these services. Under the *Pricing Flexibility Decision*, the ILECs have *carte blanche* to change rates on one day's notice in areas where they qualify for Phase II pricing flexibility. The Commission does not actively regulate or even monitor the service quality of the ILECs' Special Access offerings, and the Commission has never acted upon its proposal in 2001 to "expeditiously" adopt performance metrics for the ILECs' Special Access services.[15] Hence, the ILECs continue to enjoy free reign in implementing non-price discrimination against and among carrier-customers of Special Access services. In this laissez faire Federal regulatory environment, not only is the Court incorrect to suggest that no parties are *claiming* that the ILECs can raise their Special Access rates at will, the Court needs to know that the ILECs have indisputably *actually done it.*

Based solely on concerns of administrability, the Commission is fully justified in re-adopting its previous policy against considering Special Access services to support a finding of non-impairment. Simply put, competition cannot survive the constant surveillance and endless litigation that would be required for competitors to privately police the ILECs' Special Access pricing and rate structure decisions. In this industry, sustained competition requires business certainty over a multi-year period, and reliance upon the largely-unregulated Special Access services of the ILECs is inherently incapable of providing the business certainty required by new entrants.

Even more than that, the business reality is that CLECs will never enter the market in the first place – much less seek to maintain a stable Special Access environment through monitoring and litigation -- if the ILECs have the ability to "pull the plug" by raising their Special Access rates. Competitors cannot attract sufficient capital, or earn sufficient

[15] *See Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, 16 FCC Rcd 20896 (2001) (Notice of Proposed Rulemaking).

revenues, to stay in business if Special Access rates and service quality are fluctuating between "impairment" and "non-impairment" levels on a day-to-day and month-to-month basis. This is a real concern given that the FCC's current regime permits ILECs to raise or lower rates on one day's notice, and ILECs have instituted coercive lock-up provisions to remove actual and potential demand from the marketplace. A would-be CLEC entrant has no customers to serve, and no assurance that it could rely upon Special Access services in the future to serve whatever customers it may quarry in the market. It is no understatement to suggest that permitting the ILECs to compel a non-impairment finding through tactical Special Access pricing will eliminate any market justification for new entry by CLECs.

Congress did not intend for the Commission to take Special Access services into account when making a finding of non-impairment. If Congress believed that keeping Special Access prices and service quality at reasonable levels was sufficient to generate competitive entry, it would have been far easier to establish a rigorous regulatory regime for Special Access services rather than to create an entirely new regime of unbundled network elements. Congress chose the UNE regime because Special Access prices bear little relationship to economic cost, and are an inherently unstable basis for sustained local competition. Congress knew that a more fundamentally sound solution – one that was not under the control of the ILECs themselves – was needed to promote competitive local entry. If ILECs have the ability to eliminate UNEs through their decisions on the offering, pricing and provision of Special Access services, then the UNE regime is dead and Section 251(c)(3) has been eclipsed. The Court needs to hear that from the Commission.

C. Enterprise Loops Continue to Meet Section 251(d) Impairment

The Commission's impairment analysis in the *TRO* for enterprise loops, particularly DS-1 and DS-3 loops, was extremely cogent and detailed. *See TRO* ¶¶ 320-324 (DS-3s), 325-327 (DS-1s). Contrary to what USTA has argued recently to the D.C. Circuit, neither the Commission's analysis nor its ultimate finding of nationwide impairment was vacated in *USTA II*.[16] Accordingly, in this remand the Commission may rely on its *TRO* findings with respect to the significant operational and economic barriers that prevent CLECs from self-deploying enterprise loops, *TRO* ¶¶ 320, 326, and hence have prevented a non-ILEC wholesale market from developing. *Id.* ¶¶ 321, 327. CompTel is confident that these findings will be further buttressed by further CLEC submissions in this proceeding, which will amply demonstrate that they continue to be impaired as to these facilities.

1. *USTA II* left the Commission's nationwide impairment finding intact for DS-1 and DS-3 enterprise loops.

The USTA Petition for Mandamus erroneously suggests that *USTA II* vacated the Commission's finding that CLECs are impaired without unbundled DS-1 and DS-3 enterprise loops.[17] By lumping all "high-capacity facilities" together in one uber-category, USTA bootstraps the D.C. Circuit's partial *vacatur* into a holding that eliminates every transmission facility — all high-capacity loops, DS-1 and above, and all transport, DS-1 and above.[18] This argument grossly misrepresents the *USTA II* holding.[19]

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16 Case 00-1012 and consolidated cases, Petition for a Writ of Mandamus to Enforce the Mandate of This Court at 4 (Aug. 23, 2004) ("USTA Petition").

17 *Id.* at 4.

18 *See id.*

19 XO Communications cogently explains why USTA's assertion as to DS-1 loops is incorrect. WC Docket No. 04-313, Emergency Petition for Expedited Determination That Competitive Local Exchange Carriers Are Impaired Without DS1 UNE Loops at 17-21 (Sept. 29, 2004).

The USTA II decision vacated only "the subdelegation scheme established for mass market switching and ***certain dedicated transport elements*** (DS1, DS3, and dark fiber." 359 F.3d at 594. The Court then "vacate[d] and remand[ed] the Commission's nationwide impairment determinations ***with respect to these elements***." *Id.* The word "loop" does not appear in this holding, or indeed anywhere on the page. Moreover, "DS1" only appears in the opinion in the context of transport, 359 F.3d at 574, and "DS3" is mentioned as a loop only with respect to the Fiber-to-the-Home rule, which was upheld. *Id.* at 584. It is therefore incorrect to conclude that DS-1 and DS-3 loop UNEs were vacated by the Court.

The USTA Petition attempts to avert this conclusion by arguing that one line of *dictum* in the Court's decision renders anything that is "high capacity" part of the *vacatur*. It asserts that "'transport,' as used in the opinion," means "'transmission facilities dedicated to a single customer.'"[20] This is an untenable interpretation of *USTA II*. The Court only once used the phrase "dedicated to a single customer," and in fact the full phrase is "dedicated to a single customer ***or carrier***." 359 F.3d at 573. This phraseology matches the Commission's first definition of unbundled transport under the 1996 Act — "interoffice transmission facilities" were defined in the *Local Competition Order*[21] as "incumbent LEC facilities dedicated ***to a particular customer or carrier***, ... that provide telecommunications ***between wire centers*** owned by incumbent LECs or requesting telecommunications carriers."[22] The Court thus intended to refer to facilities provided to a customer carrier, and not to a single residence or business. In any event, the concept of providing "transport" to an end user is simply nonsensical. Transport does

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[20] USTA Petition at 4 n.5 (quoting 359 F.3d at 573).

[21] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 15 FCC Rcd. 14999 (1996).

[22] 47 C.F.R. § 51.319(d)(1), as printed at 15 FCC Rcd. at 16210 (emphasis added).

not run to customer premises; the Court of Appeals cannot re-write, in *dicta* or otherwise, the Commission's definition of transport that has been in place since 1996.[23] Thus, neither DS-1 nor DS-3 loops can be deemed vacated under *USTA II*.

2. The Commission may reinstate nationwide DS-1 and DS-3 enterprise loop impairment based on existing evidence.

In the *TRO*, the Commission unanimously held that CLECs are impaired in the enterprise market on a nationwide basis without access to DS-1 and DS-3 loops. *TRO* ¶¶ 320, 325. The Commission based this conclusion on the fact that deploying DS-3s requires "significant fixed and sunk construction costs," as well as issues involving rights-of-way,[24] building access, and delays created by third parties; the Commission recognized these same barriers with respect to all loop facilities. *Id.* ¶ 320 n.944. These "operational barriers" result in both delay and sunk costs for new entrants. *Id.* ¶ 320.

In additional to structural barriers to entry, self-deployment of DS-1 and DS-3 loops is, the Commission found, not economically feasible for CLECs. "A single DS3 loop, generally, can not provide a sufficient revenue opportunity to overcome these barriers." *TRO* ¶ 320. As to DS-1s, the markets that they are usually deployed to serve — small- to medium-sized businesses and residential customers — achieve average revenues that are "very low relative to larger enterprise market customers using higher capacity loops." *Id.* ¶ 326. Only where "there is sufficient demand from a potential customer base, usually a multiunit premises location," may a

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[23] *See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 619 (1944) ("It is not for us to rewrite a definition. That is the Administrator's duty.") (affirming remand of rule promulgated by Department of Labor, Administrator of Wage and Hour division). *See also Mobil Oil Corp. v. Department of Energy*, 678 F.2d 1083, 1089 (Em.App. 1982) (quoting *Addison*, 322 U.S. at 619) (remanding, in part, DOE cost-related rule).

[24] The Commission recognizes that right-of-way problems are considerable, and that "[b]ecause of the expense and delay associated with filing a preemption petition carriers rarely avail themselves of section 253(c) of the Act." *TRO* n.892.

carrier expect to recoup its significant financial investment. *Id.* ¶ 303. And according to the Commission, the inability of a CLEC to recover its sunk costs and fixed costs "results in impairment." *Id.* ¶ 320. Therefore, due to the economic constraints on both DS-3 and DS-1 deployment, the Commission held that self-deployment is not a viable option for CLECs. *TRO* ¶¶ 320, 325 ("record contains little evidence of competitive LECs' ability to self-deploy single DS1 capacity loops"). These economic constraints have not changed since last August when the *TRO* was released.

Nor did the Commission find that a meaningful wholesale (non-ILEC) market exists for DS-3 or DS-1 loops. It recognized only a "small but potentially growing wholesale alternative DS3 loops market," *TRO* ¶ 321, and "scant evidence of wholesale alternatives for serving customers at the DS1 level." *Id.* ¶ 325.[25] This situation has not changed since the TRO, and indeed has grown worse given the anti-competitive activities of the ILECs discussed above. The Commission can and should reasonably rely on these *TRO* findings in this remand proceeding, and hold that DS-3 and DS-1 loops are not available from non-ILEC sources in a commercially meaningful way.

In addition to these general structural and economic barriers, the Commission recognized that CLECs face the adverse effects of customer churn, especially as to DS-1s, that further increase their sunk costs and deter deployment. *TRO* ¶ 325.[26] Customers served by DS-1 loops, as the Commission acknowledged, "resist long-term contract obligations." *Id.* Thus, CLECs are likely to experience a higher churn rate for these customers, allowing them only a

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[25] According to XO, fewer than 5% of XO customers' buildings are served by CLEC DS-1s. XO Petition at 37.

[26] The XO Petition explains in greater detail the costs and barriers preventing CLECs self-deploying DS-1 loops. XO Petition at 26-29.

brief period to recover the costs of reaching the customers. *See id.* Under these circumstances, incurring the costs of deploying new DS-1 loops for each customer would bring financial doom upon a CLEC. This churn problem further underscores that self-deployment for DS-1 loops is not a reasonable expectation.

New evidence provided in this remand proceeding continues to demonstrate that the Commission's national impairment finding for DS-1 and DS-3 enterprise loops is correct. Two major studies by Economics and Technology, Inc.[27] and the Phoenix Center[28] provide compelling evidence of the ILECs' persistent bottleneck control over DS-1 and DS-3 loops. According to ETI, the ILECs own 98% of the DS-1 and DS-3 loops to business premises.[29] They have concomitantly raised, via newly-won pricing flexibility, their DS-1 rates by almost 10% and their DS-3 rates by almost 6%.[30] The Phoenix Center estimates that these raises may actually be 20% for DS-1 and 12% for DS-3 services.[31] These rate hikes are demonstrable evidence of ILEC market power over these loop facilities.[32] From this evidence, therefore, the Commission can conclude that ILECs retain bottleneck control over DS-1 and DS-3 loops.

Also provided in this proceeding is the QSI Consulting summary of the impairment data for loops and transport in 12 states.[33] QSI applied the Commission's TRO high-

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27 The ETI paper is referenced in footnote 7 *supra* as the *Special Access Study*.

28 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 (2003) ("*Phoenix Paper*").

29 *Special Access Study* at 12.

30 *Id.* at 38.

31 *Phoenix Paper* at 34, Table 1.

32 Market power "is the power to control market prices or exclude competition." *United States v. E.I. duPont de Nemours*, 351 U.S. 377, 391 (1956).

33 Gary Ball *et al.*, Analysis of State Specific Loop and Transport Data: Impairment Analysis, QSI Consulting, Inc. (Oct. 1, 2004) ("*QSI Study*"). The 12 states are: Michigan, Illinois, Ohio, Wisconsin, Indiana, Missouri, Oklahoma, Texas, Florida, Tennessee, Georgia, Washington State, New York and California.

capacity loop trigger — 2 self-provisioned CLECs or 2 wholesalers (*TRO* ¶ 329) — to the data submitted to State Commissions.[34] Of 954 buildings the ILECs identified as satisfying the DS-3 self-provisioning trigger,[35] only 130 actually do. The ILECs had underestimated impairment by more than 730%.[36] Similarly, of the 719 buildings that purportedly meet the DS-3 wholesale trigger, QSI found that actually only 49 do — an overstatement of more than 14000%.[37] The wholesale figure for DS-1s was only 36 out of the ILECs' reported 724 buildings, or 4.97%, that are actually served by alternative facilities.[38] It is therefore apparent that enterprise loop impairment persists in the three Bell regions (SBC, BellSouth and Verizon) where there is available data. The impact of the *QSI Study* is thus twofold: first, it repudiates the ILEC impairment data; and secondly, it demonstrates the considerable impairment that CLECs continue to face throughout the nation regarding enterprise loops.

3. The Commission should again expressly adopt dark fiber enterprise loops as UNEs.

As the Commission has so often held, CLECs are no less impaired for dark fiber than for facilities in use. *TRO* ¶ 311; *UNE Remand Order*, 15 FCC Rcd. at 3785 ¶ 196.[39] That is, although dark fiber differs from lit fiber in the sense that its technical parameters are, in the absence of transmission electronics, less defined, *TRO* ¶ 311 n.910, the operational and economic considerations involved in deploying lit fiber (both loops and transport) are equally

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34 QSI omitted carriers that the ILECs had erroneously counted as either a self-provisioning or a wholesale provider. QSI Study, Section IV.A.

35 QSI drew these figures from the ILECs' submissions in each State.

36 *QSI Study*, Section IV, Table 1.

37 *Id.*, Table 3.

38 *Id.*, Table 4.

39 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, 16 FCC Rcd. 3696 (1998) ("*UNE Remand Order*").

pertinent for dark fiber, and in fact dark fiber involves often significantly more sunk costs than other loops. *Id.* ¶ 312. Hence the *TRO* required unbundling of dark fiber loops wherever its lit counterparts are. *Id.* ¶ 311. Moreover, as at least one state PUC has found, the provision of dark fiber as an unbundled network element has the benefit, unlike other UNEs, of actually adding new capacity to the marketplace.[40]

In the *TRO*, the Commission found that dark fiber "is not economically feasible to self-deploy." *TRO* ¶ 313. More specifically, the Commission concluded that deploying dark fiber involves "barriers" such as "the inability to obtain reasonable and timely access to the customer's premises." *TRO* ¶ 312. These barriers exist in addition to those applicable to facilities deployment generally. *Id.*[41]

In 1998, the Commission unequivocally held that "unbundling dark fiber is essential for competition in the provision of advanced services."[42] That conclusion remains true today, and the Commission continues to recognize that dark fiber has a crucial role in the development of competition. According to evidence in the *TRO* record, "facilities-based competitive LECs" need dark fiber loops to reach "small and medium-sized customers, particularly in rural, unserved, or underserved areas of the country." *TRO* ¶ 313.[43] In addition, dark fiber serves the valuable purpose of enabling "facilities-based [CLECs] to reduce their reliance on unbundled 'lit' high-capacity loops[.]" *Id.* Thus, the Commission found it

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[40] *E.g., In the Matter of the Investigation Into US West Communications, Inc.'s Compliance With § 271 of the Telecommunications Act of 1996*, 2001 Colo. PUC LEXIS 716 at 13, Decision No. R01-846, Docket No. 97I-198T (August 16, 2001).

[41] "Dark fiber loop construction, like loops generally, involves substantial fixed and sunk costs. The primary costs associated with fiber deployment lie in the substantial sunk costs associated with physically laying the fiber cable." *Id.*

[42] *UNE Remand Order*, 15 FCC Rcd. at 3785 ¶ 196.

[43] *See also TRO* n.921 (citing *ex parte* submissions of Dominion Telecom (Jan. 28, 2004) and Norlight (Dec. 30, 2002)).

reasonable to find nationwide impairment for dark fiber loops. *Id.* ¶ 311. As explained in Section II.A.1 above, this finding was not disturbed.

CompTel urges the Commission to re-adopt that finding here. As the record will undoubtedly prove, through the detailed submissions of others, CLECs need DS-1 and DS-3 enterprise dark fiber loops. For example, the *QSI Study* shows that zero (0) of the 954 buildings studied met the enterprise loop trigger with respect to dark fiber.[44] Thus, both the empirical data and the commonsense notion that dark fiber is operationally the same as lit fiber support a renewed Commission finding of impairment.

Lastly, CompTel would reiterate its previous proposal to the Commission that the codified definition of the dark fiber UNE be expanded so that dark fiber is not merely a subset of the "loop" and "transport" UNEs. In addition to dark fiber loops and transport UNEs, the Commission should make clear that dark fiber includes unlit fiber which, when spliced to provide an uninterrupted transmission path between two points and lit through the application of optical equipment, has the capability of transmitting telecommunications, directly or indirectly, to or from its ultimate point of termination.[45] In particular, dark fiber should be defined as follows:

> 1. Fiber within the ILEC network that is not currently lit or carrying traffic;
>
> 2. Any necessary splicing of the fiber to create a continuous optical transmission path from any point on the ILEC network to interconnect with the requesting carrier's lit fiber network, or from any point on the ILEC network to a point of termination on the ILEC network, without regard to whether the requesting carrier is collocated in each central office traversed by the fiber path identified;

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[44] *QSI Study*, Section IV., Table 2.

[45] *E.g.*, Letter from Jonathan Lee, CompTel, to Marlene Dortch, FCC (February 6, 2003) (submitted on the record in CC Docket Nos. 01-338, 98-147 & 96-98) (copy attached) ("*CompTel Dark Fiber Letter*").

3. Natural points of dark fiber interconnection necessarily include existing splice cases;

4. Access to the same information about the availability and condition of ILEC dark fiber that is available to any ILEC employee or agent;

5. Dark fiber can be used by the party lighting the fiber to provide any service that fiber is capable of supporting, as long as the requesting carrier also is using the dark fiber UNE to provide a telecommunications service.

It is critical for the full development of competitive telecommunications services that CLECs have the ability to access ILEC-supplied dark fiber for the full range of telecommunications services.

D. Based on the Record Evidence, Dedicated Transport Must Be Reinstated as a UNE

The Court of Appeals' *vacatur* of transport had overwhelmingly to do with its non-delegation holding,[46] rather than a fundamental critique of the Commission's impairment analysis. Its biggest concern was whether the Commission had adequately analyzed the characteristics of different, but similar, transport routes when determining impairment along particular routes. 359 F.3d at 575. The Court felt that the Commission had "simply ignore[d]" these routes improperly. *Id.* The Commission can resolve this issue by providing a more complete rationale as to why a strict route-by-route analysis — as opposed to a comparative analysis — remains the correct structure for determining transport impairment. Under this analytical structure, as applied to the empirical data in the record, it is clear that DS-1 and DS-3 transport unbundling remains necessary.

[46] The Court found that the Commission's reliance on state "fact-finding" was in reality a much broader delegation of authority to substantively determine the competitive triggers outlined in the *TRO*. 359 F.3d at 574.

1. CompTel supports the impairment tests proposed by the competitive carriers.

The Loop-Transport Coalition has developed certain tests for impairment for use with the Commission's route-by-route transport analysis. As explained in Section II.B.1 above, route-by-route analysis remains appropriate and in keeping with *USTA II*. *See* 359 F.3d 575. CompTel wishes to emphasize that it supports the tests developed by the Loop-Transport Coalition as noted below, but it is only necessary to apply those tests after the Commission has concluded based on record evidence that there is sufficient addressable demand in the wholesale access market to support any CLEC entry at all, including the self-provision of high-capacity loops and transport facilities. As noted above, the ILECs have aggressively implemented lock-up provisions that effectively prevent a CLEC from migrating its traffic to a new CLEC entrant, or even building and operating its own facilities to serve its own demand. Until this situation is remedied, the Commission should conclude that there is impairment for all high-capacity loop and transport facilities.

The transport test proposed by the Loop-Transport Coalition is as follows: CLECs are not impaired for routes where both points are (1) in the top 50 MSAs, (2) have 4 or more fiber-based collocators with operational facilities, and (3) ILEC offices serving 50,000 or more voice-grade equivalent business lines. Only these criteria demonstrate a true ability to self-deploy, and only these criteria show that a non-ILEC source truly exists. Any lesser standard would leave CLECs with no ability to serve non-Tier I markets, which is, of course, contrary to the Commission's stated goals.[47]

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[47] *E.g.*, *TRO* ¶ 5 (seeking competitive choice "for all consumers"); ¶ 313 (reaffirming obligation to unbundled dark fiber in part on the ground that it enables carriers to reach "small and medium-sized customers, particularly in rural, unserved, or underserved areas of the country").

CompTel endorses this test as a well-reasoned and clear approach for determining impairment. By requiring that each point of a path be located in a top 50 MSA (such as Washington, D.C. and Miami-Fort Lauderdale), this test ensures that the route in question is in an area that has adequate demand to support new facilities. Similarly, by requiring that both points of the route serve 50,000-line offices, this test confirms, on a very granular level, that economical deployment is feasible. Finally, the requirement of having four operational competitive providers is reasonable, because it demonstrates that self-deployment is truly possible. The presence of only 1 or 2 competitors may create a "false positive," in that those carriers may have expended the bulk of their resources on just that one route, and other carriers could not deploy there without the same commitment of resources.

CompTel also agrees that routes having end points in offices serving 25,000 or fewer lines should be conclusively deemed as showing impairment. In accordance with the analysis provided above, central offices of this size do not demonstrate financial feasibility or that demand for competitive service will be high, and thus CLECs will continue to be impaired along such routes absent access to transport on an unbundled basis.

CompTel likewise supports the proposed test for routes that do not meet the three criteria explained above (top 50 MSA + 4 operational collocators + 50,000 lines at each end). The CLECs have proposed that these routes demonstrate impairment ***unless*** they have (1) 5 operational collocators at each end, ***and*** (2) 2 carriers that certify to the FCC that they are wholesale transport providers.

As the Commission is aware, this type of "line-drawing" warrants considerable deference in the courts,[48] as "the Commission's judgment is highest when assessing the rationality of the agency's line-drawing endeavors."[49] CompTel is thus confident that the Commission may safely adopt the Loop-Transport Coalition test on the basis of the rationale provided here.

2. The presence of actual self-deployment and meaningful wholesale alternatives on one route cannot be supplanted by inconsistent evidence on another.

Deployment figures along particular routes tell the story of whether a CLEC can build there. As the evidence presented in State Commission post-*TRO* UNE dockets demonstrates, CLECs make deployment decisions based on very targeted and precise feasibility studies of the route in question.[50] Thousands of the routes that the ILECs represented as competitive in fact were not.[51] If nothing else, this fact underscores that, even on a route-by-route basis, one size does not fit all.

As an initial matter, the Court of Appeals was entirely vague when it called for analysis of "similar routes." In the most general terms, the Court stated that a route between point A and point B should be compared to a route between point A and point C. 359 F.3d at 575. What is crucial to know here is - what is point B? And what is point C? Are they both ILEC central offices serving 50,000 lines or more? Are they both central offices that serve residential lines, or does one serve primarily businesses? It is impossible to conclude from this

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48 *See TRO* ¶ 294 (explaining the bright-line distinction between old and new transmission facilities for unbundling purposes).

49 *Prometheus Radio Project v. FCC*, 373 F.3d 372, 410 (3d Cir. 2004).

50 *See QSI Study*, Section IV.B.1 & 2.

51 *See id.*, Tables 5 and 6.

terse explanation that Route A-B is at all like Route A-C. At most, as the Court surmised, the paths may be relevant to each other. 359 F.3d at 575. Relevance does not mean that this evidence is dispositive, or even particularly instructive, on the issue of impairment.

CompTel thus suggests that the Commission explain this problem in the forthcoming order, and provide explicit criteria defining what are comparable routes. In essence, this presentation would be the impairment tests that the Loop-Transport Coalition has proposed. *See* Section III.C.1 above. These tests are very precise in defining the end-points of routes, such that it will be clear why various paths were not compared to each other.

3. The Commission's impairment finding for DS-1 loops applies equally to DS-1 transport.

The costs and barriers of deploying DS-1 facilities are the same regardless of whether the DS-1 is deployed to a premises or to a point of presence. Thus, the Commission's finding that CLECs are impaired on a nationwide basis without unbundled DS-1 loops, *TRO* ¶ 325, is equally valid as to DS-1 transport. All the same economic and operational barriers apply.

The capital requirements for deploying DS-1s are just as daunting for transport as for loops. Deployment involves collocation and fiber costs, equipment costs, and the costs involved in obtaining rights-of-way. *TRO* ¶ 371. In their Triennial Review submissions, for example, El Paso stated that burying fiber costs up to $300,000 per mile, and doing aerial placement costs $50,000 per mile. *TRO* ¶ 371 n.1137. Conversent's figures were $485,812.80 per mile for buried fiber and $44,915.40 for aerial. *Id.* Further, on an incremental cost basis, DS-1s are especially expensive, as the fixed costs of deploying fiber of any type are spread among fewer channels. *See TRO* ¶ 391. The Commission thus has recognized that CLECs face "high entry barriers" for DS-1s. *Id.* ¶ 390.

Non-ILEC sources for DS-1 are not a meaningful presence. This market is, according to the Commission, "nascent," with only "limited evidence of carriers using alternative DS1 transport." *TRO* ¶ 392 & n.1216. This market showed only the *potential* for development assuming the requisite technological developments. *TRO* ¶ 392. While the Commission's authority to make such "predictive judgments" is appropriate if it is well-reasoned,[52] CompTel believes that the data is just not there to show that the Commission's hopes have come to fruition. The *QSI Study* shows that only 49 of 6,195 buildings studied (in 14 states)[53] were served by 2 or more wholesale DS-1 providers, and only 150 of those buildings had 1 or more DS-1 wholesaler.[54] It is thus clear that the hoped-for DS-1 wholesale transport market has not materialized.

CompTel recognizes, as did the Commission, that the revenue considerations for transport are different than for loops, even when the facilities are of the same capacity. *See TRO* ¶ 371 & n.1133. Transport aggregates traffic from multiple customers, and thus incurs multiple revenue streams that help to recoup sunk costs. *Id.* Yet as to DS-1 transport, the Commission has found a DS-1 transport route is not likely to garner the traffic that will enable cost recovery. *TRO* ¶ 391. Accordingly, the Commission should not rely on self-deployment of DS-1 transport in this remand.[55]

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52 *E.g., WorldCom v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001) (FCC need not "be confident to a metaphysical certainty of its predictions"); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 822 (D.C. Cir. 1983) (judgment will be upheld if agency "'identified all relevant issues, gave them thoughtful consideration duly attentive to comments received, and formulated a judgment which rationally accommodates the facts capable of ascertainment and the policies slated for effectuation.'") (citation omitted).

53 Michigan, Illinois, Ohio, Wisconsin, Indiana, Missouri, Oklahoma, Texas, Florida, Tennessee, Georgia, Washington State, New York, and California.

54 *QSI Study*, Section IV.B, Table 8.

55 QSI did not provide self-provisioning figures for DS-1 transport.

4. The record here supports the Commission's TRO Conclusion that CLECs are impaired without unbundled DS-3 transport.

The Commission found last year that the sunk costs associated with DS-3 transport continues to impair CLECs, and that a commercially meaningful wholesale market had not yet developed for these facilities. *TRO* ¶¶ 376-387. The Commission again recognized that the fixed costs of transport deployment vary little according to their size, and remain extremely high. *Id.* ¶ 386. As cited above, carriers reported costs as high as $300,000 to deploy one mile of buried fiber, and $50,000 to install aerial fiber. Also present are the delays inherent in any build, such as obtaining rights-of-way, which are extremely expensive and time-consuming to resolve. *Id.* ¶ 371 & n.892.

The costs of DS-3 transport are not, according to the Commission, easily defrayed. Although a DS-3 carries more traffic than a DS-1, even so that traffic cannot be expected to generate revenue sufficient to recover deployment costs. *See TRO* ¶ 386. The *QSI Study* applied the evidence provided in 14 states[56] to the transport triggers for self-provisioning adopted in the *TRO*: the presence of 3 self-providers of DS-3s.[57] It found that, of the 5,502 routes that the ILECs claim meet the impairment standard, only 55 routes had 3 or more self-provisioned providers — less than one-tenth of one percent.[58] Only 215 of those routes had one or more self-provider, demonstrating that the ILECs had underestimated impairment by 25 times. *Id.* Or conversely, the ILECs had overstated by 25 the number of carriers that had self-provisioned DS-3s.

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[56] *See supra* n.28.

[57] As it had done with respect to loops, QSI omitted carriers that did not acknowledge that they had actually deployed where the ILECs alleged, and then omitted routes on which the self-provisioned transport was of OCn level or constituted 13 or more DS-3s.

[58] *QSI Study*, Section IV.B, Table 5.

Record evidence in the *Triennial Review* proceeding showed that CLECs will gladly purchase non-ILEC transport wherever possible. *TRO* ¶ 387. Such facilities remain, however, difficult to obtain "in a majority of areas." *Id.* The Commission accordingly was unwilling to hold that a meaningful wholesale market exists for these facilities. *Id.* Evidence in this record shows that this conclusion remains true. According to QSI, applying the 2-wholesaler trigger for DS-3 transport, only 40 of 6,195 routes were served by 2 or more *bona fide* wholesalers, and only 803 had one true DS-3 wholesaler (12.96%).[59] Thus, even for DS-3 transport, with its marginally better economic scenario, non-ILEC sources are scarce.

5. Dark fiber transport also requires a finding of national impairment.

The *USTA II* Court included dark fiber transport in the *vacatur*. 359 F.3d at 574, 594. Yet because, as the evidence in this record demonstrates, transport in fact should remain unbundled, so must dark fiber. Each of the Commission's impairment findings with respect to dark fiber loops, see Section III.A.3, *supra*, were also applied explicitly to dark fiber transport. The Commission held that "[a]ny operational or provisioning requirements associated with incumbent LEC provisioning of unbundled dark fiber transport apply equally to provisioning unbundled dark fiber loops." *TRO* at p.188 n.910. It is therefore reasonable for the Commission to conclude that dark fiber transport, both DS-1 and DS-3 levels, should remain a UNE.

The *QSI Study* only underscores this conclusion. Of 5,496 routes studied for dark fiber transport, only 46 included 3 or more self-provisioning CLECs. QSI Study, Section IV.B, Table 6. As to the wholesale market, QSI found that 877 of 6,189 routes had 1 dark fiber

[59] *Id.*, Table 7.

wholesaler (14.17%), and *not one route had 3 or more. Id.*, Table 7. Clearly CLECs remain impaired without dark fiber transport.

Finally, CompTel would reiterate its proposal noted above that the Commission broaden the codified definition of the dark fiber UNE beyond dark fiber loop and transport UNEs.

E. The Commission Should Establish A Meaningful Transition Plan For Any Loop Or Transport UNEs That Are De-Listed Under Section 251

In the event the Commission decides to de-list any high-capacity loop or transport UNEs under Section 251, or to create a process which could result in such a de-listing, CompTel requests that the Commission establish a viable transition plan that fully protects CLECs and consumers from anti-competitive activities by the ILECs. The legitimacy of CompTel's concerns about abusive ILEC behavior is confirmed by the ILECs' obdurate behavior in situations where CLECs have sought to "groom" their networks through circuit migrations. It is well-documented on the record how the ILECs have delayed such migrations, imposed arbitrary limits on the number of circuit migrations, or otherwise interfered with the ability of CLECs to migrate traffic off the ILECs' networks.[60]

Once it has been determined that a high-capacity loop or transport UNE should be de-listed, it is critical that the Commission prevent the ILECs from increasing the rates charged for the specific loop or transport functionality until the CLEC has had a meaningful opportunity to deploy its own facilities and/or to migrate its traffic to a third-party supplier. In particular, the Commission should clarify that an ILEC may not immediately begin imposing higher Special Access rates, or some other above-TELRIC rate, even before the CLEC has had a reasonable

[60] *E.g.*, "Transport Competition and Circuit Grooming," filed by WorldCom, Inc., CC Docket Nos. 01-338, 96-98 & 98-147, Sept. 30, 2002 (copy attached).

opportunity to migrate to an alternative solution. Rate stability is essential to maintaining strong competitive conditions, and it would protect the legitimate expectations of both the CLEC and its customers to stable rates over a reasonable period of time. Certainly, from an impairment standpoint, a CLEC is at the mercy of the ILEC during the migration period, and hence the impairment test under Section 251(d) is fully satisfied for the period of time that it takes to migrate the CLEC to a viable alternative solution. Failure to adhere to this approach would only provide an incentive for the ILECs to drag out the migration period in order to maximize the revenues they receive under their exorbitant Special Access rates (particularly for month-to-month service).

Although CompTel does not propose a specific mandatory time period for this transition, CompTel recommends that the ILEC and the CLEC be required to negotiate a suitable transition plan or, if agreement cannot be reached, to raise transition issues with the state PUCs for a final determination while the pre-existing UNE rates continue to apply. The type of transition approach outlined herein would help to ensure that ILECs cooperate expeditiously and in good faith with the CLECs' efforts to migrate their traffic to a feasible alternative solution.

IV. UNBUNDLING ANALYSIS FOR MASS MARKET SWITCHING

Over the last several years the ILECs have sought to eliminate competition from UNE-P carriers by eliminating the local switching UNE. However, the view that UNE-P carriers should be removed from the market does not stem from a thorough examination of the record evidence regarding the extent to which CLECs are impaired without access to ILEC-supplied local switching. Rather, it reflects the misguided argument (and one that is repudiated by history) that stamping out "resale" carriers will promote facilities-based investment. It also reflects a "vision" of a telecommunications industry characterized solely by intermodal

competition. The problem with this vision is that it does not reflect market conditions in America today, and it is unlikely to generate competitive local service options for tens of millions of Americans in the next year or the next decade.

As the Commission has often recognized, actual marketplace behavior is the best evidence of impairment. In this case, the decisions by AT&T and other UNE-P carriers to withdraw from the POTS market following the *USTA II* decision and subsequent events[61] are, by themselves, worth several volumes of testimony. Broad-based local services competition for residential and small business subscribers cannot thrive unless CLECs have access to ILEC-supplied mass market switching at rates that are at or close to TELRIC levels. If the ILECs are permitted to engage in "market" (*i.e.,* monopoly) pricing of mass market switching, tens of millions of mass market subscribers will see less competition, fewer competitive options, and significantly higher prices. This is now confirmed market reality, not just a matter of speculation and debate.

A. Impairment for Mass Market Switching

It bears emphasis that the Court in *USTA II* did not reject the Commission's previous conclusion, based on voluminous record evidence, that UNE Platform carriers are impaired on a nationwide basis due to problems associated with the "hot cut" process. Certainly, *USTA II* did not instruct the Commission (nor could it) to make a no-impairment finding for mass market switching. Rather, the Court merely instructed the Commission to consider operational and economic factors in addition to hot cuts before making an impairment

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[61] *E.g.,* "AT&T To Stop Competing In The Residential Local and Long-Distance Market In Seven States," AT&T News Release (June 23, 2004) (announcing AT&T decision to stop competing for new residential customers for local and long distance subscribers in seven states due to the USTA II decision and the Administration's decision not to appeal that decision to the Supreme Court). Since that announcement, AT&T has further retrenched on the offering of residential POTS services in the United States.

determination. The Commission should fully and fairly consider the additional factors as required by the Court, as well as the most up-to-date information on hot cuts. Based on the record evidence, the Commission should find that CLECs are impaired without access to mass market switching on a nationwide basis. CompTel urges the Commission to avoid reading into the *USTA II* decision an implicit judicial preference in favor of eliminating the mass market switching UNE. The Commission should make its impairment determination based on the record evidence in light of the provisions and purposes of the Telecommunications Act of 1996, not based on inchoate assumptions about the specific outcomes that might be perceived to please the *USTA II* panel.

The record evidence demonstrating impairment remains as conclusive now as when the Commission issued the TRO. The market reality today is that CLECs have no feasible wholesale alternatives, other than the ILECs, to obtain mass market switching. TRO ¶442. The record developed during the nine-month state PUC proceedings is consistent with the TRO on this point. Hence, the question is whether a CLEC's opportunity to self-deploy switching justifies a finding of non-impairment. It does not.

The Commission found in the TRO that CLECs are impaired without access to the local switching UNE for mass market subscribers because the ILECs do not have workable, reliable or reasonably priced hot cut procedures in place for single lines, bulk cutovers, and batch cutovers. The evidence gathered in the nine-month state proceedings confirms this conclusion. By itself, the hot cut problem justifies a finding of impairment. The operational and economic factors the Commission should consider at the Court's direction confirm that CLECs are impaired without access to mass market switching under Section 251. CLECs face enormous costs to establish and operate multiple collocation arrangements; buy, deploy and operate

switches for those collocation arrangements; and obtain the necessary transport and backhaul functionalities. These absolute cost disadvantages embody a particularly high entry barrier in today's challenging capital markets, and of course CLECs suffer a cost penalty because they cannot realize the full economies of scale and scope offered by self-provided switching due to the lower penetration rates endured by new entrants. The virtual absence of any so-called UNE-L competition for mass market customers, as shown in the nine-month state proceedings, confirms that the self-provisioning of switching facilities to serve the mass market has been, and remains, largely infeasible.

We recognize and support the view of the UNE-P Coalition that certain CLECs with 1500 access lines in a central office may be able to efficiently deploy their own collocation and switching facilities to serve those access lines. However, the Commission should note that any non-impairment finding should properly be limited to the specific CLEC who has obtained sufficient market penetration to satisfy the 1500-line threshold. It is not certain, or even likely, that all other CLECs in the same central office will reach that threshold, and they should continue to receive access to unbundled local switching at TELRIC rates until they do. Indeed, if one or two CLECs satisfy the 1500-line threshold, there may not be sufficient remaining addressable demand at that central office for other CLECs to have a realistic expectation of satisfying the same threshold. Hence, it is critical that the Commission apply any line threshold as an impairment test on a CLEC-specific basis.

B. Transition Plan

In the event the Commission decides to de-list mass market switching, in whole or in part, under Section 251, it is imperative that the Commission promulgate a meaningful transition plan to ensure that consumers do not suffer service interruptions or precipitous rate

increases, and that affected carriers can modify their business plans in an orderly and efficient manner to preserve competitive market conditions to the extent possible. The Commission previously adopted a transition plan upon a finding of non-impairment, and this transition plan was neither appealed by any party nor questioned by the Court. Hence, CompTel submits that the Commission should re-adopt this plan, or at a minimum clarify that the plan adopted in the TRO continues to be effective today, subject only to those exceptions and modifications necessary to minimize the situations where CLECs are denied access to the local switching UNE where impairment may still exist or to ensure that the ILEC-CLEC implementation plan promotes the interests of consumers and competition.

In addition, it is critical that the Commission establish the requirement that the second phase of the transition plan – whereby CLECs lose the ability to use unbundled local switching under Section 251 to serve new customers – not take effect unless the rates, terms and conditions under which CLECs can obtain the same (or a functionally equivalent) mass market switching capability from the ILECs, either alone or as part of a network element combination, are clearly established in a legally-binding ILEC offer under Section 271 or state-specific laws and regulations. The transition should not move forward if there is any uncertainty as to the rates that CLECs will pay for unbundled local switching, or if the terms and conditions for obtaining unbundled local switching are not yet finalized. It is unacceptable for consumers and competition if this transition plan moves forward in an environment of uncertainty and gamesmanship, and the strict rules proposed herein would ensure that the ILECs have an incentive to move forward expeditiously to resolve these uncertainties in order for the transition plan to proceed.

Lastly, the Commission should require the ILEC-CLEC implementation plan, as approved by the state PUC, to contain ILEC performance metrics and reasonable non-performance penalties on ILECs in connection with any migration of customers away from ILEC-supplied local switching to other serving arrangements (e.g., a UNE-L solution). Further, each implementation plan must have provisions for the re-imposition of a mandatory mass market switching obligation under Section 251 in the event the ILECs, either inadvertently or through deliberate actions, interfere with the orderly and efficient transition to the seamless provisioning of this functionality under Section 271 or state-specific laws and rules. A UNE-P carrier with an existing customer base is impaired within the meaning of Section 251(d) if the ILEC precludes migration to alternative serving arrangements or business models. In the event the Section 251 obligation is re-imposed, there should be a three-year minimum period during which the ILEC must provide local switching under Section 251 before it may petition to have mass market switching delisted.