Inc. V. FCC*, No. 04-73800 and consolidated cases (9th Cir.).

of previously approved terms[473] — or at the least agreements — would improperly circumvented if the ILECs' request is granted.

2. The Commission cannot interfere with or preempt State Commission review of agreements as mandated by Section 252.

Section 252 is also clear, that State Commissions are vested with jurisdiction over all agreements "for interconnection, services, or network elements." *Id*. § 252(a)(1). At least one federal Court of Appeals has held that State Commission cannot avoid Section 252 even if they wish to.[474] In addition, the Commission held in the *Qwest NAL that* State Commissions have a "statutory role provided by Congress," and that the 1996 Act "expressly contemplates that the section 252 filing process will occur with the states."[475] The Commission was "reluctant to interfere" with that authority,[476] and thus held that "states should determine in the first instance which sorts of agreements fall within the scope of the statutory standard."[477] On these grounds, Qwest lost in its attempt to hold CLEC agreements away from scrutiny.

Despite the Commission's unequivocal refusal to impede on state jurisdiction, Verizon cites to a footnote in the *Qwest MO&O* in which the Commission opined that only agreements "relating to section 251(b) or (c)" should be filed.[478] This footnote, which was taken entirely out of context, in no way supports the ILECs' cause. That is, it follows the Commission's statement,

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473 *See* H.R. Conf. Rep. 104-458, 104th Cong., 2d Sess. at 126 (1996).

474 *Verizon North v. Strand*, 367 F.3d 577, 586 (6th Cir. 2004) (Michigan PSC improperly circumvented Section 252 by enforcing reciprocal compensation provisions of a tariff that had not been negotiated in an agreement); *Verizon North v. Strand*, 309 F.3d 935, 941 (6th Cir. 2002) (vacating Michigan PSC order requiring Verizon to abide by UNE tariffs in lieu of agreements).

475 *Qwest MO&O*, 17 FCC Rcd. at 19341 ¶ 10.

476 *Id*.

477 *Id*.

478 *Verizon Comments* at 5 (citing *Qwest MO&O*, 17 FCC Rcd. at 19341 n.26).

quoted above, that prospective agreements "pertaining to" interconnection, elements and services fall within Section 252 filing requirements.[479] It therefore cannot reasonably be contended, as Verizon purports to do, that the Commission "endorsed" Qwest's flawed interpretation of Section 252(a)(1).[480] Rather, the Commission provided this expansive definition of "interconnection agreement" — which is not binding on the states[481] — to indicate that the breadth of agreements subject to Section 252 filing requirements is quite broad.[482]

Underscoring its commitment to the transparency of interconnection agreements, in March of this year the Commission issued a $9 million Notice of Apparent Liability for Forfeiture against Qwest for failing to file 46 agreements with the Minnesota and Arizona state commissions.[483] These agreements contained terms regarding "interconnection, access to unbundled network elements ('UNEs') and/or access to services."[484] The Commission gave no indication that agreements containing terms not compelled by the *Triennial Review Order* were exempt from Section 252 or the holding in the *Qwest MO&O*.

The Commission's rationale for imposing a $9 million fine — the largest in FCC enforcement history — is particularly instructive on the importance of Section 252. Characterizing Qwest's conduct as "egregious," the Commission held that its failing to file

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479 *Qwest MO&O*, 17 FCC Rcd. at 19341 ¶ 8.

480 *Verizon Comments* at 5.

481 "[W]e decline to establish an exhaustive, all-encompassing 'interconnection agreement standard. … We encourage state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval." *Qwest MO&O*., 17 FCC Rcd. at 19342 ¶ 10.

482 The Commission also denounced Qwest's position as constituting a "cramped reading" of Section 252. *Id*., 17 FCC Rcd. at 19341 ¶ 8.

483 *Qwest NAL*, 19 FCC Rcd. at 5169 ¶ 1. Qwest paid this fine in full, without any appeal, in May 2004. Qwest Communications International Inc. Form 10-Q at 73 (period ending June 30, 2004).

484 *Id*., 19 FCC Rcd. at 5175 ¶ 2.

agreements It also reiterated its previous holding that ILECs must file all agreements "pertaining to" collocation, interconnection, reciprocal compensation, and other local competition-related subject.[485] Thus, the Qwest case is far from being a dispositive precedent in favor of the ILECs' position, rendering their reliance on these orders[486] somewhat inexplicable.

In what is plainly a petition for reconsideration filed two years late, the ILECs have also argued that states are preempted from requiring the filing of agreements because such action "thwarts" what SBC amorphously terms "federal objectives."[487] The ILECs do not argue, because they cannot, that the 1996 Act expressly preempts State Commission filing requirements. Section 252's express mandate that agreements "*shall be submitted* for approval to the State commission" precludes such a conclusion. 47 U.S.C. § 252(e)(1) (emphasis added). Rather, the ILECs resort to the secondary, far less powerful argument that State involvement inhibits a purported Commission goal of total deregulation of local competition. BellSouth argues that filing requirements "frustrate the purpose of the Act,"[488] or, as Verizon obliquely frames it, "chill" interconnection negotiations,[489] which they believe are sufficient allegations to warrant depriving states of the authority Congress gave them.

Preemption of state review is not permitted under Section 252. According to the Supreme Court, preemption "is compelled whether Congress' command is explicitly stated in the

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485 *Id*., 19 FCC Rcd. at 5175 ¶ 11 (quoting *Qwest MO&O*, 17 FCC Rcd. at 19340-41 ¶ 8).

486 *SBC Petition* at 11-12; *BellSouth Petition* at 6-7; *Verizon Comments* at 5.

487 *SBC Petition* at 15. *See also BellSouth Petition* at 10-14; *Verizon Comments* at 8-9.

488 *BellSouth Petition* at 12. SBC argues that filing requirements a "a barrier to commercial negotiations." *SBC Petition* at 15.

489 *Verizon Comments* at 9.

statute's language or implicitly contained in its structure and purpose."[490] Absent express language, preemption is warranted where "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress *left no room for the States to supplement it.*"[491] The Court's later decision in *Iowa Utilities*, in which it held that the Commission and the states retain coexistent and equal roles in the development of local competition,[492] certainly defeats any contention that there is "no room for the States" in local competition. The plain language of Section 252(e) further demonstrates the fallacy of ILEC pleas for preemption. Indeed, the Commission itself has found that to be the case.[493]

Further, the ILECs are incorrect in asserting that filing agreements thwarts the Commission's regulatory regime. The most obvious example militating against the ILECs is Section 251(i) — the "all-or-nothing" rule preserves CLECs' rights to adopt pre-existing agreements.[494] The Commission demonstrably intends, and is mindful of Congress's intent, that agreements must remain public in order that this rule may operate. Accordingly, the Commission's regulatory regime provides no indication that state filing requirements "thwart" a federal goal; rather, the two set of rules are necessary complements.

The Loop and Transport CLEC Coalition, contrary to SBC's surmising, do not "fail to see the public policy benefits of commercial negotiations."[495] For the question is not one of

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490 *Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977).

491 *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

492 *AT&T v. Iowa Utils. Bd*., 525 U.S. 366, 380-81 (1999). In reaching this holding, the Supreme Court reiterated that the FCC cannot "tak[e] intrastate action solely because it furthered an interstate goal." *Id*. at 381 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

493 *Qwest MO&O*, 17 FCC Rcd. at 19341-42 ¶¶ 10-11.

494 *All-or-Nothing Order* ¶ 10.

495 WC Docket 04-172, SBC Reply to Oppositions at 1 (May 25, 2004).

mere policy, but rather statutory mandate. Filing CLEC agreements is an obligation imposed on ILECs by Congress, and that obligation is not as circumscribed as the ILECs would like. It moreover includes state review as a necessary component, which can neither be preempted nor read out of Section 252. Accordingly, agreements between ILECs and CLECs that provide for local interconnection or some other input necessary to local competition, must remain subject to Section 252 review and opt-in requirements.

IX. CONCLUSION

For the foregoing reasons, the Commission should adopt rules consistent with the positions described above.

Respectfully submitted,

THE LOOP AND TRANSPORT CLEC COALITION

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BROADVIEW NETWORKS, INC.
ESCHELON TELECOM, INC.
GRANDE COMMUNICATIONS, INC.
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