

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

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

INITIAL COMMENTS OF BELLSOUTH CORPORATION

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BellSouth Corporation ("BellSouth"), for itself and its wholly owned affiliated companies, respectfully submits its initial comments in response to the *Notice*.¹

I. INTRODUCTION

This is the fourth attempt by the Federal Communications Commission ("Commission") to adopt lawful unbundling rules consistent with the Telecommunications Act of 1996 ("1996 Act"). With some or all of the Commission's three prior sets of unbundling rules having been invalidated by the courts, the industry has been left to operate for the past eight years under an unlawful unbundling regime.

The *Notice* gives the Commission and the industry an opportunity for a fresh start. By taking to heart the directives of the Supreme Court and the United States Court of Appeals for the D.C. Circuit, the Commission can and must adopt lawful unbundling rules that comply fully with the letter and spirit of the 1996 Act. In doing so, the Commission should be guided by four general principles.

¹ *Unbundled Access To Network Elements; Review Of The Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 & CC Docket No. 01-338, *Order and Notice of Proposed Rulemaking*, FCC 04-179 (rel. Aug. 20, 2004) ("*Notice*" or "*Interim Order*").

First, any unbundling rules adopted by the Commission must be narrowly tailored to address those circumstances when competitive local exchange carriers ("CLECs") are genuinely impaired. If anything has been learned from the past eight years of litigation and regulatory uncertainty it is that the maximum unbundling approach to which the Commission has previously adhered is legally unsustainable. In this proceeding, the Commission must confine its unbundling requirements to those bottleneck facilities that cannot reasonably be duplicated.²

Second, the Commission should adopt unbundling rules that promote facilities-based competition. As Congress recognized, and as this Commission has repeatedly observed, facilities-based competition promotes innovation and investment, which benefit consumers.³ The Commission must put an end to the "completely synthetic competition" that has been the

² In *United States Telecom. Ass'n. v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003), a unanimous panel of the D.C. Circuit (Williams, J., joined by Edwards, C.J., and Randolph, J.) overturned the Commission's second attempt to craft unbundling rules. The essential thrust of the court of appeals' decision in *USTA I* was that the Commission had failed to conform its rules to the principles of *AT&T Corp. v. Iowa Utils. Bd.* 525 U.S. 366 (1999), as reinforced by *Verizon Communications v. FCC*, 535 U.S. 467 (2002), in which the Supreme Court stressed that unbundling should apply only to "bottleneck" or "very expensive to duplicate" facilities, not to the entire narrowband network of the incumbent local exchange carrier ("ILEC"). *Id.* at 510 & n.27.

³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17025, ¶ 70 (2003) ("*Triennial Review Order*"), *reversed in part on other grounds, United States Telecom. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *petitions for cert. pending, NARUC v. United States Telephone Ass'n*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004) ("[w]e reaffirm the conclusion in the UNE Remand Order that facilities-based competition serves the Act's overall goals"); and *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3757-60, ¶¶ 134-139 (1999) ("*UNE Remand Order*"); *also Notice*, ¶ 2 ("[w]e believe that unbundling rules based on a preference for facilities-based competition will provide incentives for both incumbent LECs and competitors to innovate and invest . . . as we initiate this remand proceeding, we renew our commitment to promoting the development of facilities-based competition and seek to develop unbundling rules that will achieve this end.").

hallmark of the Commission's prior unbundling regimes, which promotes neither innovation nor investment.⁴

Third, the Commission's unbundling rules must provide certainty. The industry has been operating for too long under a cloud of doubt created by increasingly complex legal rules that proved difficult, if not impossible, to implement. This time around, the Commission must adopt a lawful impairment test and apply that test to the facts in the record, thereby defining precisely those facilities that must be unbundled consistent with the requirements of the 1996 Act and identifying with specificity those markets, if any, where the impairment test has been met. At the end of this proceeding, it is imperative that ILECs, CLECs, and their respective shareholders know which network elements must be unbundled and where such elements must be made available on an unbundled basis.

Finally, the Commission's inquiry in this proceeding should be limited to those issues that were remanded by the D.C. Circuit in *USTA II* in its review of the Commission's *Triennial Review Order*. The Commission should decline any invitation to revisit the Commission's prior unbundling decisions such as broadband and line sharing, which have been affirmed by the D.C. Circuit. There is no justifiable reason or any legal basis for the Commission to revisit such issues at this juncture, particularly when this proceeding was initiated to implement unbundling obligations "in a manner consistent with" the decision of the D.C. Circuit.⁵ To the extent any party has been aggrieved by the Commission's unbundling decisions that were affirmed by the

⁴ *USTA I*, 290 F.3d at 424; see also *Triennial Review Order*, 18 FCC Rcd at 17505, Separate Statement of Chairman Michael K. Powell at 2, (noting that the unbundled network element platform (or "UNE-P") allows CLECs to "resell the entire incumbent's network, at heavily discounted rates set by regulators, without having to provide anything in the way of [their] own infrastructure").

⁵ *Notice*, ¶ 1.

D.C. Circuit, their remedy lies with the United States Supreme Court, and not another bite at the unbundling apple in the context of this proceeding.

II. SUMMARY

The Commission must adopt a narrow and rational impairment standard consistent with the 1996 Act. In so doing, the Commission should find that CLECs: (1) are not impaired without access to unbundled circuit switching; (2) are not impaired without access to unbundled high-capacity loops, transport, and dark fiber in any central office with 5,000 or more business lines; and (3) are not entitled to obtain entrance facilities on an unbundled basis.

Because carriers that are using special access are not impaired without access to the same facilities on an unbundled basis, the Commission should prohibit carriers from converting special access to UNEs. The Commission also should not allow the unbundling of facilities used to provide wireless or interexchange services. At the same time, the Commission should adopt restrictions on the use of Enhanced Extended Links (“EELs”) to ensure that such facilities are not used to provide services for which there has been no showing of impairment and for which no showing could be made.

The Commission should clarify that Section 271 imposes no obligations on BOCs to unbundle “next generation,” “broadband,” or other advanced telecommunications and information service aspects of their networks. The Commission should further clarify that states have no authority to impose unbundling obligations of any sort on Bell Operating Companies (“BOCs”) pursuant to Section 271.

Finally, the Commission’s proposed transition plan should represent the absolute outer limits of any transition plan that the Commission can or should adopt in this proceeding, and the second 6 month plans of the current transition plan should take effect immediately within 30

days after publication of its new rules in the Federal Register, which should be no later than January 31, 2005. Further, the Commission should clarify, as part of its transition plan, that: (1) states have no authority under federal or state law to order unbundling of an element for which the Commission has determined there to be no impairment; and (2) ILECs and carriers may negotiate access to ILEC network facilities that do not satisfy the impairment standard through commercial agreements that may be made publicly available pursuant to Section 211(b), but need not be filed with, or approved by, any regulatory authority.

BellSouth's comments are structured as follows: in Section III of its Comments, BellSouth outlines the background of this proceeding. In Section Four, BellSouth will propose an impairment standard that is consistent with the 1996 Act as interpreted by the United States Supreme Court and the D.C. Circuit.⁶ BellSouth will apply this impairment standard to switching in Section Five of its comments. In Section Six, BellSouth will address its hot cut process. Section Seven addresses the impairment standard in connection with high capacity transport, loops, and dark fiber. In Section Eight, BellSouth's comments will address other issues raised in the *Notice*, including the consideration of entrance facilities and EELs. Section Nine will address the impact of Section 271 on the Commission's unbundling decisions. Finally, in Section Ten BellSouth will explain the reasons for its position that no additional transition period beyond that adopted in the Commission's August 20, 2004 *Order and Notice of Proposed Rulemaking* is warranted in implementing any new rules adopted in this proceeding.

⁶ Consistent with the *Notice*, BellSouth contemporaneously files with these Comments copies of supporting material in an appendix. This material includes evidence from state proceedings and the Triennial Review proceeding to the extent it is relevant. In addition, BellSouth includes affidavits with additional data. Citations to material from BellSouth's appendix will refer to "BellSouth App." and citations to affidavits will refer to the Affiant's last name, "Affid.," and the relevant paragraph number and/or affidavit exhibit.

III. BACKGROUND

As the Commission recognized in the *Notice*, the crafting of lawful unbundling rules must start with *USTA II*. In *USTA II*, the D.C. Circuit vacated certain rules adopted in the *Triennial Review Order* regarding the unbundling of narrowband facilities.

In the *Triennial Review Order*, a 3-2 majority of the Commission made provisional findings of nationwide impairment for both mass-market switching and high-capacity facilities (including both the transmission facilities that connect BellSouth switches and the loops that connect switches to larger customers). It then expressly “delegated” to 51 separate commissions the duty to make the ultimate determination of which network elements must be made available. These state decisions were to be effective without any review or approval by the Commission.⁷

More particularly, for “mass-market” switching,⁸ the Commission made a provisional finding of nationwide impairment pending the state determinations, based solely on supposed difficulties with the “hot-cut” process by which a loop is transferred from an incumbent’s switch to a competitor’s switch. The Commission then gave state commissions nine months to determine whether to mandate switch unbundling on a permanent basis. During that time, state commissions were to apply a two-stage analysis. First, the state commissions were to find “no impairment” when either “three or more unaffiliated competing carriers each is serving mass market customers in a particular market with the use of their own switches” or “two competitive

⁷ *Triennial Review Order*, 18 FCC Rcd at 17096-98, 17242, ¶¶ 188-90, 426.

⁸ The “mass market” includes residential and small-business customers. The Commission did not require switch unbundling for large-business “enterprise” customers – a determination that was affirmed by the D.C. Circuit. *See USTA II*, 359 F.3d at 587.

wholesale providers” of switching are serving the market.⁹ The Commission left it to the states to “define the markets in which they will evaluate impairment.”¹⁰ If this first test was not satisfied, the states were next to determine the potential ability of CLECs to deploy their own switches based on a number of criteria.

The Commission employed a similar approach for transport facilities and high-capacity loops. The Commission made provisional findings of *nationwide* impairment on the ground that it could not determine the *specific routes* on which CLECs had deployed such facilities. The Commission then again delegated to the states the authority to make the ultimate unbundling determinations according to another two-stage inquiry. At the first stage, states were to grant relief from unbundling only if multiple alternative providers had already deployed facilities on a specific point-to-point route or to a specific building. At the second stage, states were to use their “analytical flexibility” to consider a long series of factors and determine whether CLECs could deploy facilities at locations where they have not already done so.¹¹

On March 2, 2004, the D.C. Circuit vacated the Commission’s narrowband unbundling rules. The Court of Appeals did so not only because the Commission had wrongly purported to delegate ultimate unbundling determinations to the states, but also because the Commission’s

⁹ *Triennial Review Order*, 18 FCC Rcd at 17296-99, ¶¶ 501, 505.

¹⁰ *Id.* at 17291-92, ¶ 495.

¹¹ *Id.* at 17167, 17176, 17179, ¶¶ 314, 329, 335. In contrast to its decision to maintain maximum unbundling for traditional narrowband voice facilities, the Commission decided to impose limited unbundling obligations on most facilities used to provide high-speed broadband services. For example, subject to a transition period, the Commission freed incumbents from the obligation to offer “line sharing,” found that CLECs are not impaired without access to the next-generation fiber to the home (or “FTTH”) facilities, and, with respect to hybrid loops, required ILECs to provide a narrowband transmission path to CLECs, but not to turn broadband capabilities over to their competitors. The D.C. Circuit affirmed the Commission’s decisions on these issues. *See USTA II*, 359 F.3d at 582, 584.

nationwide impairment findings for switching and high-capacity facilities (transport, high-capacity loops, and dark fiber) were substantively deficient in multiple respects.

As to switching, for example, the D.C. Circuit stated that the Commission had failed to consider “several more narrowly-tailored alternatives” that would fully address the its lone purported basis for finding impairment on a provisional basis (the hot-cut process).¹² Moreover, “[a]fter reviewing the record,” the Court of Appeals expressed its “doubt that the record supports a national impairment finding for mass market switches.”¹³ Indeed, the D.C. Circuit pointedly noted that the Commission could not possibly justify nationwide impairment findings as to switching because the record evidence “indicated the presence of many markets where CLECs suffered no impairment in the absence of unbundling.”¹⁴

The Court of Appeals likewise concluded that the Commission’s impairment findings as to high-capacity facilities could not be sustained. Again, the Court of Appeals found that the Commission had unlawfully delegated authority to state commissions to make impairment determinations. But the D.C. Circuit held that the Commission also had acted unlawfully both by “ignor[ing] facilities deployment along similar routes when assessing impairment” and by refusing to “consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired.”¹⁵ And the Court of Appeals again indicated that *nationwide* unbundling obligations could not be justified on this agency record: “[A]s with mass market switching, the Order itself suggests that the Commission doubts a national impairment

¹² *USTA II*, 359 F.3d at 570.

¹³ *Id.* at 569, 570.

¹⁴ *Id.* at 587.

¹⁵ *Id.* at 575, 577.

finding is justified on this record.”¹⁶ Indeed, according to the Court of Appeals, the Commission had “frankly acknowledged that competitive alternatives are available in some locations” for these network elements.¹⁷

IV. THE IMPAIRMENT STANDARD

A. **The Impairment Standard Must Determine Where “Competition Is Possible” Without Access to Unbundled Network Elements.**

Impairment is the “touchstone” to any unbundling determination.¹⁸ Because of “the costs of unbundling (such as discouragement of investment and innovation) ... the Commission is obliged to apply a limiting standard of impairment, rationally related to the goals of the 1996 Act.”¹⁹ Moreover, the Commission must “make specific, affirmative findings that elements

¹⁶ *Id.* at 574.

¹⁷ *Id.* (internal quotation marks omitted). Some CLECs have claimed that the D.C. Circuit did not vacate the Commission’s rules requiring nationwide unbundling of high-capacity loops. In the *Notice*, the Commission assumed, without deciding, that the Court had done so. *See Notice*, ¶ 1, n. 4. But the D.C. Circuit clearly stated that it was vacating *all* of the Commission’s delegations of impairment determinations to the states. *See USTA II*, 359 F.3d at 568. And the Commission unquestionably made such a delegation in the context of both high-capacity loops and transport. *See Triennial Review Order* 18 FCC Rcd at 17175-76, 17223-24, ¶¶ 327-328, 394. Moreover, the D.C. Circuit defined the term “transport,” as used in the opinion, to refer to “transmission facilities dedicated to a single customer,” which the Commission defines as “loops,” as well as to facilities dedicated to a “carrier,” which the Commission defines as “transport.” *USTA II*, 359 F.3d at 573; 47 C.F.R. § 51.319(a), (e). The Court’s treatment of high-capacity loops and transport was consistent with the manner in which the incumbents briefed the issue, by addressing both simultaneously. *See* Brief for ILEC Petitioners and Supporting Intervenors at 31-35, Nos. 00-1012 *et al.* (D.C. Cir. filed Jan. 16, 2004); Reply Brief for ILEC Petitioners and Supporting Intervenors at 15-17, Nos. 00-1012 *et al.* (D.C. Cir. filed Jan. 16, 2004). And the two substantive flaws the D.C. Circuit identified with respect to the Commission’s analysis of high-capacity facilities – considering impairment at on a route-specific basis and the failure to consider the availability of special access, *see USTA II*, 359 F.3d at 575, 577 – apply equally to the Commission’s determinations as to both loops and transport, *see Triennial Review Order* 18 FCC Rcd at 17047-48, 17177-78, 17182-84, 17227-28, 17230-31, ¶¶ 102, 332, 341, 401, 407.

¹⁸ *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 427-428; 391 (1999) (“*Iowa Utils. Bd.*”); *USTA I*, 290 F.3d at 423; *USTA II*, 359 F.3d at 580.

¹⁹ *USTA II*, 359 F.3d at 572.

should or should not be unbundled.”²⁰ It is insufficient to simply outline a conceptual framework in broad brushstrokes and then allow others to fill in the blanks. This proceeding requires clear and unambiguous answers to the unbundling questions currently confronting the Commission.

To provide the unambiguous answers that the 1996 Act demands, the Commission must determine “whether a market is suitable for competitive supply,” which requires an inquiry into whether “competition is possible” without access to unbundled network elements (“UNEs”).²¹ A market is obviously “suitable for competitive supply” when competitive facilities already have been deployed. Thus, record evidence demonstrating the existence of 1,200 CLEC circuit switches, 8,700 CLEC packet switches, 19 CLEC networks in each of the top 50 Metropolitan Statistical Areas (“MSAs”), 324,000 miles of fiber optic cable and 32,000 on-net buildings has meaning and cannot be simply wished away.²² Such evidence is “dispositive” and not merely “probative” of whether competitive entry is possible without access to UNEs.²³

Furthermore, competition is possible even in markets where competitors have yet to deploy facilities (or have deployed them to a lesser extent). In such circumstances, the Commission cannot merely conclude that the absence of competitors is “proof” of impairment; instead the Commission must consider whether competition is possible by considering competitive deployment in “similarly situated” markets.²⁴

²⁰ *Triennial Review Order* 18 FCC Rcd at 17026-27, ¶ 72.

²¹ *USTA II*, 359 F.3d at 571.

²² *UNE Fact Report 2004*, Section I, Table 1. This nationwide CLEC circuit switch total is based on an estimate from New Paradigm Resources Group, Inc. As explained in the Affidavit of Ms. Pamela A. Tipton, and in Section IV, C, *infra*, BellSouth includes its calculation of CLEC circuit switches in its region using more inclusive filtering criteria.

²³ *Triennial Review Order*, 18 FCC Rcd at 17042-43, ¶ 94.

²⁴ *USTA II*, 359 F.3d at ¶ 575.

In assessing whether competition is possible in a market without access to UNEs, the Commission also must take into account intermodal competition. As the D.C. Circuit held in *USTA I* and expressly reaffirmed in *USTA II*, “the Commission cannot ignore intermodal alternatives” in evaluating the state of competition.²⁵ In particular, the Court of Appeals noted that the presence of “robust intermodal competition” would ensure that “mass market consumers will still have the benefits of competition,” regardless of the degree to which CLECs using unbundled network elements were present in the market. As the D.C. Court concluded, “[w]here competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling.”²⁶

There can be no serious dispute that real and robust intermodal competition pervades the industry.²⁷ For example, 87% of homes have access to cable modem service, 97% of the population lives in counties with three or more wireless providers, 88% of the population lives in counties with five or more wireless providers, 11 million wireless subscribers have cut the wireline cord, and 17 million homes have access to circuit switched cable telephony.²⁸ The Commission must do more than blithely acknowledge the existence of such alternatives, but then accord them lesser “weight.” Nor should the Commission limit consideration of intermodal alternatives by comparing newer technologies against the cost, quality, and maturity of ILEC services. Doing so would be flatly contrary to the Commission’s pledge to adopt rules that

²⁵ *Id.* at 572-573.

²⁶ *Id.* at 576.

²⁷ *E.g.*, *USTA II*, 359 F.3d at 572-573.

²⁸ *UNE Fact Report 2004* at Section I, Table 1.

reflect “current conditions in particular markets.”²⁹ There is no doubt that intermodal alternatives exist and are flourishing, and it makes no sense to minimize such competitive alternatives by comparing newer technologies against the “maturity” of traditional ILEC services.

B. The Impairment Standard Must Address the Concerns Raised in *USTA II*

In *USTA II* the D.C. Circuit took the Commission to task for including in its impairment definition a factor – whether enumerated operational and entry barriers “make entry into a market uneconomic” – that was so “vague almost to the point of being empty.”³⁰ The Court of Appeals admonished the Commission to explain the standard by which entry is judged to be “uneconomic” or not.

In those markets where competitive entry has occurred, whether by CLECs or intermodal competitors, such entry must be presumed to be “economic,” and there is no need to wade into the amorphous concepts inherent in cost studies and business modeling.³¹ However, to the extent any economic analysis must occur, it should be conducted by the Commission to assess whether competitive entry is “uneconomic” from the perspective of an efficient CLEC, and not a

²⁹ Brief for Respondents at 1, *USTA et al. v. F.C.C. et al.*, No. 01-1012 (D.C. Cir. filed Sept. 16, 2004) (FCC’s brief filed in opposition to writ of mandamus stated that in this proceeding it “must adopt new unbundling rules that reflect a nuanced and comprehensive analysis of competitive impairment under current conditions in particular markets”).

³⁰ *USTA II*, 359 F.3d at 572.

³¹ Indeed, in the *Triennial Review Order* 18 FCC Rcd 17046, ¶ 99, the Commission explained that the consideration given to cost studies, business case analyses and modeling, while useful, was less relevant than actual marketplace evidence. In relevant part the Commission acknowledged actual marketplace evidence demonstrated as a practical matter that new entrants had surmounted barriers to entry. In addition, studies were “difficult to verify” and “easily manipulated.” Finally, the Commission acknowledged factors affecting a competitor’s ability to enter the market are difficult to foresee.

particular CLEC or even an “average” or “representative” CLEC.³² Judging competitive entry based on an efficient CLEC is consistent with (but more realistic than) the approach embodied in the Commission’s TELRIC pricing rules.³³ An efficient CLEC standard also is consistent with the position taken by CLECs themselves.³⁴ Thus, if the Commission applies controlling benchmarks and standards to assess economic market entry, such benchmarks and standards should presume an efficient CLEC deploying an efficient network architecture using the most current technology, while pursuing all potential revenue opportunities and taking all steps necessary to satisfy customers and reduce churn.³⁵

³² See *USTA II*, 359 F.3d at 572. As discussed in detail in Sections VII and VIII, with respect to wireless and long distance carriers and for certain high-capacity services, economic competitive entry has occurred through the use of tariffed special access services, which is fatal to any finding of impairment. See *USTA II*, 359 F.3d at 576 (“[w]here competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling.”).

³³ See 47 C.F.R. § 51.505(b)(1).

³⁴ See, e.g., Letter from David W. Carpenter, Counsel for AT&T Corp., to Mark J. Langer, Clerk, United States Court of Appeals for the District of Columbia Circuit, Nos. 00-1012 (filed Jan. 29, 2002) (acknowledging that, in determining impairment, an efficient CLEC “is inherent” in the analysis).

³⁵ The Commission must reject any attempt by CLECs to argue against cost assumptions they extolled in UNE cost proceedings or to disavow statements made in other state proceedings. See BellSouth App. at 1. Compare FPSC Docket No. 030852-TP, Rebuttal Testimony of CompSouth witness Gary J. Ball (criticizing BellSouth’s use of cost information used to develop TELRIC rates in Florida in potential deployment analysis and claiming that an evaluation of costs “specific to CLECs” is required) with GPSC Docket No. 14361-U, Direct Testimony of AT&T witness Brian F. Pitkin (seeking 6.25% reduction in Georgia UNE rates); also GPSC Docket No. 5825-U, Direct Testimony of SECCA witness Joseph Gillan (“[t]he fundamental calculus determining a customer’s profitability is the . . . total revenue from the family of services that it purchases. This calculus applies equally to the incumbent and new entrant. The financial attractiveness of a customer is decided by the totality of service it purchases . . .”). Likewise, the Commission must remain vigilant to CLEC gamesmanship that would only seek to undermine any economic standard by: (1) proffering an economic model that disregards completely any revenue opportunities; BellSouth App. at 2; (2) claiming that CLECs face a “tremendous disadvantage” and that economic predictions are “inherently uncertain;” BellSouth App. at 3; and (3) arguing that it is incumbent on the ILEC to meet a “burden of proof” to establish that CLECs are not economically impaired. BellSouth App. at 4.

Assessing economic entry from the perspective of a particular CLEC or an “average” CLEC would reward inefficiency. It also would make it difficult for the Commission to distinguish uneconomic entry from poor business planning or regulatory gamesmanship.³⁶

In *USTA II* the D.C. Circuit again held that the Commission cannot find impairment simply because retail rates have been held below historic costs in order to preserve universal service.³⁷ In the *Triennial Review Order*, below-cost retail rates were not listed as one of the enumerated barriers to entry, yet in the improper delegation to the states, universal service support was listed as a factor for consideration.³⁸

There is no reasonable basis for including universal service subsidies as an impairment factor. Such inclusion effectively penalizes those carriers willing to shoulder the carrier of last resort responsibility without any corresponding ability to recoup the profits lost to carriers that “cream-skim” by selectively providing service only to the most lucrative customers. In an ideal world, there would be a concrete solution to this dilemma. In the real world, there are no such easy or quick fixes, and the Commission should simply decline to include universal service subsidies in assessing impairment.

C. Implementation of the Impairment Standard

³⁶ For example, although AT&T and MCI have gone to great lengths to announce a retreat from the local service market due to the uncertainty surrounding the availability of the unbundled network element-platform (“UNE-P”), AT&T has simply shifted its strategy to VoIP and continues to market local circuit-switched service and VoIP via its website. Tipton Affid. ¶ 32. Likewise, MCI’s website continues to assert that “The Neighborhood is now available in all 48 contiguous states plus Washington, DC, making MCI the first nationwide local phone company.” See http://consumer.mci.com/TheNeighborhood/res_local_service/.

³⁷ *USTA I*, 290 F.3d at 422; *USTA II*, 359 F.3d at 573.

³⁸ *Triennial Review Order*, 18 FCC Rcd at 17305, ¶ 518.

As the D.C. Circuit correctly recognized, any impairment standard “finds concrete meaning only in its application.”³⁹ To develop such concrete meaning, BellSouth demonstrates below how a narrowly defined impairment standard can be properly applied to the specific individual elements remanded by the D.C. Circuit. Through the proper application, the Commission can determine precisely whether carriers are genuinely impaired without unbundled access to switching and high capacity transport, loops, and dark fiber and, if so, where such impairment exists.

V. LOCAL CIRCUIT SWITCHING

In *USTA II*, the D.C. Circuit vacated this Commission’s national impairment finding concerning mass market switching. The D.C. Circuit explained that the Commission had essentially ignored specific markets, going so far as to state that “the Commission’s own conclusions do not clearly support a non-provisional national impairment finding for mass market switches.”⁴⁰ As discussed below, the proper application of the impairment standard conclusively demonstrates that switching is suitable for competitive supply and that CLECs are not impaired without access to unbundled local switching from BellSouth.

A. Switching Is Suitable for Competitive Supply for Both Enterprise and Mass Market Customers

In turning to switching, the Commission must reconcile its finding – upheld on review – concerning the existence of widespread switch deployment to serve the “enterprise” market with its conclusion that CLECs were impaired in self-providing switching to mass-market customers.⁴¹ The Commission’s mass-market switching conclusion rested solely upon the

³⁹ *USTA II*, 359 F.3d at 572.

⁴⁰ *Id.* at 569.

⁴¹ *Triennial Review Order*, 18 FCC Rcd at 17258-59, ¶ 451.

“need for hot cuts,” which is addressed below.⁴² Besides the Commission’s prior (and incorrect) conclusion concerning hot cuts, the evidence demonstrates that any alleged distinction between switching used to serve enterprise customers as compared to switching used to serve mass market customers is artificial. Because the same CLEC switches can and do serve both mass market and enterprise customers, any alleged barriers to entry have been overcome. In addition, and perhaps more compelling, the rapid advances in intermodal alternatives mandate both an extension of the no unbundling decision to all circuit switching as well as an eradication of the fictitious enterprise/mass market distinction.

In its *Triennial Review Order* this Commission found “the record ... does not contain evidence identifying any particular markets where competitive carriers would be impaired without access to local circuit switching to serve enterprise customers.”⁴³ The D.C. Circuit affirmed the Commission’s finding, acknowledging the evidence showed an absence of *any* impairment.⁴⁴ The Commission also created a “safety valve” by which state commissions could rebut the national finding of no impairment.⁴⁵ In BellSouth’s region, only one CLEC challenged the no impairment finding, which was rejected out of hand by the Kentucky Public Service Commission.⁴⁶ No other challenges occurred in BellSouth’s serving territory, which aptly

⁴² Brief for the Federal Respondents at 9-10, *NARUC v. United States Telephone Ass’n*, Nos. 04-12, 04-15 & 04-18 (S. Ct. filed Sept. 1, 2004) (FCC’s brief stated it found CLECs were generally impaired absent unbundled mass-market switching because they could not use their own switches without hot cuts).

⁴³ *Triennial Review Order*, 18 FCC Rcd at 17260, ¶ 455.

⁴⁴ *USTA II*, 359 F.3d at 587.

⁴⁵ *Triennial Review Order*, 18 FCC Rcd at 17260-63, ¶¶ 454-58.

⁴⁶ BellSouth App. at 5 (KPSC rejected petition of Southeast Telephone Inc. seeking an FCC waiver of the “no impairment” finding for enterprise customers).

demonstrates the correctness of the Commission's finding relating to switching used to serve enterprise customers.

Despite the no impairment finding concerning switching used to serve enterprise customers, the *Triennial Review Order* left a huge void concerning switching to serve mass market customers. While reaching inapposite conclusions regarding enterprise and mass market switching, the Commission failed to adopt rules clearly delineating between the two customer segments. The practical impact means that even today, the Commission's enterprise switching finding remains unfulfilled. More importantly, however, when the Commission appropriately accounts for the vast array of competitive alternatives, including intermodal, the record evidence shows no impairment exists for any switching whatsoever.

B. Competitive Supply Exists for Switching

Competitive supply for switching remains alive and well. CLECs operate a large embedded base of switches.⁴⁷ In BellSouth's serving territory alone, July 2004 LERG data⁴⁸ indicates there are more than 450 CLEC switches.⁴⁹

Of the CLEC switches in BellSouth's serving territory, many of the switches currently serve mass-market customers.⁵⁰ Indeed, using the conservative assumption that a mass-market customer is a residential or small business customer with three or fewer DS0 lines, BellSouth

⁴⁷ *UNE Fact Report 2004* at Section I, Table 1.

⁴⁸ The LERG is the industry source for routing of switched traffic, and it contains information concerning all competitive switches deployed nationwide. Notably, the LERG contains data *as reported by carriers themselves* and is updated on a monthly basis. Because the LERG contains self-reported data, there can be no legitimate CLEC protest lodged against using it to derive the numbers of CLEC circuit switches in BellSouth's serving territory.

⁴⁹ Tipton Affid., ¶ 4. *Also n. 22 supra*. Included with Ms. Tipton's Affidavit are exhibits that show the number of MSAs and Micropolitan Statistical Areas ("MCSAs") in BellSouth's serving territory that have circuit switches or switching points of interface ("POIs") using July 2004 LERG data and the filtering methodology described by Ms. Tipton.

⁵⁰ Tipton Affid., ¶ 12; *also* BellSouth App. at 6.

specifically identified 110 switches in its regions serving mass-market customers.⁵¹ There is ample record evidence that CLECs can and do economically use their switches to serve mass-market customers.⁵² Indeed, AT&T has admitted that it “serves very small businesses from its switches today, which is a portion of the mass market.”⁵³

To the extent that CLEC circuit switches are not currently being used to serve mass-market customers, they could readily be.⁵⁴ Even AT&T concedes as much, acknowledging that “[t]here’s no technological reason that prevents the use of [AT&T’s six Florida local switches] as a UNE-L platform” and that “class 5 local switches . . . are capable of serving both enterprise and mass market customers.”⁵⁵ Similarly, US LEC testified that, while it served business customers using DS1 or broadband facilities, it could also “market service to small business customers . . . with its own switches.”⁵⁶ US LEC also explained that it could “economically serve its targeted business customers in Georgia using its own switches, notwithstanding the costs of backhauling.”⁵⁷ Likewise, Knology, a CLEC that predominantly serves the residential market, uses long-haul transport facilities throughout the state of Georgia, and can “economically serve

⁵¹ Tipton Affid., ¶12.

⁵² *Id.* In the state impairment cases, BellSouth filed an economic model which indicated that in certain markets CLECs were impaired without access to unbundled circuit switching. However, BellSouth’s model utilized the broad economic impairment standard that the D.C. Circuit questioned in *USTA II* and thus it did not consider the full extent of the intermodal alternatives that are ubiquitous throughout BellSouth’s serving territory. Consequently, any suggestion that BellSouth has conceded impairment in certain areas without access to local circuit switching is false.

⁵³ BellSouth App. at 6.

⁵⁴ Tipton Affid., ¶ 22; Milner Affid., ¶ 10; BellSouth App. at 6.

⁵⁵ BellSouth App. at 6.

⁵⁶ BellSouth App. at 7.

⁵⁷ *Id.*

its customers in Georgia without access to unbundled switching from BellSouth, notwithstanding the costs of backhauling.”⁵⁸

CLECs have sought to avoid such facts by insisting that the number of mass-market customers served by CLEC switches is “de minimus.” CLECs, however, did not and cannot dispute that CLEC switches are actually serving mass-market customers. That some CLECs have elected to utilize UNE-P rather than their own switches is unsurprising given the large profit margins that this synthetic form of competition entails. As the D.C. Circuit explained, however, the purpose of the 1996 Act is not “to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate.” Although UNE-P CLECs invented a host of excuses in an attempt to explain away evidence of competitive switches,⁵⁹ it bears repeating that these carriers did not contest that such switches *actually serve* mass-market customers.⁶⁰ Indeed, one CLEC – FDN Communications – acknowledged the inherent fallacy in the enterprise/mass market switch distinction, testifying that “competitive switches out in the market ... serve enterprise customers [and] also do serve what you are calling mass market.”⁶¹

⁵⁸ BellSouth App. at 8.

⁵⁹ BellSouth App. at 9. See enumerated criteria of Sprint and CompSouth. That CLECs invented additional criteria in the state impairment proceedings in order to disqualify switching trigger candidates was particularly hypocritical given the CLECs acknowledgment before the D.C. Circuit that the self-provisioning switching test was “automatic.” See Opening Brief of CLEC Petitioners, *USTA v. FCC*, (D.C. Cir. Nos. 00-1012, 03-1310) at 36.

⁶⁰ See BellSouth App. at 6.

⁶¹ BellSouth App. at 10. Remarkably, AT&T and MCI refused to concede FDN met the vacated self-provisioning trigger test, despite FDN’s testimony that it was a trigger company. BellSouth App. at 23-24. BellSouth also identified as trigger companies in certain areas both ITC^DeltaCom, Inc. and Network Telephone Corp. On Sept. 8, 2004, these three companies announced definitive merger agreements, touting the benefits of this merger as providing “greater penetration in its southeastern market, an enhanced facilities-based platform to serve its expanding customer base, and a significantly improved competitive position.” See [http://www.fdncommunications.com](http://www.fdncommunications.com;); <http://www.itcdeltacom.com>; and <http://www.networktelephone.net/NTCportal/Visitor>.

Notably, FDN explained that “switching has been and still is readily available to any one willing to purchase a Class 5 type device.”⁶²

Today’s switches are capable of serving multiple markets, entire states, indeed, the entire world.⁶³ CLECs have consistently touted the scope and reach of their switches and network architecture as efficient, and farther ranging than traditional ILEC switches.⁶⁴ That CLECs can readily use fewer switches and economically serve customers broadly dispersed throughout a large geographic area cannot be seriously disputed.

C. Intermodal Competition Exists For Switching

The array of intermodal competitive alternatives available today is phenomenal. While technological advances may have surpassed the traditional thinking of communications, the Commission has recognized that the 1996 Act “expresses no preference for the technology that carriers should use to compete with the incumbent LECs.”⁶⁵ Indeed, intermodal services have grown exponentially, at growth rates that outstrip traditional wireline customers.⁶⁶ Residential and small business customers have ready access to intermodal alternatives that are equally available to medium and large businesses.

1. Voice-Over-Broadband Service

⁶² BellSouth App. at 10.

⁶³ BellSouth App. at 11.

⁶⁴ BellSouth App. at 12.

⁶⁵ *Triennial Review Order*, 18 FCC Rcd. at 17045, ¶ 97.

⁶⁶ June 2004 FCC Local Competition Report (“*Local Competition Report*”), available at www.fcc.gov/scb/stats. Compare 157.0 million mobile wireless telephone subscriptions with 29.6 million CLEC switched access lines; also *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 04-111, FCC 04-216, ¶ 5 (“Ninth CMRS Report”) (rel. Sept. 28, 2004) available at www.fcc.gov, (reporting 160.6 wireless subscribers as of December 2003).

The most promising new technologies are Internet protocol-based services provided using packet switches, most often over broadband transport. The service provided with these packet switches is commonly known as Voice over Internet Protocol, or more simply “VoIP.” VoIP services are sold as a discrete offering running over broadband data connections, which are sold separately.⁶⁷ Cable companies, interexchange carriers (“IXCs”), CLECs, and a new breed of VoIP providers are all offering or are on the verge of offering such services. VoIP services may be economically provided to customers that already have a broadband connection as well as to those that have not yet added this feature. Moreover, industry analysts, competitive carriers, and equipment vendors now agree that VoIP provides quality and functionality comparable or superior to conventional circuit-switched service.⁶⁸

The six major cable operators, which collectively reach 85% of U.S. households and serve 90% of all cable modem subscribers, have either begun or announced imminent plans to commercially deploy VoIP. Smaller cable companies are following the lead of the major operators. Analysts predict that within the next two years 80% or more of U.S. households will be able to obtain IP telephony services from their cable operator.⁶⁹

VoIP services are not limited to cable companies – many traditional CLECs and IXCs have begun deploying VoIP services. Both AT&T and MCI are aggressively focusing on VoIP initiatives; AT&T projects one million VoIP customers by the end of 2005, while MCI claims that VoIP “has come into its own” and that “IP is the world’s dominant protocol. It will continue

⁶⁷ *UNE Fact Report 2004* at Section II.

⁶⁸ *Id.* at Section II, A, 1 & 2.

⁶⁹ *UNE Fact Report 2004* at Section II, A, 2.

to evolve and prove its versatility, and so too will Voice over IP services.”⁷⁰ Other CLECs are also aggressively launching VoIP service; for example Level 3 has announced an aggressive VoIP rollout.⁷¹

Additional competition in VoIP comes from new companies – such as Vonage – that do not offer traditional circuit-switched voice service, as well as providers that rely on the public Internet and do not own or operate network facilities – such as Skype. Vonage offers local numbers in more than 1,900 rate centers in 120 U.S. markets. Skype provides software that allows users to place free calls over the Internet. Pulver.com, Free World Dialup, Net2Phone and InPhonex also offer similar free-calling soft-phone service.⁷²

In BellSouth’s region, there are at least 200 packet/soft switches, which can be broadly utilized to provide customers VoIP services.⁷³ Packet switches, like other switches, have the technical capability of serving customers over a wide geographic area.⁷⁴ When considering the reach of these switches, it is clear that any given market -- whether an MSA, a LATA, or some smaller designation -- has ready access to VoIP service. For example, with respect to cable modem service specifically, BellSouth estimates that 83% of the households in the top 26 MSAs of its serving territory have such access.⁷⁵ BellSouth also has included maps reflecting the extensive cable footprint that exists throughout its serving territory. The cable modem

⁷⁰ *Id.* at Section II, A, 1; also http://global.mci.com/us/info/email/digital_view/articles/voip.xml.

⁷¹ *UNE Fact Report 2004* at Section II, A, 1.

⁷² *Id.*

⁷³ Tipton Affid., ¶ 8.

⁷⁴ BellSouth App. at 11 (in describing Global NAPs’ single packet switch located in the state of Florida, Mr. James Scheltema explained “any switch can serve any location in the entire world depending upon how you utilize transport.”).

⁷⁵ Tipton Affid., ¶ 6.

percentages as well as the cable footprint maps visually depict the extent of the robust intermodal competition available to both mass market and enterprise customers alike.⁷⁶

2. Circuit-Switched Cable Telephony

In addition to VoIP services, cable companies also offer circuit-switched cable telephony. Circuit-switched cable telephony is available to approximately 15% of all U.S. households, and more than 15% of households with access to cable telephony subscribe to this service.⁷⁷ Moreover cable telephony has grown – during the second half of 2003, cable telephony lines increased by 6%, to 3.2 million lines.⁷⁸ In BellSouth’s region alone, Comcast currently offers circuit-switched phone service to tens of thousands of residential customers in Florida, Georgia, and Kentucky. In addition, Cox and Knology also actively provide circuit-switched cable telephony in selected areas of BellSouth’s serving territory.⁷⁹

3. Wireless

Wireless provides yet another competitive alternative to traditional wireline service. Ninety-seven percent of the total U.S. population lives in a county with access to three or more wireless providers.⁸⁰ The number of wireless subscribers has grown to approximately 160.6 million,⁸¹ and 20 million new wireless subscribers are added annually.⁸²

⁷⁶ Tipton Affid., Exhs. PAT-2, PAT-3, and PAT-4.

⁷⁷ *Id.*

⁷⁸ *Local Competition Report* at 2; also June 18, 2004 News Release concerning *Local Competition Report*; (“cable telephony lines increased by 6% during the second half of 2003”).

⁷⁹ Tipton Affid., ¶ 10; and BellSouth App. at 13-15.

⁸⁰ Ninth CMRS Report, ¶ 2.

⁸¹ *Id.*, ¶ 5.

⁸² *UNE Fact Report 2004* at Section II, B, 1.

Growing numbers of customers have embraced wireless technology to the point of abandoning traditional wireline service entirely. Estimates of the percentage of customers who currently subscribe only to wireless service range from six to eight percent.⁸³ Moreover, an even larger percentage of young consumers have abandoned traditional wireline service altogether.⁸⁴ Some analysts predict that approximately 13 percent of total access lines will be displaced by wireless service.⁸⁵

Wireless service is prevalent in BellSouth's serving territory. Taking the data from this Commission's Ninth CMRS Report, BellSouth has created maps depicting the extent of the wireless service in the southeastern states. This data show that wireless services are available ubiquitously in BellSouth's region, and, like the cable modem data, underscore the numerous alternatives equally available to mass market and enterprise customers.⁸⁶

In addition to traditional wireless service, wireless fidelity service, more commonly referred to as "Wi-Fi" is growing dramatically.⁸⁷ Wi-Fi networks allow multiple users to share bandwidth and send and receive data within a certain signal reach of a Wi-Fi base station. Wi-Fi access to the Internet has experienced explosive growth; Wi-Fi hotspots exist on a commercial and noncommercial basis. Wi-Fi access is available on a no-fee or a modest-fee basis, and industry analysts predict the continued growth of Wi-Fi access points as well as wireless Internet

⁸³ *Id.*; but see FCC's August 2004 *Telephone Subscribership in the United States*, p. 2, n. 2 (estimating 6.0% of households have only wireless phones) available at <http://www.fcc.gov/wcb/iatd/stats.html>.

⁸⁴ *UNE Fact Report 2004* at Section II, B, 1.

⁸⁵ *Id.*

⁸⁶ Tipton Affid., Exh. PAT-8.

⁸⁷ FCC's Report, "Availability of Advanced Telecommunications Capability in the United States," Fourth Report to Congress (Sept. 9, 2004) ("Fourth Advanced Telecommunications Report"), at 17-18, available at www.fcc.gov.

providers. Wi-Fi provides another option for the last-mile provision of advanced services for residential use.⁸⁸

D. CLECs Are Not Impaired Without Access to Unbundled Switching

Given the extensive deployment of competitive switches and the wide availability of other competitive alternatives, the Commission should find that CLECs are not impaired without unbundled access to circuit switching.

If history repeats itself, the CLECs will likely file comments seeking the continued availability of unbundled switching on a ubiquitous basis in the name of consumer welfare and competition. While the versions of this tired refrain vary, the gist of the song is that mass-market competition will suffer without access to the UNE-P. Attempting to give life to this terminally ill melody, the CLECs may even cite to their own press releases as alleged concrete evidence supporting this self-fulfilling, apocalyptic prophecy. The Commission should not fall prey to such antics.

In addition to considering existing and potential competitive alternatives, the “at a minimum” language of Section 251(d)(2) requires that the Commission assess impairment by analyzing: the effect of infrastructure investment when making unbundling decisions; the deterrent to investment posed by the regulatory environment; the balancing of the potential of

⁸⁸ *Id.* In addition to the robust intermodal competition available with voice over broadband facilities, cable telephony, and wireless service, other options, such as satellite, and broadband over power lines (“BPL”) present other competitive alternatives. The satellite industry continues to grow and provide critical services, which include voice, video, and data services. See “A Satellite Report,” presented by David Abelson, FCC, Chief, International Bureau (Sept. 9, 2004), available at www.fcc.gov; also FCC’s Report, *High Speed Services for Internet Access: Status as of December 31, 2003*, (rel. June 8, 2004), available at www.fcc.gov/wcb/stats (providers report using satellite technology in all 50 states). BPL systems use existing electrical power lines as a transmission medium to provide high-speed communications and have the potential to take advantage of the deployed infrastructure of the power grid to provide services to customers not yet served by either digital subscriber line (“DSL”) service or by cable modem service. Initial trials of BPL are underway in Virginia, Pennsylvania, and Ohio. *Id.*

increased consumer costs in the short-term to stimulate future technological innovations; and the negative effect of unbundling on CLEC investment decisions.⁸⁹

When considering such criteria, the only reasonable outcome is a finding of no impairment with respect to circuit switching. The intermodal competition created by cable, VoIP, and wireless services demonstrates clearly that consumers are benefiting from increased choice and reduced prices without the need for unbundled switching from BellSouth.⁹⁰ When factoring in the negative effect unbundling has on both ILEC and CLEC investment decisions,⁹¹ it is clear that the “at a minimum” balancing favors extending the “no unbundling” decision that currently exists for enterprise switching to switching used to serve the mass market and erasing completely this artificial and unnecessary boundary.

VI. BELLSOUTH’S HOT CUT PROCESSES

In the *Triennial Review Order*, the Commission focused on alleged problems with the hot cut process in making its nationwide finding of impairment with respect to switching used to serve mass-market customers. The D.C. Circuit rejected the Commission’s analysis and expressed “doubt” that the record evidence concerning hot cuts supported an impairment finding for mass-market switches.⁹²

As explained more fully below, BellSouth’s hot cut processes, including its batch hot cut process, allows for UNE loops to be provided at a high level of efficiency and quality and for large quantities of UNE-P arrangements to be converted to UNE loops in a short time frame.

⁸⁹ *USTA II*, 359 F.3d at 581.

⁹⁰ *E.g.*, *UNE Fact Report 2004* at Section I, A.

⁹¹ *E.g.*, BellSouth App. at 12. (Global NAPs witness testified regulation was one complication preventing it from providing voice services to mass-market customers).

⁹² *USTA II*, 359 F.3d at 569-70.

Accordingly, BellSouth's hot cut process cannot serve as a basis for a finding of impairment with respect to local circuit switching.⁹³

A. BellSouth Individual Hot Cut Performance Continues to Be Excellent

This Commission has defined a hot cut as "a largely manual process requiring incumbent LEC technicians to manually disconnect the customer's loop which was hard wired to the incumbent LEC's switch and physically rewire it to the competitive LEC's switch."⁹⁴ The "cut is said to be 'hot' because telephone service on the specific customer's loop is interrupted for a brief period of time, usually fewer than five minutes, during the conversion process."⁹⁵

This Commission reviewed BellSouth's individual hot cut process in the 271 proceedings and found that BellSouth provided CLECs with nondiscriminatory access to unbundled loops via its hot cut process.⁹⁶ BellSouth's hot cut performance data, which the Commission has previously reviewed and endorsed, establishes that BellSouth can effectively migrate loops from

⁹³ The details of BellSouth's hot cut processes are set forth in the accompanying affidavit of Kenneth L. Ainsworth, W. Keith Milner, and Alphonso J. Varner (hereinafter "Ainsworth Affid.").

⁹⁴ *Triennial Review Order* 18 FCC Rcd at 17266 ¶ 465, n.1409.

⁹⁵ See *Application by Verizon New Jersey Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, *Memorandum Opinion and Order*, 17 FCC Rcd at 12275, ¶ 61 (2002) ("*New Jersey 271 Order*"); see also *Triennial Review Order*, 18 FCC Rcd at 17266, ¶ 465, n 1409 ("From the time the technician disconnects the subscriber's loop until the competitor reestablishes service, the subscriber is without service.").

⁹⁶ Ainsworth Affid., ¶ 17.

one carrier's switch to another carrier's switch.⁹⁷ Such data reflect that BellSouth's hot cut performance is consistently exemplary, and no CLEC has argued otherwise.⁹⁸

Actual commercial usage, which the Commission has determined is the most probative evidence of the availability of network functionality,⁹⁹ further buttresses the Commission's 271 decision regarding BellSouth's ability to transfer effectively a loop from one carrier's switch to another carrier's switch. For example, BellSouth performed over 18,000 individual hot cuts for one CLEC in Florida from November 2003 to March 2004.¹⁰⁰ Indeed, for one day during this time period, BellSouth performed 360 hot cuts in a single office for one Florida CLEC with a due date met performance exceeding 98%.¹⁰¹

The commercial experience of FDN also establishes that BellSouth's hot cut process works. FDN, a CLEC providing service to mass market customers in Florida and Georgia using its own switch, testified that "[a]s a UNE-L based CLEC that performs numerous hot cuts for DS-0 loops daily and has more working DS-0 loops than any other single CLEC in the state, *FDN would be hard pressed to say that the hot cut process does not work well.*"¹⁰²

⁹⁷ See *Triennial Review Order*, 18 FCC Rcd at 17301, at ¶ 512 ("Specifically, we ask the states to determine whether incumbent LECs are providing nondiscriminatory access to unbundled loops. Evidence relating to this inquiry might include, for example, commercial performance data demonstrating the timeliness and accuracy with which the incumbent LEC performs loop provisioning and the existence of a penalty plans with respect to the applicable metrics.").

⁹⁸ Any argument that BellSouth's performance data is irrelevant to the Commission's impairment analysis is directly contradicted by paragraph 512 of the *Triennial Review Order*, wherein the Commission specifically referred to performance data to establish whether ILECs are providing nondiscriminatory access to loops.

⁹⁹ See *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, *Memorandum Opinion and Order*, 15 FCC Rcd 3953, 3974, ¶ 53 (1999).

¹⁰⁰ BellSouth App. at 16; Ainsworth Affid., ¶ 67.

¹⁰¹ Ainsworth Affid., ¶¶ 67-68; 11. See also BellSouth App. at 16.

¹⁰² BellSouth App. at 20 (emphasis added).

B. BellSouth Has an Effective Batch Hot Cut Process

BellSouth has implemented a batch hot cut process for converting large quantities of UNE-P loops to UNE loops. In the *Triennial Review Order*, the Commission described certain criteria for an acceptable batch hot cut process that include: (1) the ability to migrate simultaneously two or more loops from one carrier's switch to another carrier's switch and specifically allow for the migration from UNE-P to UNE-L in a timely manner;¹⁰³; and (2) a specified volume of loops, performance measurements associated with, and a rate for the batch hot cut process.¹⁰⁴ As established below, BellSouth's batch hot cut process satisfies all of these criteria.

1. BellSouth's Batch Hot Cut Process Is Efficient

BellSouth's batch hot cut process has three main components: preordering, batch ordering process, and batch provisioning. In the preordering phase, the CLEC submits a Notification Form (in spreadsheet format) to BellSouth identifying the lines it wishes to migrate. Second, a BellSouth project manager then reviews the spreadsheet, marshals and coordinates the necessary resources to migrate the lines, and assigns due dates to the cutovers.¹⁰⁵ Third, the CLEC submits to BellSouth a batch hot cut local service request ("LSR"), which allows CLECs to submit one order (i.e., an LSR) to request the conversion of up to 2,475 lines from UNE-P to UNE-L.¹⁰⁶ Fourth, BellSouth performs all rewiring prior to the due date for each hot cut and then

¹⁰³ See 47 C.F.R. § 51.319(d)(ii).

¹⁰⁴ *Id.* at (d)(ii)(A)(3)(4).

¹⁰⁵ Ainsworth Affid., ¶ 7. BellSouth currently is developing a web-based scheduling tool that will allow CLECs to schedule the due dates for their orders on their own prior to submitting their bulk requests, which will shorten the batch process intervals. Ainsworth Affid., ¶ 24.

¹⁰⁶ Ainsworth Affid., ¶ 29.

coordinates and performs the hot cuts on the due date.¹⁰⁷ The actual provisioning work used to perform a hot cut in the batch process is the same process BellSouth uses in its individual hot cut process.¹⁰⁸

With the batch process, BellSouth and the CLECs are able to obtain efficiencies in handling batch cuts that are not present in BellSouth's individual hot cut process. For instance, through the project manager, BellSouth is able to assign its work force to handle a particular workload for a specified time period.¹⁰⁹ Thus, rather than technicians handling one circuit at a time, they are equipped to process the entire batch in an efficient, managed sequence. AT&T has recognized that efficiencies can be gained through project management.¹¹⁰ In addition, through the mechanized ordering process, the CLEC can use a single batch order to convert up to 2,475 telephone numbers.¹¹¹

BellSouth's batch hot cut process includes batch provisioning. AT&T defined batch provisioning as working a set number of hot cuts within a time window,¹¹² while MCI defined batch provisioning as one in which there are multiple customers migrated on the same day.¹¹³ BellSouth's batch process has both of these characteristics. When it performs batch hot cuts, BellSouth provisions groups (or batches) of loops in a single central office in a given time

¹⁰⁷ Ainsworth Affid., ¶¶ 17; 20.

¹⁰⁸ Ainsworth Affid., ¶¶ 19-20.

¹⁰⁹ Ainsworth Affid., ¶ 10.

¹¹⁰ BellSouth App. 19 (declaration of Ellyce Brenner stated “[t]here are numerous advantages to a project managed approach ...”; AT&T had already converted “UNE-P lines to its own facilities using the project-managed approach,” which resulted in “a loss of dial tone ... less than 1 percent of the time ...”).

¹¹¹ Ainsworth Affid., ¶ 29.

¹¹² BellSouth App. at 16.

¹¹³ BellSouth App. at 17.

window. There is no other way to accomplish “batch” provisioning – as all parties agree, the cuts must be accomplished on a loop-by-loop basis.¹¹⁴

2. BellSouth’s Batch Process is Dynamic and Scalable

BellSouth’s batch hot cut process encompasses both DS0 EELs and DS0 loops via Integrated Digital Loop Carrier (“IDLC”).¹¹⁵ IDLC is a special version of Digital Loop Carrier (“DLC”) that does not require a host terminal in the central office to disaggregate the multiplexed loops into individual transmission paths but instead terminates the digital transmission facilities directly into the central office switch.¹¹⁶ In compliance with Commission requirements that BOCs “must provide competitors with access to unbundled loops regardless of whether the BOC uses integrated digital loop carrier (“IDLC”) technology or similar remote concentration devices for the particular loops sought by the competitor,” BellSouth provides CLECs with access to IDLC loops via eight different methods and includes loops served by IDLC equipment in the batch process.¹¹⁷

Moreover, BellSouth has added or is in the process of adding numerous features to its batch hot cut process to address CLEC concerns raised during the state *Triennial Review Order*

¹¹⁴ See BellSouth App. at 18. It is not possible to “batch” provision by one technician moving multiple loops simultaneously, and AT&T has conceded that batch provisioning does not require one technician pulling two jumpers off the frame at one time.

¹¹⁵ Ainsworth Affid., ¶ 21.

¹¹⁶ See Affidavit of Keith Milner, filed concurrently herewith (“Milner Affid.”).

¹¹⁷ See Memorandum Opinion and Order, Application by SBC Communications Inc. en. Al., Pursuant to Section 271 of Telecommunications Act of 1996 to Provide In-Region, InterLATA services in Texas, 15 FCC Rcd 18354 ¶ 248 (2000); and Milner Affid. filed concurrently herewith. With respect to the Commission’s request for comment on whether and how it should clarify its rules regarding access to customers served by IDLC equipment in a manner that promotes facilities-based deployment, the Commission should simply refrain from creating any further rules in this area. As the attached affidavit of W. Keith Milner explains, BellSouth makes all of its loops, including loops provided via IDLC equipment, available to CLECs in a non-discriminatory manner. BellSouth provides access to IDLC loops in at least eight different ways, which have been considered and approved by this Commission and all of the state commissions in BellSouth’s region in the context of its Section 271 applications.

cases. These additions include: after-hours hot cuts; weekend hot cuts; all hot cuts for a single account be performed on the same day; hot cut completion within a specified time window; hot cut timely restoral process; UNE-P to CLEC UNE-L hot cuts; CLEC UNE-L to CLEC UNE-L hot cuts; e-mail notification of hot cut completions; web-based scheduler; web-based notifier; shorter hot cut intervals; and hot cuts for DSO EELs.¹¹⁸ These enhancements addressed virtually every single one of the CLECs' alleged criticisms of the batch hot cut process.¹¹⁹

In addition to being effective, BellSouth's batch hot cut process is scalable. BellSouth's batch hot cut process can meet the anticipated volume of hot cuts that will be required when unbundled switching is no longer available. To prove it can handle the volume, BellSouth ran a force model to forecast the additional load in the centers and network operations that would result if the Commission were to find no impairment. In this model, using Florida as an example, BellSouth used several conservative assumptions to prove that BellSouth's forces can handle the "worst-case" scenario of UNE-L volumes.¹²⁰

Using these assumptions, which are detailed in the Ainsworth Affidavit, BellSouth determined that, beginning in August 2005, it would have to perform approximately 318,000 hot cuts a month or approximately 14,000 a day, region-wide. Based on these calculations, the BellSouth force model determined 687 additional central offices employees, 394 additional

¹¹⁸ Ainsworth Affid., ¶ 13.

¹¹⁹ Throughout the state proceedings, no CLEC in BellSouth's region presented an alternative batch hot cut process for state commission consideration. While AT&T discussed its Electronic Loop Provisioning ("ELP") method, AT&T admitted that "there is no ILEC that has an old hot cut process that answers of [*sic*] our concerns at this time. Obviously, what we would like to see is an electronic method, which does not exist today." BellSouth App. at 18, 16. Similarly, MCI admitted that it had not proposed a batch hot cut process for any state commissions to adopt. BellSouth App. at 17. In addition to having no batch hot cut process of their own, AT&T and MCI have not found a batch hot cut process anywhere in the country that they can endorse. BellSouth App. at 18, 16.

¹²⁰ Ainsworth Affid., ¶ 71-95.

installation and maintenance employees, and 530 center employees would be needed to handle the increased hot cut volumes in Florida, BellSouth's largest state.¹²¹ BellSouth can meet these increased work force levels as detailed in the Ainsworth Affidavit.

3. BellSouth's Batch Hot Cut Process Works

Because the CLECs have not used BellSouth's batch hot cut process, BellSouth hired PriceWaterhouseCoopers ("PWC") to verify that the process works. Specifically, after reviewing 724 hot cuts performed on multiple days and in multiple central offices and spending over 2500 hours performing the audit, PWC confirmed BellSouth's assertions that: (1) the batch hot cut process enables a CLEC to migrate multiple end-users from UNE-P service to UNE-L service; and (2) the batch hot cut process requires central office and field technicians to physically perform the individual hot cut process, which is the same region-wide.¹²²

PWC's testing constitutes conclusive evidence that BellSouth's batch hot cut process works. PWC is the same audit company that performed regionality testing as part of BellSouth's 271 approval process, upon which the Commission relied in granting BellSouth 271 relief. Furthermore, PWC conducted its batch hot cut testing in accordance with the "attestation standards" established by the American Institute of Certified Public Accountants. "An attestation examination is one in which a practitioner is engaged to issue a written communication that expresses a conclusion about the reliability of a written assertion that is the responsibility of another party. An attestation examination is the highest level of assurance that can be provided on a written assertion under these standards."¹²³

¹²¹ Ainsworth Affid. ¶ 81-82.

¹²² Ainsworth Affid., generally, at ¶¶ 44-66.

¹²³ Ainsworth Affid. ¶ 46. AT&T generally supported testing of the batch process. AT&T witness Van de Water recommended that the batch process be subject to "both pre-

4. BellSouth's Batch Hot Cut Rate Is Reasonable

BellSouth offers its batch hot cut process at a reasonable rate. In recognition of the efficiencies gained through the batch process, for loops converted in the batch process, BellSouth charges ten percent (10%) off the applicable nonrecurring charge for individual hot cuts.¹²⁴ Importantly, the ten percent (10%) discount is off of the individual hot cut rates already established by the state commissions and which were either approved by this Commission as 271-compliant or which are lower than the rates approved by this Commission as 271-compliant.

D. CLEC Criticisms of BellSouth's Batch Process Are Speculative

In the state proceedings, the CLECs raised a myriad of arguments in an attempt to rebut the undeniable conclusion that BellSouth has a batch hot cut process that complies with the criteria set forth in the *Triennial Review Order*. As explained above, BellSouth has addressed most of these complaints through the enhancements to its process. To the extent the same performance arguments are raised in this proceeding, they are easily refuted.

In contrast to the overwhelming evidence presented by BellSouth that the batch hot cut process provides CLECs with the ability to timely and efficiently transfer volumes of lines from UNE-P to UNE-L, the CLECs have no empirical evidence to support their contrary claims. For instance, MCI admitted that despite filing extensive testimony alleging BellSouth's batch process would not work, it "had not ordered any hot cuts on a commercial basis for residential customers" in BellSouth's region.¹²⁵ MCI further admitted that it had no evidence to support its claims that: (1) "work is required on all of BellSouth's database used to configure and provide implementation and post-implementation testing" and urged that third-party testing be done to provide CLECs with assurance that they can move customers from UNE-P to UNE-L. BellSouth App. at 18, 28. The PWC audit operated exactly as Mr. Van de Water suggested.

¹²⁴ Ainsworth Affid., ¶ 10.

¹²⁵ BellSouth App. at 19, 29.

UNE-L to mass market customers, including LFACS, E-911, LIDB, CNAM, DA/DL and potentially others;” (2) MCI’s customers have been put in the middle of “finger pointing exercises,” involving BellSouth and MCI, with respect to the provisioning of UNE-L service; or (3) BellSouth’s hot cut “process is not working.”¹²⁶ When confronted with this glaring absence of proof, MCI conceded that it had no “first-hand” evidence of BellSouth’s performance with respect to hot cuts and that its testimony on the issue was “speculative.”¹²⁷

AT&T’s criticisms fare no better. AT&T’s hot cut expert, Mr. Van de Water, criticized BellSouth’s batch hot cut process, even though he had never worked in the BellSouth region and AT&T has no experience with BellSouth batch hot cut process because AT&T is not doing batch migrations.¹²⁸ Moreover, AT&T’s alleged evidence of hot cut problems was approximately three years old.¹²⁹

In considering a batch hot cut process in this proceeding, the Commission should evaluate the actual evidence before it. BellSouth has presented empirical data ranging from performance data and an independent, third party test, which establish that its batch process provides CLECs with a timely and efficient manner in which to migrate large volumes of lines from UNE-P to UNE-L. The Commission can and should extend its finding of no impairment to all switching, in full confidence that BellSouth’s hot cut processes can readily convert UNE-P arrangements to UNE-L arrangements.

¹²⁶ BellSouth App. at 29.

¹²⁷ BellSouth App. at 17.

¹²⁸ BellSouth App. at 16, 19, 21.

¹²⁹ BellSouth App. at 18. When BellSouth sought to obtain through discovery the factual evidence supporting its alleged hot cut problems that allegedly occurred years ago, AT&T responded that such documents “do not exist” or that “BellSouth specific data no longer exists.” BellSouth App. at 30. As a result, AT&T has no credible evidence to support its hot cut claims.

VII. HIGH-CAPACITY TRANSPORT, LOOPS, AND DARK FIBER

A. CLECs Have Extensively Deployed High-Capacity Facilities

CLECs continue to deploy extensively high-capacity facilities, which the Commission defines as “DS1 [1.544 Mbps] and above.”¹³⁰ In fact, this deployment has continued unabated since enactment of the 1996 Act. As of 1999, 47 of the top 50 MSAs had three or more competitors providing high-capacity transport.¹³¹ As of year-end 2001, 49 of the top 50 MSAs had five or more competitors self-providing high-capacity transport, and competitors had deployed at least 184,000 miles of high-capacity facilities.¹³² As of year-end 2003, competing providers had deployed at least one network in 140 of the top 150 MSAs, and each of the top 50 MSAs had an average of 19 CLEC fiber networks in which competitors self-provide high-capacity transport. These networks consist of 337,000 route miles of fiber optic cable.¹³³ Such extensive deployment is fatal to the notion that CLECs are impaired without access to high-capacity facilities on an unbundled basis.¹³⁴

B. CLECs Make Extensive Use Of Special Access Services

¹³⁰ *Triennial Review Order*, 18 FCC Rcd at 17012, ¶ 45; *see id.* at 17102, ¶ 197, n. 624.

¹³¹ *See USTA I*, 290 F.3d at 422.

¹³² *UNE Fact Report 2002* at Section III, B.

¹³³ *UNE Fact Report 2004* at Section I, Table 1.

¹³⁴ *See USTA I*, 290 F.3d at 422 (faulting Commission for failing to “explain[] why the record supports a finding of material impairment where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis”). Although relatively few CLECs separately report the total number of local route miles they operate or the number of on-net buildings they serve, the available data reflect that CLECs continue to experience growth in both areas. *See UNE Fact Report 2004* at Section III, n. 8. (noting that only AT&T and Time Warner publicly reported their local route miles for each of the past two years, which increased by 2,500 and 1,075 route miles, respectively, while of the CLECs reporting their on-net buildings for the past two years, four reported increases ranging from 11 buildings (McLeodUSA) to an addition of 313 buildings (Time Warner Telecom)).

In addition to self-deployment of high-capacity facilities, CLECs routinely make use of ILEC tariffed special access services to fill out their networks.¹³⁵ The availability of special access services and their extensive use by CLECs is additional evidence that CLECs are not impaired without unbundled access to high capacity loops and transport. As the D.C. Circuit has made clear, “special access availability” is relevant to the Commission’s impairment analysis, and the Commission “must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired”¹³⁶

In fact, CLECs use DS1 special access services more extensively than DS1 UNEs in competing against BellSouth. In BellSouth’s region, there are 106,640 buildings served by CLECs using DS1 circuits, either purchased as special access services, UNEs, or both. Of these 106,640 buildings, 63% (67,312) are served either by special access services exclusively (51.8%) or by both special access services and UNE circuits (11.3%). Only approximately 37% of the buildings (39,328) are served by CLECs only through the use of UNE DS1 circuits.¹³⁷ Such extensive use of special access by CLECs belies any suggestion that they are impaired without access to high capacity facilities on an unbundled basis.

C. CLECs Should Be Prohibited From Converting Special Access To UNEs.

¹³⁵ See Press Release, *Time Warner Telecom Applauds U.S. Eighth Circuit Court of Appeals Ruling Supporting Special Access Performance Reporting* (Aug. 25, 2004) (noting that Time Warner, a leader in “the deployment of innovative communications solutions to large, medium, and small businesses,” “relies principally upon its own network facilities,” but purchases special access services from ILECs “to reach customers not directly served by our fiber network”) [<http://www.twtelecom.com/Documents/Announcements/News/2004/>]; see January 15, 2003 Ex Parte from US LEC Corp., CC Docket No. 01-338 (noting US LEC’s use of ILEC special access facilities to augment its fiber network).

¹³⁶ *USTA II*, 359 F.3d at 577.

¹³⁷ Padgett Affid., ¶ 26.

Consistent with the D.C. Circuit's holding in *USTA II*, CLECs should be prohibited from converting special access services to unbundled network elements without any change to the underlying facility or the service to which it is put. By definition, a "conversion" can occur only if the requesting carrier already is using special access services to provide the services that it seeks to offer; otherwise there would be nothing to convert. And, if a carrier already is using special access services to provide the services that it seeks to offer, it cannot be said that it requires high-capacity loops or transport on an unbundled basis in order to offer those services.

Indeed, the only effect of a conversion would be to give that carrier access to the same facility that it is already using, but at the dramatically reduced TELRIC-based rates that apply once that facility is called a "UNE" instead of special access. But, as the Supreme Court made clear, the impairment standard is not satisfied simply because unbundled access would permit competitors to reduce their costs and earn higher profits.¹³⁸ Furthermore, as the D.C. Circuit noted:

[T]he purpose of the [1996] Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition – preferably genuine, facilities-based competition. *Where competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling.*¹³⁹

Thus, allowing special access conversions would run afoul of the 1996 Act and should be prohibited by the Commission.¹⁴⁰

¹³⁸ *Iowa Utilities Board*, 525 U.S. at 390.

¹³⁹ *USTA II*, 359 F.3d at 576.

¹⁴⁰ To be sure, the D.C. Circuit held that the Commission was "free to take into account such factors as administrability, risk of ILEC abuse, and the like" in assessing whether CLECs are impaired despite the availability of tariffed ILEC special access services. *USTA II*, 359 F.3d at 577. However, such factors cannot be used to rationalize a CLEC's converting special access to