REDACTED – FOR PUBLIC INSPECTION

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 Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

REPLY COMMENTS OF SPRINT CORPORATION

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Despite a remarkably tight comment timetable, more than 70 parties filed comments, and many thousands of pages, in response to the Commission's Order and Notice of Proposed Rulemaking ("Interim Order"), released August 20, 2004 (FCC 04-179).[1]

I. INTRODUCTION AND SUMMARY

Emboldened by the D.C. Circuit's vacatur and remand of portions of the Triennial Review Order,[2] the Bell Operating Companies ("BOCs") ignore the pro-competitive

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

[2] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (rel. Aug. 21, 2003) ("Triennial Review Order"), modified by Errata, 18 FCC Rcd 19020 (rel. Sept. 17, 2004), upheld in part and vacated

mandate of the Telecommunications Act of 1996,[3] and brazenly push for the virtual elimination of unbundled network elements ("UNEs") on which competitors must rely. Alternatively, for high-capacity loop and transport UNEs, BellSouth, SBC, and Verizon abandon their former demands for real "granularity" and instead call for elimination of unbundling using arbitrary line counts. Qwest argues for the elimination of any unbundling obligations for these facilities.

Competitive local exchange carriers ("CLECs"), independent interexchange carriers ("IXCs"), and wireless carriers all stress the need for access to UNEs, particularly high-capacity loops and transport. Evidence submitted directly and indirectly from state commissions establishes chronic impairment by requesting carriers for unbundled DS1, DS3, and dark fiber loops and DS1, DS3, and dark fiber transport.

In addressing the D.C. Circuit's remand[4] of the Commission's impairment findings for dedicated transport, and in reformulating the Triennial Review Order's approach to high-capacity loops, Sprint agrees with MCI that the evidence now before the Commission is sufficient to adopt a nationwide finding of impairment for DS1, DS3, and dark fiber loops and DS1, DS3, and dark fiber transport. If the Commission believes a more granular review is necessary to identify those exceptional locations where there is evidence indicating non-impairment, Sprint recommended that the Commission

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and remanded in part, United States Telecom. Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), cert. denied sub nom., National Ass'n of Reg'y Util. Commrs. v. USTA, Sup. Ct. No. 04-12 (Oct. 12, 2004) ("USTA II").

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

[4] USTA II, 359 F.3d 554.

undertake a location-specific review, using self-provisioning and wholesaling triggers, but scrapping the potential deployment trigger, based on evidence gathered in state reviews and utilizing Commission-ordered reporting by carriers.

However, if the Commission believes that task is too large, or the ongoing responsibility problematic, then the Commission should adopt AT&T's alternative proposal. That is, the Commission could issue a finding of impairment in all high-capacity loop and transport locations (excluding OCn facilities), except where the requisite number of wholesalers have self-certified that they provide capacity. AT&T's proposal is a straightforward, bright-line test – reasonable, administrable, and self-executing. It is granular and location-specific by its very nature.

On remand, the Commission should also revise the definition of transport to remove its elimination of entrance facilities, and in doing so ensure that CMRS carriers are entitled to access to high-capacity UNE transport where they are impaired. Rather than handicap CMRS carriers' ability to expand their product lines and compete head to head with wireline local carriers, the Commission should recognize the importance of access to high-capacity transport if CMRS carriers are to become significant competition in the local market for mass market customers and if independent CMRS carriers are to compete effectively against BOC-controlled carriers.

II. FRAMEWORK FOR UNBUNDLING

A. Approach to USTA II on Remand

Many commenters recognize that the Commission is likely frustrated by the D.C. Circuit's intrusion into the agency's decision making. Competitive carriers agree with Sprint that the USTA II panel again failed to extend the full measure of deference to which the Commission is legally due. The same judges in USTA I acknowledged the "extraordinarily complexity of the Commission's task" and the fact that Congress "gave no detail as to either the kind or degree of impairment that would qualify."[5] Yet in USTA II the panel again failed to accord the Commission the Chevron[6] deference it is due under such circumstances.

The Commission may also recall that a different panel of the court, dealing with nearly identical issues, applied a "highly deferential standard," noting that "[o]ur deference is particularly great where, as here, the issues involve 'a high level of technical expertise in an area of rapidly changing technological and competitive circumstances.'"[7] And of course, the USTA I and USTA II panel's apparent skepticism about the merits of UNE-based competition appears contrary to the structure of the Act and is certainly not shared by the Supreme Court. The high court noted that the elimination of local

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[5] United States Telecom. Ass'n v. FCC, 290 F.3d 415, 421, 442 (D.C. Cir. 2002), cert. denied, 538 U.S. 940 (2003) ("USTA I").

[6] Chevron USA, Inc. v. National Resources Defense Council, 467 U.S. 837, 843-45 (1984).

[7] Verizon Tel. Cos. v. FCC, 292 F.3d 903, 909 (D.C. Cir. 2002), quoting Sprint Comms. Co. v. FCC, 274 F.3d 549, 556 (D.C. Cir. 2001).

monopolies was "an end in itself," and that UNE ratesetting provisions are "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property."[8] The Commission need not, indeed should not, assume that three judges' perceived hostility to unbundling requirements should drive Commission policy-making on remand.

The BOCs would have the Commission believe that the way to meet the USTA II panel's concerns would be to eliminate unbundling obligations completely for mass market switching, high-capacity loops, and dedicated transport. Failing that, they would have the Commission so limit them on an arbitrary basis that they would nearly achieve the same result. They paint a grossly misleading picture about the state of competition in the local telecommunications market, the goals of the 1996 Act, and the meaning and impact of the USTA II decision. The Commission should resist their efforts to reverse the limited gains that competitors have as yet been able to accomplish. It has an obligation to implement the 1996 Act with a full awareness of its market-opening and pro-competitive goals.

Competitive carriers and a number of state regulators remind the Commission that the USTA II vacatur or remand of portions of the unbundling rules do not mean that the agency has to abandon those rules altogether. They recommend fashioning updated unbundling rules that would speak to the court's concerns while ensuring that requesting carriers have the ability to access UNEs based on realistic assessments of impairment.

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[8] Verizon Comms. Inc. v. FCC, 535 U.S. 467, 476, 489 (2002).

On this point, Sprint agrees with the Loop/Transport Coalition of switch-based competitors (at i): "If this proceeding is about how much of the 1996 Act the Commission will give back to the ILECs in order to placate what is seen as a hostile court, the Commission will have done a great disservice to the institution and the statutory objectives of the Communications Act, as amended." The Commission should instead embrace this remand proceeding as an "opportunity to set a secure foundation for facilities based local competition in both residential and business services." Id..

B. Definition of Impairment

The commenters generally accept the Triennial Review Order's definition of impairment. Neither the BOCs nor competitive carriers generally dispute the suitability of assessing impairment based on operational and economic barriers to entry, including a granular review, in particular "geographic and customer markets," of "marketplace evidence" documenting any "self-provisioning" or the availability of "third-party sources." Triennial Review Order ¶ 84. The BOCs, however, overreach by claiming that unbundling can be required "only where competition would not exist without it." SBC at 61. They seek to unlawfully narrow the impairment review by focusing on intermodal retail competition and availability of tariffed special access services. Intermodal competitors are irrelevant to section 251(c)(3) analysis, so long as their facilities are not available to other entrants. Furthermore, that some carriers rely on special access in some markets does not mean they are not impaired in those markets or in other geographic and service markets.

Other commenters agree that USTA II "did not disturb the Commission's core impairment test." AT&T at 7. In the Triennial Review Order, the Commission adopted a basic impairment test that considers whether economies of scale, sunk costs, first mover advantages, absolute cost advantages and barriers within the ILEC's control will likely make market entry uneconomic without unbundling.

Competitive carriers generally agreed with Sprint that the Triennial Review Order adequately addressed the USTA II panel's concerns about the Commission's impairment test. The court had found that there was "one important respect" in which the impairment test seemed to lack sufficient content.[9] The Triennial Review Order did not expressly answer the question of "[u]neconomic by whom?" Id. Since any number of standards could be imagined, the court directed the Commission to clarify this issue on remand, which would ensure that its impairment test is not "too open-ended" to allow consistent application.

The Loop/Transport Coalition's reaction to the Commission's updated impairment definition was typical. CLECs assessed "[t]he core of the Commission's definition as sound," and offered that any "modifications" that some might seek to clarify proper application of the impairment standard would be, at best, "minor."[10] And to deal

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

[10] Loop/Transport Coalition at 23, 26.

with the USTA II panel's criticism, the Commission need only specify that uneconomic market entry is to be considered in the context of "a *reasonably efficient* competitor."[11]

Even the BOCs seem to agree that the obvious focus is on "whether an *efficient* competitor" can enter the market.[12] However, they wrongly attempt to gut the Commission's market entry standard by arguing that an intermodal competitor's entry without reliance on UNEs -- such as a CATV-based provider -- should preclude a finding of impairment even though an intramodal competitor would be impaired without access to the ILEC facility. Id. at 28-29. The Act plainly envisions that a competitor is to have access to ILEC UNEs if it would be impaired without it. The fact that an intermodal competitor might be able to enter the market using different technology and resources unavailable to an intramodal entrant does not mean that the latter does not face operational and/or economic entry barriers. The Commission should flatly reject such reasoning as plainly inconsistent with the Act.

Competitive carriers recognize that, in assessing operational and economic entry barriers faced by any potential entrant, "the most probative evidence that competitors are not impaired is evidence of actual deployment in the marketplace." MCI at 23. With high-capacity loops and transport such evidence is very rare, because -- as the evidence shows -- impairment remains nearly universal.

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[11] ALTS at 7 (emphasis added). See also CompTel at 7; Sprint at 14-15.

[12] SBC at 28 (emphasis in original).

C. Intermodal Alternatives

The BOCs claim that, after USTA I, the Commission cannot "ignore" intermodal competitors.[13] Contrary to the BOCs' claims, the Triennial Review Order did not "ignore" intermodal alternatives to ILEC UNEs. USTA I stated that the Commission is free to decide the appropriate weight for any intermodal alternatives in any given context. The Commission correctly recognized that the mere presence of intermodal competitors does not mean that a requesting carrier is not impaired. Intermodal retail competition, by itself, has no bearing on whether another competitor is impaired.[14]

Apart from the BOCs, parties nearly universally agree that alternatives to ILEC facilities remain extremely limited. The records of state impairment proceedings – as shown by certain state commenters and by the QSI Report submitted jointly by a group of CLECs[15] -- bear this out. That should be little surprise to anyone. CATV networks are, as a rule, irrelevant because those systems are generally closed to requesting carriers. Regardless, even in rare cases where their facilities might become available, unbundling remains essential to promote competition and investment. CATV networks are typically limited to residential customers, and eliminating unbundling requirements based on the presence of a cable-based retail competitor would limit consumers, at best, to a duopoly,

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[13] E.g., SBC at 13-14.

[14] Intermodal *retail* competition has no bearing on the BOCs' dominance of the *wholesale* exchange access market.

[15] QSI Consulting, Inc., Analysis of State Specific Loop and Transport Data – Impairment Analysis ("QSI Report"). The report was submitted as joint ex parte filing on October 4, 2004.

while gutting the market-opening purposes of the Act, as the Commission has previously recognized.

Wireless carriers also offer no alternative to ILEC UNEs. CMRS and fixed wireless carriers do not have facilities to make available to competitors. They rely on ILEC facilities, particularly ILEC transport, to provide their services. They must rely on their competitor, who has control over their key costs and who enjoys owner's economics in competing against them in both the wireline and wireless markets. With currently deployed technology, CMRS carriers cannot meet all the needs of enterprise customers. And CMRS and fixed wireless carriers are forced to pay special access rates for ILEC transport, which continues to impair them from competing in the local services market against wireline carriers, including ILECs and CLECs. Broadband wireless also remains limited by technological, cost, and quality of service constraints.

In their comments and their so-called UNE Fact Report,[16] the BOCs repeatedly point to *retail* competition in arguing against finding impairment. Retail competition, however, is irrelevant to the Commission's impairment analysis. The BOCs obligations to provide UNEs – indeed all of their obligations under sections 251, 252, 271, and 272, and much of the rest of the Act besides – all involve the *wholesale* market, as do the Commission's mandates, inter alia, to open markets, assess impairment, and to unbundle ILEC and especially BOC networks.

[16] UNE Fact Report 2004, WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 4, 2004) ("BOC Fact Report").

But even as to retail competition, the BOCs misrepresent the state of the local telecommunications market. They point to cable-based telephony, but cable MSOs provide telephone service to just 2% of the nation's households.[17] Cable-based systems generally do not reach business centers and are unable to meet the needs of enterprise customers.[18] The BOCs point to the "success" of CMRS carriers, but after the industry invested scores of billions, only 3 to 5% of consumers have substituted wireless for wireline services.[19] The Commission also cannot assume, as the BOCs do, that all CMRS carriers are interested in promoting competition between CMRS and ILEC wireline services. CLECs noted that, in the nation's top ten markets, the in-region BOC controls approximately a third of the mobile customers and out-of-region BOCs control another quarter. Thus, in the nation's largest cities, perhaps fewer than half of mobile subscribers are served by a non-BOC company. The BOCs have little interest in fostering real wireline-wireless competition, and the local market cannot be seen as wholly competitive where wireline incumbents control both a majority of the wireless market and the input costs of all wireless carriers.

The BOCs also point to fixed wireless carriers. But although broadband wireless may offer some *potential* as a future alternative, it has failed to become a meaningful competitor to ILEC services. The three largest fixed wireless companies, Metricom,

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[17] Industry Analysis & Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of Dec. 31, 2003 (June 2004) ("Local Competition Report") at 2 & Table 5.

[18] Triennial Review Order ¶ 439 n.1349.

[19] USTA II, 359 F.3d at 575; Triennial Review Order ¶ 53.

Teligent, and Winstar, all filed for bankruptcy. The large IXCs have walked away from fixed wireless alternatives, including write-downs of $1.3 billion by AT&T and $1.2 billion by Sprint. From a technical performance perspective, matching traditional wireline characteristics such as available bandwidth, reliability, latency, and connection set-up times has been challenging, and has typically required operating parameters (such as line-of-sight) that significantly limit the addressable market. The BOCs also point to VoIP services that use broadband facilities purchased from other providers. Yet even including CATV systems (which, again, are generally closed to competitors), if everyone purchasing broadband services (at least 200 kbps in one direction) also purchased VoIP services, that would equate to only 16% of the lines nationwide.[20] These niche players, moreover, are far from being viable, much less significant, competitors. 8x8 Incorporated, for example, which operates the Packet-8 VoIP service, lost $2.8 million during the second quarter of 2004. Without the ability to produce steady income from operations, these carriers appear destined to remain at the fringe of the telecommunications market, and especially so in the near and intermediate future.

The BOCs are not citing actual retail competition but *potential* retail competition that has not yet materialized.[21] And as every non-BOC commenter emphasized in

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[20] Local Competition Report at Table 1; Industry Analysis & Technology Division, Wireline Competition Bureau, High-Speed Services for Internet Access: Status Report as of Dec. 31, 2004 (June 2004) at Table 1.

[21] The BOC Fact Report cites analysts' *predictions* about future CATV telephony offerings and offers inflated estimates about *future* wireless substitution. E.g., Fact Report at II-7, II-28-31.

opposition to Qwest's attempt to avoid unbundling in the Omaha MSA,[22] it is all *irrelevant* to ILECs' obligation to open their networks where an intramodal competitor faces impairment. Wireline ILECs remain dominant in their retail markets nationwide, and without access to unbundled high-capacity loops and transport at the wholesale level, competitors will continue to be impaired from competing in the local telecommunications market.

D. Impairment Where State Regulation Keeps Historic Rates Below Costs

In the Triennial Review Order, the Commission directed the states to consider the impact of unbundling on any situations where regulated retail rates still remain higher or lower than costs. In the first situation, unbundling would invite competitive entry since TELRIC prices might sometimes be below the retail prices. In the second situation, subsidized service rates would discourage competitive entry. The Commission appropriately cautioned states to continue steps to rebalance rates or resolve any such rate issues through a universal service mechanism. Triennial Review Order ¶ 518.

In their comments, the BOCs complain that some states have not done enough to "rationalize" retail rates. They argue that, given USTA II's concern about state "cross-subsidies" (359 F.3d at 573), the Commission cannot rely just on "regulatorily-suppressed retail rates" to "prove impairment." SBC at 10; Verizon at 28. Instead, they

[22] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223 (filed June 21, 2004). State commissions and competitive carriers filed comments in opposition on August 24, 2004.

contend, the Commission must adopt unbundling rules "that encourage states to rationalize their rates in order to encourage competition." SBC at 34.

As Sprint explained in its comments, and as the Commission and even the Supreme Court has acknowledged, this problem is already diminishing, and its impact can be exaggerated. Indeed, NASUCA (at 31) believes the record shows that lower residential rates "make impairment more common, rather than less." More importantly, however, this issue is only a significant issue for mass market switching. The BOCs themselves address this issue solely by attacking "subsidized retail rates" that they contend have sometimes led to "artificially low prices for UNE-P." Qwest at 36. The BOCs provided no evidence to suggest that UNE rates for high-capacity loop or transport facilities have been materially affected by any states' tardiness in completing significant rate rebalancing. The Commission can address this issue, if and where necessary, as an aspect of its location-specific impairment review for unbundled local switching. Ultimately, however, ILECs are fully capable of defending their interests against any improperly set TELRIC rates at the state commissions and on appeal.

Sprint also notes that SBC joined Sprint and many other carriers – among them AT&T, Global Crossing, Iowa Telecom, Level 3, MCI, and Valor – in endorsing the Intercarrier Compensation Forum's plan.[23] This consensus plan reflects input from the full range of the ILEC and competitive carrier industries. The most effective way to deal with retail cross-subsidies is through its comprehensive reform of intercarrier

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

compensation and universal service. Taking prompt action to implement this reform plan may alone be enough to address the court's concern.

E. Availability of Special Access

The BOCs pretend that the court's remand, with its reference to vigorous competition between CMRS carriers, means that the mere existence of any actual competitor demonstrates that "competition is possible without UNEs," (SBC at 29, Verizon at 12-13) and therefore that such mere presence of a carrier ordering special access "precludes a finding" of impairment. Qwest at 29. In "areas in which competitive providers have already … proven their ability to compete by using UNE alternatives, including ILEC special access," the FCC must "decline to order unbundling both in those areas and areas that share the same characteristics." SBC at 64. In other words, if any non-ILEC competitor exists, impairment is an impossibility almost anywhere. They contend there are no locations where there is impairment, "given the ubiquitous availability of special access." SBC at 61.

This arrogant attitude betrays an astonishing disregard of reality, and more than a small measure of disrespect for the Commission. Congress was fully aware that special access offered a means for carriers to provide services. It could have adopted the existing special access structure as the means for competitive local market entry. Instead, it chose to establish cost-based, nondiscriminatory UNE offerings. ALTS at 10. Incredibly, Verizon (at 31) claims that competition in high-capacity services started long "before the 1996 Act and has grown intensely" since. If that were true, the 1996 Act would never

have been enacted. In reality, Congress made clear that opening local markets and breaking down BOC monopolies was necessary and a long-running task. Today, now that they have won section 271 authorization to enter the long distance market (and have been relieved of section 272 and operations, installation, and maintenance market safeguards), the BOCs are trying to maintain their overwhelming dominance of their local markets.

In fact, as Covad points out, the Act may fairly be read actually to preclude consideration of special access offerings. It "focuses impairment determinations on alternatives *outside* the ILECs' network." Covad at 80. The Triennial Review Order did not address this point. Section 251(d)(2) directs the Commission to consider whether "the failure to provide access to such [unbundled] network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Section 2(29) of the Act defines a "network element" as "a facility or equipment used in the provision of a telecommunications service." Accordingly, "the question of whether requesting carriers could compete with access to elements at higher rates is not part of the impairment inquiry." Covad at 81.

In every order since 1996, the Commission has found that the availability of special access is irrelevant. Competitive carriers agree with Sprint that, once again, "[t]he Commission should find that the existence of special access tariffed services should play no role in its unbundling analysis," (MCI at 150), and that it should re-adopt the Triennial Review Order's finding that special access is "irrelevant to impairment

determinations." AT&T at 84. True, the USTA II panel remanded the Commission's ruling, but it nevertheless "invited the Commission to proffer an explanation on remand as to why special access is in fact completely irrelevant to the impairment analysis." ALTS at 8. It even volunteered three bases on which the Commission could find that availability of special access does not eliminate impairment that otherwise exists for high-capacity loops and transport. They include the "risk of ILEC abuses," the fact that "tariffed services present different opportunities and risks than UNEs," and problems of "administrability." All "three justifications the court specifically identified" are applicable here. AT&T at 86.

First, the risk of ILEC abuses is well established in the record. Special access rates are well above the section 251 cost standard – commonly twice TELRIC cost-based rates.[24] ILECs have received price flexibility in major markets, and now enjoy the ability to unilaterally raise special access prices. Qwest has just increased pricing on high-capacity facilities by about 25%.[25] Many competitive carriers complained of BOC price squeezes; AT&T (at 86) notes that it has been forced to "abandon[] providing several enterprise local services" for this reason. Sprint has experienced BOCs modifying special access pricing precisely to frustrate cost savings intended to be realized by Sprint's deployment of its facilities-based MAN networks. The record is also replete

[24] It is interesting that Verizon, while criticizing others' attempts to measure BOC margins on special access, fails to offer any alternate measure of its own.

[25] TWT (at 17) points out DS1 channel terminations (zone 1) pricing increased 24.75% and 0-8 mile DS1 transport mileage increased 26.48%. Even with its volume and term commitment, Qwest's unilateral price increase "resulted in a 19% increase in rates charged to TWTC."

with examples of the BOCs' failure to comply with the market-opening and nondiscrimination requirements of the Act, including strategic pricing to target specific competitors, cost misallocation, and discrimination in quality of service. Collectively, they have incurred more than $2 billion in penalties, ordered refunds, and consent decree payments. See Sprint at 37.

Second, the differences between special access and UNEs likewise show the irrelevance of special access to impairment analysis. ILECs cannot unilaterally raise UNE pricing. They are available on a month-to-month basis, rather than subject to term and volume requirements that are necessary for the lowest pricing. Such "lock-up" provisions, invariably combined with stiff penalties, serve to discourage facilities-based competition, by frustrating competitors' ability to build their own facilities once they have customer demand or capital in hand sufficient otherwise to justify it. In addition, UNE rates are subject to performance standards, which do not apply to special access.

Third, "including special access in the impairment determination is administratively infeasible." Covad at 81. The court recognized that, "[g]iven the ILECs' incentive to set the tariff price as high as possible and the vagaries of determining when that price gets so high that the 'impairment' threshold has been crossed," it may "raise administrability issues." 359 F.3d at 576. There are thousands of special access tariffs, often complex and commonly changing. But determining the applicable special access rate "would be only the first part of the inquiry." Covad at 82. The Commission would need to examine rates in all zones, for each product and service, and to review

each potential package of special access alternatives that might be applicable to given circumstance. It would then have to "determine whether whatever difference existed between them would permit reasonably efficient carriers to compete using these facilities." Id. All competitive carriers agreed this type of approach would be unmanageable.

The BOCs nevertheless argue that because some carriers have relied on special access facilities, this shows that it must be economic to do so. Verizon at 54-55. The fact that some carriers appear to have been able to maintain some market presence using special access does not mean that they are not impaired without access to UNEs. It does not mean that carriers can economically rely on special access on every particular route or location, much less on those for which they have not ordered special access. Verizon, for example, claims that 90% or more of DS1 and DS3 revenue is wholesale special access, not UNEs. Verizon at 60. But the BOCs figures are misleading.

There is very little *local* competition using special access. Their figures improperly include the embedded base of long distance special access – and they overlook the many obstacles and BOC practices that have made it so difficult for competitors to secure UNEs, even in the short time that they have been technically "available." Requesting carriers have faced "use restrictions," qualification criteria, and prohibitions on commingling. They have faced wireline-centric definitions that allowed BOCs to deny wireless carriers access to high-capacity transport. They have faced -- particularly from Verizon -- claims of "no UNE facilities available," although special

access orders for the same facilities could be processed. And they faced, and continue to face, countless other impediments that BOCs have imposed on the ordering of UNEs. E.g., ATX et al. at 9-10. TWT at 6-7; Sprint at 36-37.

Many CLECs have been forced to rely heavily on special access because of these difficulties, which has impaired their ability to compete and has limited them to selected markets and only the highest value customers. This impairs them from entering other geographic and service markets and from serving smaller customers and those that are more costly to reach. The BOCs also ignore the fact that some competitors are only beginning to be able to automate UNE-ordering, whereas automated special access ordering processes have long been well-established.

Thus, competitors that utilize special access under these circumstances are hardly unimpaired. They are altogether cut off from much of their potential market and must struggle at a considerable disadvantage. The Commission may note the sorry condition the CLEC industry, the bankruptcies among competitive carriers, the shortage of new capital available for CLECs, and the withdrawal from key portions of the market by competitive carriers large and small alike. The BOCs are crazy to suggest that there is robust competition, much less that competing carriers are "thriving," without access to unbundled high-capacity UNEs. Even those CLECs that the BOCs suggest are managing adequately with special access implore "the Commission to retain high capacity loops as UNEs as an effective check on pricing of special access." PAETEC at 9. Without the constraining influence of UNEs, current regulations offer insufficient against BOC

abuses. See TWT at 6-13. If the wholesale market for high capacity loops and transport were competitive, as the BOCs pretend, then special access prices would have dropped. Instead, they have generally risen – often sharply -- where BOCs have received pricing flexibility.[26]

The market is also fast changing, such that "[p]ast use is simply not a good predictor of future use when something as fundamental as ILEC 271 authority has changed." Covad at 89. The fact that independent interexchange carriers could compete against each other, when all had to pay special access, does not mean they are unimpaired in attempting to compete with the BOCs. Today, after the Commission's granting of section 271 applications to enter the interstate long distance markets, and its elimination of many section 272 safeguards, the BOCs have rapidly gained long distance market share. That is attributable directly to their ability to leverage their dominance over the local exchange services market. Virtually overnight, by leveraging their overwhelming dominance in the local services market, they have won greater long distance market share than independent IXCs garnered over two decades.

Additionally, long distance as a stand-alone product is rapidly being replaced by bundled services. Consumers demand bundles of services, including local, long distance, and, increasingly, broadband and wireless services. The BOCs' ability to combine these services, without having to pay special access rates themselves, places competitors at a

[26] CompTel (at 17) cites Economics and Technology, Inc., "Competition in Access Markets: Reality or Illusion – A Proposal for Regulating Uncertain Markets," Prepared for the Ad Hoc Telecommunications Users Committee, Aug. 2004, submitted in the record of CC Docket No. 03-173.

serious disadvantage. Competitive carriers' reliance on special access makes local market entry – and retention of existing long distance base -- extremely difficult. The Commission should review the current health of the independent long distance industry to determine its viability in light of BOCs' unfair competitive and regulatory advantages. MCI has only recently emerged from bankruptcy. AT&T has announced it is discontinuing marketing traditional local and long distance services to the consumer market. Sprint, too, has seen significant decline in its long distance revenue. And all three long distance carriers have announced layoffs and significant write-downs of their long distance assets, including announcements by AT&T and Sprint even within the past two weeks.[27]

Similarly, the fact that wireless carriers have been able to compete *against one another* in the wireless market does not mean they are not impaired from competing in the local market against wireline carriers, including both ILECs and CLECs. In this regard, Sprint disagrees with other competitive carriers that suggest the court's vacatur of the impairment standard was in the "context" of wireless only (AT&T at 123), and Sprint rejects any implication that CMRS carriers are necessarily unimpaired without access to UNE transport. If the wireless industry has "an established history of competition" (id. at 124), it does not have a history of profitably providing service using special access. Most

[27] News Release: "AT&T Continues Restructuring and Cost Reduction Efforts," Oct. 7, 2004 (announcing asset impairment charge of $11.4 billion and elimination of 20% of its 2004 work force); News Release: "Sprint Announces Key Strategic Actions," Oct. 15, 2004 (announcing $3.5 billion impairment charge on long distance network assets and 700 headcount reduction).

wireless carriers are not yet profitable, despite retail rates typically far higher than those of wireline local carriers. Wireless carriers face the same problems of price squeezes that other competitive carriers face and are even more dependent than wireline CLECs on ILEC facilities. All of the risks identified by competitive carriers are true with respect to both wireline and wireless services. Wireless competes with BOCs' wireline and wireless services and with wireline CLECs. It is unfair and, Sprint believes, unlawful to discriminate against CMRS carriers in unbundling rules.

III. SPECIFIC NETWORK ELEMENTS

A. High-Capacity Loops and Transport

Every competitor has an incentive to use its own facilities when it can, and to avoid reliance on BOC facilities whenever possible. CLEC commenters all agree, however, that the economic and operational barriers to self-provisioning of high-capacity loops and transport are substantial and virtually universal, at least below the OCn level.

The BOCs claim that "wherever there is demand for high-capacity services, competing providers are competing successfully using a combination of their own or other alternative facilities and special access services purchased from incumbent LECs." Verizon at 30. Competitors are, they claim, successfully "using these alternatives to UNEs to provide high-capacity services to customers of all shapes and sizes, in both large and small markets across the country." Id. Such statements lack any credibility.

It is true that competitors "target buildings where high-capacity demand is concentrated."[28] But local competition served by high-capacity facilities is extremely limited outside the OCn level. For example, PAETEC (at 5-6) says that, while other CLECs have gone bankrupt, it has survived by limiting its business to high-value, high-capacity customers. ATX (at 9) also explains that because the BOCs "have repeatedly frustrated and delayed CLEC attempts to obtain UNE loops and transport," CLECs are forced to "order[] special access in order to meet the demands of their customers" rather than lose them. These observations bely BOC assertions that CLECs are competing successfully without high-capacity UNEs.

1. DS1, DS3, and Dark Fiber Loops

CLEC commenters highlight the substantial fixed costs of loop deployment – costs that are sunk even before the customer is won.[29] CLECs also point to the time needed for construction, permitting, delays of construction, which few customers can tolerate and to the rights-of-way and building access problems that are all serious obstacles for would-be competitors. E.g., CompTel at 27; TWT at 3, 5; Sprint at 43-44. The BOCs' loop plant already reaches nearly every building in America. They have existing access to rights-of-way and complete (and generally free) access to these buildings. In contrast, CLECs point to rights-of-way restrictions, permitting delays, municipal "franchise" fees and conditions, moratoriums on street cuts or construction,

[28] Verizon at 50-51, discussing "market research."

[29] Sprint comments explained that fiber loop construction costs average $[ ] per foot, or $[ ] per mile, and often is far higher, in metropolitan areas.

preservation constraints, and even environmental restrictions that all pose barriers to entry. E.g., ATX et al. at 9-10. CLECs also describe how building owners commonly impose unreasonably high fees on non-ILECs for building access, for the lease of telco closet space, and for intrabuilding cabling. Owners can take months to address a request for access. For CLECs, unlike ILECs, the costs of building access and intrabuilding cabling pose a serious risk of stranded investment, whether DS0, DS1, DS3, or dark fiber. CLECs also face rights-of-way barriers – including costs, delays, restrictions, and outright bans – that incumbents do not face.

These sources of loop impairment are clear to everyone in this proceeding, other than the all-denying BOCs. Perhaps they hope the Commission has forgotten what the Supreme Court recognized in Verizon[30] -- that the Act was premised on the fact that

> a newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the 'last mile' of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses.

The BOCs ignore such problems, and they paint a grossly exaggerated picture of competitive loop availability. Each of the BOCs has touted maps that purport to show fiber facilities deployed in metropolitan areas in their service territories. These, they argue, show that high-capacity loop facilities already reach, or are near, a vast number of buildings in the nation's metropolitan areas, even in smaller cities. The Triennial Review Order declined to unbundled OCn lit fiber loop facilities, and fiber can carry any lower

[30] Verizon Comms. Inc. v. FCC, 535 U.S. 467, 490 (footnote omitted).

capacity traffic. They provide no basis for eliminating unbundling requirements for high-capacity loops, however. The Triennial Review Order (¶ 202) found requesting carriers unimpaired nationwide, but based that finding in part on their ability to secure unbundled dark fiber loops and then light it themselves. For assessing impairment, the existence of fiber, even if it reaches the customer, is irrelevant, unless DS1 and/or DS3 capacity facilities are actually made available on a wholesale basis.

Even so, the BOCs' maps are unreliable guides. They do not identify particular fiber facilities by carrier, so it is impossible even for facilities' owners to know whether they are accurately described. Based on Sprint's review, however, Sprint believes they include many fiber facilities that cannot be used for the provision of local service, such as long-haul long distance plant.[31] Moreover, even assuming a particular fiber could be used for local service, the mere fact that it runs seemingly near to a building does not mean that it can be accessed, much less that it can be accessed easily. Fiber cannot be tapped just anywhere, and potential connection points, or "nodes," are often at a distance that renders connection to a building uneconomic, or that pose operational barriers in the form of rights-of-way and building access problems.

AT&T's own review of loop data for San Francisco illustrates the BOCs' overreaching. Out of 1,231 enterprise locations identified by SBC and Verizon as being

[31] For example, Sprint's long distance, PCS, and MAN fiber routes are "hardened" for network reliability. These facilities can be accessed only at central office collocations. Typically, all other parts of the fiber route, including manholes, are protected below ground to ensure no single point of failure -- a design condition absolutely essential to Sprint to meet reliability expectations and SLA obligations.

served by CLECs, only 71 buildings – or 5.8% -- have CLEC-owned lit fiber. AT&T at Selwyn Decl. p. iii. Additionally, since the BOCs excluded locations where retail service is provided by the BOC itself, the actual "proportion of total enterprise customer locations where 'lit' fiber is in place, at the very most, is only about 5%, and is almost certainly considerably less than that." Id.

In the state impairment proceedings, the BOCs identified remarkably few buildings served by high-capacity loops, and, after close examination, state commissions found the BOCs' claims usually untenable. For example, in California, SBC claimed 196 locations met the self-deployment trigger for dark fiber or DS3 loops, and that two locations met the wholesale trigger for DS1 or DS3 loops. After reviewing the evidence, the California PUC staff concluded that only *two* locations showed self-provisioning for DS3, just *four* met the self-provisioning trigger for dark fiber, and *none* met the wholesaling trigger for DS1 or DS3 loops. California PUC at 97. Among the reasons for the disparity – in California and in other states – is the BOCs' insistence that higher capacities can count for lower ones, something flatly inconsistent with the Triennial Review Order's capacity-specific triggers. California PUC at 105. The BOCs also sought inappropriately to count loop providers who were not ready to serve (e.g., lacking OSS capabilities), who could not serve the entire location, or who served only one wholesale customer (rather than offering service on a widely available basis).

A group of CLECs submitted an independent consultant's report, which presents an impartial analysis of data submitted in the state impairment proceedings.[32] The QSI Report summarizes the findings reached in fourteen states, where the impairment reviews were sufficiently complete as to have mature, complete, and reliable evidentiary records. The report shows, impressively, that the number of locations and routes meeting the triggers for nonimpairment are dramatically few. As AT&T explains, the report shows there were only a *de minimis* number of cases where competitors have been able to construct, or to find wholesale, alternatives below the Triennial Review Order's capacity levels.[33]

> [T]here were only a total of *130* building locations in 12 states [including California, Illinois, New York, and Texas] where two or more competitors self-provisioned 2 or fewer DS3 lops and *fewer than 50* buildings where there was any loop wholesaling.

Other states Sprint believes the QSI Report is highly credible.

Sprint's own comments described its alternative access vendor ("AAV") database, which lists building addresses nationwide for which Sprint has identified a potential alternative loop supplier to the ILEC. Sprint utilizes the database in its ordering and provisioning decisions on a day-to-day basis. It is continually updated, and is likely among the most complete such resources in the county. It shows, at most, just [ ]% of

[32] The Report was submitted in these dockets on October 1, 2004.

[33] AT&T at 56-57, citing QSI Report at 12, 14.

buildings are potentially reached by any AAV, and only [ ]% of those have potentially two or more AAVs reaching any portion of the building.[34]

Sprint's database, however, actually overstates the availability of non-ILEC loop facilities. Sometimes a single facility is claimed by two vendors, leading to double-counting that suggests broader availability and greater capacity than really exists. Some buildings may have multiple addresses. Some entries are collocation hotels that lack any end-user customers. It also includes many addresses reported by an AAV that turn out to be served by ILEC-owned facilities merely leased by the vendor. In addition, of course, the facilities may be of insufficient capacity, and often the provider may be financially unreliable. Sprint's database also includes addresses even where only a portion of the building may be served.

It warrants emphasizing that a chronic problem with AAV loops is that even when while the provider may be in the building, it often does not reach a particular customer's suite. During 2002, [ ]% of Sprint's new orders for special access loops were in buildings that had some form of AAV option, but the vast majority of them had insufficient reach in the building to serve the customer. In the first eight months of 2004, of [ ] DS1 circuits, [ ]% had a potential address match in Sprint's database, but only [ ]% were installed using the AAV. For DS3 circuits, [ ]% had a potential database match, but just [ ]% could even potentially be handled by the AAV.

[34] Even in the 50 largest MSAs, only [ ] buildings, or just [ ]% have two or more AAVs with potential to reach even part of the building.

AT&T describes similar experience. "Because marketplace realities require that service be provided to a customer quickly, it often proves impractical or impossible to negotiate access to the *entire* building," and instead "only allows the competitive carrier to establish a connection to serve a single customer in a building but not other tenants."[35] AT&T describes how of the [ ] buildings it serves with its own loop facilities, all but about [ ] are limited to a single floor. Even in the buildings where AT&T has deployed its own loop facilities, AT&T is compelled "to lease loops from the incumbent in the majority of cases when it seeks to serve additional customers in those buildings." Id. at ¶ 59. For the same reasons, the California PUC staff concludes that "a mere assumption" of access is not "a substitute for factual evidence," and given the difficulties of building access, a competing provider should not be counted toward any wholesale loop trigger unless there is "data in the record clearly confirming that the candidate has access to the entire customer location." California PUC at 106.

Given limitations such as these, Sprint's database significantly overstates the number of customer locations with AAV options. Predictably, it yields higher (though still paltry) building counts than the QSI report. Given its provisioning purpose, it is deliberately over-inclusive and generates false positives.[36] The QSI Report, in comparison, properly excludes buildings where the nonimpairment triggers were not

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[35] AT&T at Fea-Giovannucci Decl. ¶ 44.

[36] Sprint's database suggests [ ] buildings nationwide potentially have some degree of AAV access, with [ ] in the 50 largest MSAs. The database lists [ ] addresses in the top 50 MSAs that might potentially have two or more AAVs.

met.[37] It excludes buildings where carriers are providing more than two DS3s of capacity. It excludes buildings where the CLECs or AAVs are not providing the designated capacity level -- noting that a DS3 does not count toward the DS1 trigger. And it appropriately excludes buildings where the record showed the CLECs or AAVs did not have access to the entire building.

In any case, the lessons that may be drawn from both the QSI Report and Sprint's database are the same. The number of locations that are served by CLEC- or AAV-owned loop facilities is remarkably small. In about 95% of the locations, requesting carriers are impaired without access to UNE high-capacity loops.

The BOCs repeat their previously claims that cable TV and mobile and fixed wireless networks offer alternatives to ILEC loop unbundling. E.g., SBC at 28. The Triennial Review Order (¶ 439 n.1349) properly rejected these arguments. The record is clear that these systems are not a source of loop, much less high-capacity loop, for new entrants. CMRS loop does not and cannot rival ILEC wireline loop for high-capacity services, at least as currently deployed, and the fixed wireless industry has so far been unable to mount a major competitive presence due to cost and technology problems. Cable TV systems are generally closed to competitors and, in any event, reach only residential customers, at lower capacities. The Commission has consistently, and rightly, declined to exempt loop from unbundling simply because CATV-based telephony is

[37] The QSI Report applied the Triennial Review Order's triggers of two self-provisioners or two wholesale loop providers. QSI at 9.

available, finding it "would be inconsistent with the Act's goals of encouraging entry by multiple providers." UNE Remand Order ¶ 189.

2. DS1, DS3, and Dark Fiber Transport

The BOCs argue that CLEC fiber presence in a wire center is itself an indicator that transport need not be unbundled at that facility. E.g., BellSouth at 39; Verizon at 42-44. This position makes no sense. First, the bare fact that another carrier is present does not mean that it can adequately satisfy the needs of all other requesting carriers. Second, competition in transport is utterly meaningless on a wire center-by-wire center basis. By definition, transport is a circuit between two wire centers, or between a wire center and a requesting carrier office. Thus, it is not whether alternative facilities exist at a wire center, but rather where those facilities can go to that is the relevant issue. Only if transport facilities are ubiquitously available *between* all such points could one argue there is no impairment for a requesting carrier. That is far from the case today.

Sprint's comments showed, from its own experience, that competitive transport is limited even in the highest density centers. Sprint at 52. The great majority of ILEC central offices do not have viable alternatives for transport. No alternative vendor or combination of vendors yet provides coverage that can approach the ubiquity of ILECs' interoffice networks. Meanwhile, it remains unreasonable to require competing carriers to construct dedicated transport to each and every ILEC central office in order to provide service to their customers.

The QSI Report, using actual data gathered in 14 states,[38] shows only 55 transport routes with three or more self-providers of DS3 transport and fewer than 50 routes with two or more wholesalers of DS1 or DS3 transport. This is a small fraction of 1% of total transport routes in these states. As AT&T (e.g., at 26-29) points out, such evidence proves that any future construction at or below the 2 DS3 and the 12 DS3 thresholds would be uneconomic for an efficient competitive carriers using the most efficient technology. If there are any exceptions, they would arise only in very rare and unique instances. Indeed, in two of these 14 states, the BOCs did not even challenge impairment on DS1, DS3, or dark fiber transport routes.

The California PUC's submission provides similar evidence. Reviewing impairment for high-capacity transport, its staff examined SBC and Verizon claims of nonimpairment on specific routes. California PUC at 127. SBC claimed 151 routes met the self-provisioning triggers for DS3 or dark fiber transport. Verizon claimed 40 and 69 locations, respectively. The commission staff's investigation, however, found none qualified. Where SBC claimed 500 and Verizon 116 routes as meeting the DS1 and DS3 wholesaling trigger, the commission's investigation found none qualified.

The BOCs have no evidence to refute this impairment. Their touted fiber maps actually confirm how, in the great majority of cases, competitive carriers depend on the BOCs, not alternative providers, for dedicated transport as well as high-capacity loops.

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[38] The QSI Report includes evidence from California, Florida, Georgia, Illinois, Indiana, Michigan, Missouri, New York, Ohio, Oklahoma, Tennessee, Texas, Washington, and Wyoming. Together, these states account for nearly 60% of the U.S. population.

The maps provide no basis for identifying the type of services or capacity over those facilities, or whether they are even available at all.

The BOCs also emphasize the number of miles of fiber installed by competing carriers, claiming its presence, and its growth, shows that alternatives to ILEC transport must now be broadly available.[39] But the BOCs' data are misleading. They include intercity as well as local transport, and they double-count shared facilities, which inflates the total. Since providers commonly install fiber facilities with 144 fibers in one sheath, alternative fiber is overlapping and concentrated in limited areas, unlike the ubiquitous networks of the ILECs. Additionally, short runs of many fibers each are in high-density districts, like Manhattan, which gives a misleading sense of fiber reach and obscures its lack of ubiquity. Route miles are a more honest indicator of competitors' reach. By that measure, despite remarkable investment since 1996, all of the combined fiber of the CLEC industry is still tiny compared to the millions of miles of ILEC transport facilities constructed over decades.

Sprint's experience is consistent with that of other CLEC commenters, and it confirms that interoffice transport remains a critical UNE. Sprint's deployment of fiber rings in [ ] U.S. cities shows the difficulty that even the most determined competitor faces when trying to bypass ILEC transport. Of the [ ] BOC central offices in the LATAs covering those metropolitan areas, only [ ], or just [ ]%, had any potential non-ILEC transport. But many potential providers were not financially viable,

[39] E.g., BOC Fact Report at Section III.

dropping the potential central office count to [ ], or less than [ ]% of the total. And even among those, many providers were unable to provide the transport at the capacity Sprint needed. Alternatives to the ILEC high-capacity transport, at least below the OCn level, are very limited.

3. Approaches to Impairment Review

i. Line Count Surrogates

Previously in the UNE dockets, the BOCs insisted that only a market-by-market, location-specific impairment review could pass legal muster. Ultimately, the Commission agreed. The Triennial Review Order found that each high-capacity loop and transport route ultimately must be assessed individually, using capacity-specific triggers, to determine whether requesting carriers are unimpaired. The Commission directed state commissions to undertake those impairment/nonimpairment determinations, based on actual evidence in their own markets, following Commission guidelines and on an accelerated schedule. The USTA II panel did not question the Triennial Review Order's conclusion that the building location (for loops) and transport route are the proper frames of reference for impairment analysis, but it vacated the Commission's delegation of certain impairment determinations to the states.

Verizon offers a strained interpretation of USTA II when it claims the ruling "found that the Commission had improperly defined individual loop and transport routes as unique markets." Verizon at 33. The court actually said only that the Commission should not "ignore facilities deployment" at similar locations. 359 F.3d at 575. Verizon

is wrong to imply that USTA II prohibits the Commission from reviewing impairment on a loop-by-loop and route-by-route basis. On the contrary, the court recognized that "it may be infeasible to define the barriers to entry in a manageable form, *i.e.*, in such a way that they may usefully be applied to MSAs (or other plausible markets) as a whole." Id. What concerned the court was that the Commission did not say whether "it explored such alternatives, much less found them defective." Id. The Commission can easily address that concern on remand.

In the course of USTA I, the BOCs persuaded the court to require a "more granular" impairment review. Now the BOCs are arguing instead that the Commission can simply look at the number of business access lines in an ILEC central office to determine unbundling for high-capacity loops or transport.[40] The BOCs offer no evidence to meaningfully correlate their proposed numbers to actual construction of impairment. There is certainly no basis to assume that it will be economic to construct loops or transport facilities at those locations. The approach needlessly increases the risk of under-inclusion at locations where requesting carriers are impaired -- and the risk of yet another reversal of appeal. And line counts are crude and inevitably arbitrary.

BellSouth, for example, contends that CLECs are not impaired without access to high-capacity loops and dark fiber in central offices with more than 5,000 business access

[40] Even some CLECs grudgingly offer line count thresholds, presuming that the Commission may be hesitant to undertake the impairment review task. E.g., Loop/Transport Coalition at 82 (suggesting a conditional 50,000 business line threshold in central offices in the 50 largest MSAs; ALTS at 77 (suggesting a "three-tier" threshold for dark fiber transport in the largest MSAs); Alpheus at 19-20 (suggesting a 40,000 line threshold for transport).

lines.[41] As it turns out, BellSouth offers no statistical methods to prove any real correlation between this threshold and deployment of competitive facilities at a particular location or route. BellSouth at 39-44. Like Verizon (at 48-50), BellSouth points to a GeoResults study that purports to identify buildings served by lit fiber, but these reports are hopelessly inaccurate. BellSouth claims 85.5% of the offices with more than 5,000 business access lines have buildings served by CLEC lit fiber. That says nothing, however, about impairment at any particular building location or transport route.[42] BellSouth also provides the number of buildings in its territory where CLECs have purchased DS1 facilities, either as UNEs or special access. BellSouth at Padgett Decl. p. 26. But BellSouth shows no correlation between lines and impairment. Indeed, BellSouth incorrectly assumes that *all* of these loops are used to provide local services, when many are providing interexchange or non-telecommunications services. All this suggests to Sprint that BellSouth has no interest in determining the actual locations where CLECs are competing on a facilities-basis using their own or AAV facilities. It has simply identified locations where carriers have ordered special access. Contrary to its claims, however, its approach does nothing to promote facilities-based competition. Rather, it just allows the BOCs to maintain a stranglehold on bottleneck loop facilities, to

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[41] BellSouth at 44. This is the same arbitrary threshold that BellSouth picks for dedicated transport, except that BellSouth uses different criteria to reach (conveniently) the same conclusion.

[42] Moreover, BellSouth does not state how many of their total offices with 5,000 or more business access lines actually have buildings "lit" by someone other than BellSouth, or even whether every one of these offices actually has buildings served by non-BOC fiber.

protect their special access revenues, and to enjoy continued control over pricing inputs of their competitors.

BellSouth claims that these offices represent only 27% of its total central offices, but that figure is misleading. To examine BellSouth's threshold, Sprint analyzed publicly-available BOC access line data, and discovered that offices with more than 5,000 business access lines account for more than 90% of business access lines nationwide.[43] Adopting BellSouth's proposal would effectively eliminate high-capacity UNE loop and transport facilities, with devastating results for competition.

Two of the other BOCs make similar arguments.[44] Verizon suggests the same ludicrously low 5,000 business access line count, and SBC (at 64) proposes a 15,000 line threshold for the DS1 level. The fact that there is such a wide difference in line count even among the BOCs shows how plainly arbitrary and unreasonable a line-count approach would be.

Beyond this fatal shortcoming, however, a line-count approach does nothing to meet USTA I's call for "nuanced market definitions," the BOCs' protests notwithstanding. BellSouth at 49; see USTA I, 290 F.3d at 426. A line count approach

[43] Sprint utilized data from the 2000 release of the Commission's synthesis model "HCPM." While this data may have changed slightly since 2000, it is unlikely that today's figures are materially different. The fact that the BOCs did not volunteer any percentages is consistent with such overreaching.

[44] Qwest stubbornly, and unrealistically, advocates eliminating all unbundling of high-capacity facilities.

has no correlation to impairment or nonimpairment, and would itself fail to withstand judicial review.

It follows that the Commission should likewise decline any CLEC proposals using similar surrogates. Those include the Loop and Transport Coalition's proposal for entrance facilities and ALTS's proposal on high-capacity transport. The Coalition includes a 50,000 line count threshold and four fiber-based collocations. ALTS includes "assumptions" of nonimpairment between offices with 40,000 or more lines in the largest 50 MSAs and of impairment outside those largest markets and between offices with 10,000 or fewer lines. ALTS suggests that "evidence ... is simply too inconsistent" for all other routes, but that merely underscores the unreliable and arbitrary character of any surrogate based on line count or market size. Given USTA I and USTA II, the Commission cannot afford take crude shortcuts based on arbitrary market size or line counts.

ii. National Impairment Finding

All parties acknowledge that the USTA II struck down the Commission's delegation of impairment decision-making to the states, at least for switching and transport. The BOCs, however, suggest that the court's decision means the Commission cannot require unbundling at *any* location, absent an affirmative finding of impairment at that location. E.g., Verizon at 7; Qwest at 13; BellSouth at 9-10. That position misreads USTA II. In fact, "although the Court of Appeals vacated the Commission's delegation of unbundling authority to the states, it found nothing wrong with the Triennial Review

Order's unanimous national finding of impairment for all DS1 loops and for all DS3 loops with less than 3 DS3s of capacity." AT&T at iii. As to dedicated transport, the court held that the Commission's "national impairment finding for dedicated transport below 12 DS3s could not stand" (id.), but only because the court's vacatur of delegation to the states of the transport impairment review removed the "safety valve" provided by state impairment proceedings. 359 F.3d at 565.

The court found it had no choice but to remand the transport impairment determination, because the Triennial Review Order itself concluded that the record then before the Commission was "insufficiently detailed." Id. at 574, citing Triennial Review Order ¶ 398. In particular, the court observed that the order expressed the Commission's "doubts" that it had evidence sufficient to assess the extent to which requesting carriers could economically provide transport facilities at lower capacity levels in specific markets. That forced the court to vacate the resultant national impairment finding for DS1, DS3, and dark fiber transport and to remand for consideration with a fuller record. 359 F.2d at 574. With the additional comments and evidence submitted here, including the results of state impairment reviews in more than a dozen states, the Commission now has that record.

On remand, USTA II does not preclude the Commission from adopting a national finding of impairment for high-capacity loops and transport, from which particular locations are removed as evidence becomes available to show that nonimpairment are met. Frankly, the BOCs' proposals for line-count triggers is based on the very same

notion of "presumed" impairment or nonimpairment, though they do not acknowledge it. Where triggers are not met, impairment can be presumed, because the record shows that impairment exists at those locations. Sprint agrees with CompTel (at 4) that the Commission lawfully can and reasonably should readopt the Triennial Review Order's "presumption in favor of impairment" for high-capacity UNEs, based on the evidence now before it.

Sprint believes the Commission's national guidelines for presuming impairment were and are reasonable: a 2 DS3 threshold for loop and a 12 DS3 threshold for transport. Some competitive carriers believe these are too restrictive, but others generally agree these guidelines should be retained.[45] The BOCs contend that this would inevitably lead to unbundling in some instances where impairment may not actually exist. If true, it is equally likely that it will preclude cost-based UNE access where impairment actually does. The D.C. Circuit itself recognized that any standard adopted by the Commission "inevitably" must involve some "over- and under-inclusiveness." USTA II, 359 F.3d at 570. This not a basis for denying the Commission authority to fashion any generalized rules at all. The court recognized it owes "deference [to] the Commission's predictive judgment" on impairment. Id.

[45] See, e.g., AT&T at 33 ("Virtually all of AT&T's actual and potential loop deployment occurs above the 2 DS3 threshold."). For its part, Sprint is not constructing DS3 loop facilities to end-user premises outside its own ILEC territories, precisely because of the economic and operational barriers.

iii. Location-Specific Impairment Review

CLECs and state commissions say the Commission, on remand, should build on the data already collected by the states. For high-capacity loop and transport, MCI, example, believes that record now shows that self-provisioning is so uneconomic and wholesale alternatives are so few, that it is more than sufficient to justify a nationwide finding of impairment for DS1, DS3 and dark fiber loops and DS1, DS3, and dark fiber transport. MCI at 125.

Sprint agrees with MCI, and other CLECs, that the record – including evidence gathered by more than dozen states and information provided by state commissions and competitive carriers – shows that impairment is pervasive for DS0, DS1, DS3, and dark fiber loops and DS1, DS3, and dark fiber transport routes. Self-provisioning is so uneconomic, and wholesale alternatives are so few, that a nationwide impairment finding is warranted.

First, given this evidence, one cannot reasonably infer from the presence of competitive facilities at *one* loop or route that deployment is feasible on *all* routes. These facilities are the most difficult for requesting carriers to self-provision or to secure from non-ILEC providers. Second, the record in the states and the submissions shows – more than could be envisioned at the time of the Triennial Review Order – that provisioning is so scant, that triggers are so seldom met, that a national finding of impairment is justified. The D.C. Circuit realized that some over- or under-inclusion is inevitable. Given the record that has been developed, a nationwide impairment finding for these UNEs is

without the bounds of the discretion to which the Commission can expect a court to defer. The contrary position advanced by the BOCs – a presumption of *non*impairment – is extreme. It is an example of the tail wagging the dog.

Sprint is not suggesting that the Commission should not go beyond the national finding and address conditions at particular loops or routes. But it is entirely justified, given the paucity of competitive deployment that now exists, to make impairment – rather than *non*impairment – the default condition for high-capacity loops and transport. Sprint realizes, however, that the Commission may be concerned that -- despite this new evidence supporting a national impairment finding -- a more granular review is necessary to identify those exceptional locations where there is evidence to show non-impairment. Many commenters likewise call for a nationwide "presumption" of impairment (AT&T at 22; Covad at 70; ATX et al. at 4; CompTel at 16) of impairment – a finding from which the exceptional locations can be removed when there is evidence to show nonimpairment. That leaves the Commission solely the task of identifying where nonimpairment triggers are met.

Sprint recommended that the Commission undertake a location-specific review, using the same self-provisioning and wholesaling triggers adopted in the Triennial Review Order, but scrapping the potential deployment trigger as impracticable, subjective, and unnecessary. The Commission could proceed based on the evidence gathered in state reviews and utilizing Commission-ordered reporting by self-provisioners and wholesalers.

If the Commission believes that the task is too large, the time is too short, or the ongoing responsibility too problematic, then the Commission can reasonably and lawfully adopt AT&T's alternative recommendation for high-capacity UNEs. AT&T proposes a capacity-specific impairment test based on the Triennial Review Order's wholesaling triggers.[46] The Commission would adopt a finding of impairment at all locations except where the requisite number of wholesalers have self-certified that they make the appropriate capacity facilities available to requesting carriers. Those self-certifications would be real evidence – not speculative assumptions – by which nonimpairment would be established, and by which an ILEC could deny high-capacity loop or transport at the requisite capacity level.

Sprint supports AT&T's proposal. The existence of wholesale alternatives to the incumbent provider are the key to impairment. Wholesalers have every incentive to report promptly and to self-certify accurately, because where the wholesale trigger is met their facilities and services become more valuable as their retail competitors and wholesale customers lose access to cost-based UNE rates.

AT&T's test is a straightforward, bright-line impairment standard. It is reasonable, objective, and backed by real-world evidence, yet at the same time readily administrable and self-executing. It is granular and location-specific by its very nature. It does not invite delay, nor require ongoing impairment review by the Commission, but automatically updates the impairment finding on a building-specific and route-specific

[46] See AT&T at vi, 6-7.

basis indefinitely as new facilities are constructed and made available. And unlike line count or market-size thresholds, it correlates directly to the impairment faced by requesting carriers. Further, it builds on the wholesale trigger findings adopted by the Triennial Review Order and left undisturbed by USTA II, and it has the level of granularity and specificity that the court believes the law requires.

The BOCs may argue that AT&T's test does not address the *potential* for deployment on similar routes. The test, however, applies to all loops and routes equally. The potential for deployment is subsumed by actual deployment on which the nonimpairment findings are based. This objection, moreover, is based on the BOCs' assumption that the existence of any non-ILEC loop or transport facility *anywhere* means competitors are unimpaired *everywhere*. USTA II cannot stand for that proposition. Were that reasoning correct, Congress would never have passed the Act nor directed the Commission in section 251 to implement unbundling rules wherever requesting carriers are impaired.

B. Transport for CMRS Carriers

Non-BOC wireless carriers need access to high-capacity links at competitive prices if they are to provide the intermodal competition that the Commission claims it needs to promote and to compete effectively with BOC-controlled wireless carriers. "Despite investing heavily in the deployment of wireless infrastructure, CMRS providers still must rely on incumbent LEC facilities to provide the connections that link their base stations to their mobile switching centers (MSCs), particularly the facilities connecting

their base stations to incumbent LEC central offices."[47] CMRS carriers must rely on ILEC facilities for transport between their base stations and ILEC central offices; between ILEC central offices and their MSCs; and between their MSCs and the ILEC central office or tandem with which the CMRS carrier exchanges traffic.

T-Mobile rightly argues that the Commission should undertake individual impairment analyses for each of these transport links, "focusing on the *actual deployment* of competitive facilities, to determine whether the Communications Act and the FCC's implementing rules require incumbent LECs to provide competitors unbundled access to those elements at cost based rates." (T-Mobile at 6-7, emphasis added.) If there is no alternative to ILEC-provided transport, then impairment is actually likely. After all, special access offerings commonly cost CMRS carriers twice as much as UNE transport rates, and often more. The disparity is much greater still in rural and low density areas, where the transport links are long.

The BOCs scoff at the suggestion that CMRS carriers can be impaired without access to unbundled high-capacity transport, and they reverently cite USTA II's dicta[48] about vigorous competition that exists among CMRS carriers. SBC (at 6) claims the court's observation on the success of wireless carriers precludes the Commission from making UNEs available "in markets that are already competitive." Verizon (at 22) suggests that since "competition is possible" for CMRS carriers without UNEs, that is

[47] T-Mobile at 2 (noting also that T-Mobile must rely on ILECs for "over 95% of those wireline circuits").

[48] 359 F.3d at 575.

"dispositive evidence that competition is possible without UNEs, both in that market and in all similarly situated markets." Qwest (at 3) assumes that there can be no impairment for CMRS carriers, because the fact that there is an alternative "precludes any finding of impairment as a matter of law." Price, it contends, is irrelevant. Id. at 21. BellSouth goes even farther, claiming that the fact that CMRS carriers rely on tariffed transport, rather than building their own facilities, means it must be more economical than self-provisioning.[49]

Sprint believes CMRS providers offer the best hope for future mass market competition against ILECs, but today they are unable to enter the market directly against wireline competitors. Thanks to their control of CMRS carriers' high-capacity transport, the BOCs have control over their competitors' costs, limit their competitive threat, and, yes, impair them from entering the market as direct competitors against the ILECs' traditional wireline services. Thus, the BOCs' optimism about CMRS competition is sorely misplaced. The BOCs point to the impressive investment and growth in the wireless industry.[50] True, wireless subscribership has grown to 161 million,[51] wireless traffic has risen as a percentage of voice traffic. But the CMRS industry's growth is beside the point.

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[49] BellSouth at 65, citing NERA Declaration attached to BellSouth Reply Comments in CC Docket No. 01-338 (filed July 22, 2002).

[50] BellSouth at 23-25; SBC at 53-55; Verizon at 71-73, 99-102.

[51] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Ninth Report, FCC 04-216 (rel. Sept. 28, 2004) ("CMRS Report") at App. A, Table 2.

First, as Sprint explains in its comments, the fact that CMRS carriers have successfully competed *against each other*, does not mean that they are unimpaired where attempting to compete against wireline competitors in the local and all distance calling markets. T-Mobile agrees that "competition between wireless carriers is *meaningless* to impairment analysis."[52] Obviously, high special access prices put wireless carriers at a severe disadvantage when attempting to compete against wireline carriers in the local telecommunications market.[53] The USTA II panel overlooked this, and the Commission should not make the same mistake.

Second, despite $146 billion in investment by CMRS carriers, only 3-5% of end-users have as yet substituted wireless for wireline service.[54] This belies the BOCs' assertion that wireless is today a direct replacement for wireline services. SBC at 28. See T-Mobile at William Decl. Such low levels of substitution after such massive investment actually shows that CMRS carriers are impaired in entering the local telecommunications market in *direct* competition with wireline carriers. The BOCs point to projections of *future* wireless substitution,[55] and projections are not evidence. The failure of CMRS carriers *today* to achieve more substantial substitution for traditional

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[52] T-Mobile at 18 (emphasis added).

[53] Where "special access prices paid by CMRS carriers raise their incremental costs to levels that inflate the prices of CMRS products," they are ultimately prevented from winning market share from wireline competitors, which also removes competitive pressure on wireline rates. T-Mobile Decl. of M. Williams at 2.

[54] CMRS Report at App. A, Table 1; USTA II, 359 F.3d at 575, citing Triennial Review Order ¶ 53.

[55] E.g., BOC Fact Report, Section II.

ILEC voice services is evidence of impairment, evidence the Commission has a duty to explore.

Third, even after reaching a mature level of subscribership, the CMRS industry is generally not yet profitable. At least four of the largest six CMRS providers have not yet achieved profitability, and some smaller operators and affiliates have gone bankrupt.[56] Meanwhile, as MCI points out, the BOCs enjoy "excessive" margins on special access,[57] driving CMRS prices higher and hampering their ability to enter the ILECs' market as direct competitors for traditional mass market local services. Special access transport is the largest operating cost in Sprint's network.

Fourth, the BOCs fail to acknowledge the impact on competition posed by three BOCs' control of the two largest CMRS carriers, a concentration which will only increase upon any approval of Cingular's acquisition of AT&T Wireless.[58] CMRS carriers are denied a level playing field against wireline competitors by being forced to purchase transport as special access, when ILECs have owners' economics and wireline CLECs have access to UNEs. But some CMRS carriers, including T-Mobile and Sprint,

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[56] Industry accounts suggest Verizon Wireless and Nextel recently reached profitability. Sprint PCS is operationally cash-flow positive, but continues to show diminishing losses after factoring in capital investment in its network.

[57] See MCI at 159, showing 2003 special access rates of return of 23%, 63%, 68%, 69%.

[58] ALTS (at 15) voiced concern that Qwest might also discriminate in favor of Sprint PCS, given Qwest's resale of Sprint PCS services under its own name. However, Qwest accounts for only a small portion of Sprint's wireless traffic, and Qwest's wireless services compete directly with Sprint PCS and other carriers reselling Sprint-branded or other-branded services. There is also little opportunity for market distortion by Sprint's ownership of ILEC operations. They account for just 5% of the nation's access lines, spread among noncontiguous service territories in 18 states.

are forced to compete even in the wireless market against competitors that have potential access to preferential BOC transport pricing over vast, multi-state areas of the country. Thus, some CMRS carriers may be impaired when limited to special access, even if others might not be.

Fifth, the BOCs – previously the greatest advocates of "geographic granularity" in this docket -- overlook the differences among geographic markets. In low-density and rural areas, and in markets a wireless carrier seeks newly to enter, CMRS backhaul may stretch vast distances. The link between the tower and MSC can be scores, even hundreds of miles. In much of the country, particular in rural areas, the high cost of special access transport poses a barrier to entry, even into the stand-alone wireless market. The Commission should apply the same location-specific impairment analysis to CMRS providers that apply to wireline carriers.

C. Exclusion of Entrance Facilities

Given the impact on CMRS carriers, it follows that the Commission must re-examine the exclusion of entrance facilities from the definition of transport. The Triennial Review Order (¶ 367) determined that ILEC interoffice transport facilities must be made available on an unbundled basis and that ILECs cannot exclude wireless carriers from access transport facilities under section 251(c). However, the Commission abruptly redefined "transport" to exclude entrance facilities for any requesting carriers. Id. at ¶ 368. The Commission based this redefinition solely on statutory interpretation. The USTA II court, however, remanded the Commission's redefinition, finding that "the

Commission's reasoning appears to have little or no footing in the statutory definition" and noted CLECs' arguments that it was contrary to the Commission's finding that "network element" is not limited to facilities "*actually used* by the incumbent LEC in the provision of a telecommunications service," but includes facilities "capable of being used by a requesting carrier in the provision of a telecommunications service regardless of whether the incumbent LEC is actually using the network element to provide a telecommunications service." 359 F.3d at 586; Triennial Review Order ¶ 59 (emphasis added).

Sprint agrees with competitive carriers that the exclusion of entrance facilities from transport is arbitrary, contrary to the Act, and inconsistent with the Commission's findings in every unbundling order since 1996. It should be rescinded for the reasons set out by those carriers. E.g., ALTS at 89; ATX et al. at 46; Sprint at 56-69.

T-Mobile agrees with Sprint that the Commission's analysis was particularly mistaken on this issue. T-Mobile at William Decl. pp. 8-9. The Commission's conclusion on the treatment of CMRS transport from a base station to the ILEC central office was based on wireline network design. By redefining transport to exclude "internetwork" facilities, the Commission assumed that CLECs can obtain alternate facilities or self-provision at switch locations, where their traffic is aggregated. The Commission also assumed that "competing carriers have some control over the location of their network facilities." Triennial Review Order ¶ 367. The BOCs argue that, as traffic aggregator points, they provide the highest incentive to a carrier to build facilities.

They rationalize that a requesting carriers can control transport costs by locating their switch near the ILEC central office or an alternative transport provider's facilities. But while this may be true for most wireline carriers, it is not true of wireless base stations. The placement of CMRS facilities is dictated by geography, subscriber density, zoning, and other issues beyond the carrier's control. Unlike wireline carriers, CMRS providers cannot aggregate their traffic because they must deploy many base stations throughout a metropolitan area.

Thus, the Triennial Review Order's redefinition of transport overlooks the differences between wireline and wireless networks. Even if one assumed that backhaul transport to a carrier's switch should not be available on an unbundled basis from the ILEC, the connections between ILEC end offices and CMRS base stations should be. Thus, even though the Triennial Review Order (¶ 368) suggests that the redefinition "applies to all competitors alike," regardless of technology, the redefinition of transport to exclude entrance facilities falls most harshly on CMRS carriers. It plainly discriminates against wireless technology and wireless carriers. It is not, as the Triennial Review Order pretends, "technology neutral." Id.

The impact on wireline carriers alone is reason enough to rescind the exclusion of entrance facilities for all requesting carriers. As the USTA II court recognized, the entrance facility can be a network element, too, and the Commission should not eliminate

ILECs' unbundling obligation without undertaking an impairment analysis.[59] The deployment barriers of the new entrant are the same for loop, interoffice, or entrance facility. ALTS at 89. The economics of building entrance facilities are "identical" to those for other transport facilities, and Sprint agrees that "the same standard should apply" to both interoffice and entrance facilities. AT&T at viii. The Commission should apply the same triggers that govern other high-capacity facilities below the OCn capacity level. The BOCs claim that entrance facilities are the "most competitive transport link," and that the high percentage of special access orders shows there cannot be impairment. BellSouth at 53; SBC at 70. If true, there should be little reason for the BOCs to object to the Commission reversing its exclusion of entrance facilities, since the competitive trigger threshold would often be met.

IV. GENERAL UNBUNDLING ISSUES

A. Section 271 Issues

The BOCs are loath to acknowledge USTA II's rejection of their claims that section 271 obligations on particular network elements parallel any Commission action under section 251.[60] SBC (at 110), for example, argues that if there is no impairment finding under section 251(c)(3), there is "no justification to impose the societal costs of unbundling under section 271." BellSouth (at 71-72) likewise repeats the old argument

[59] See 359 F.3d at 585-86. Indeed, some CLECs maintain that entrance facilities are a UNE distinct from transport, and should be subject to their own impairment review on that basis, as well. ATX et al. at 46.

[60] 359 F.3d at 588.

that section 251 and section 271 obligations are tied together, pretending that, where there is no longer an obligation to unbundle a particular UNE under section 251(c)(3), then there is nothing for the checklist to act upon and thus "no independent obligation" to unbundle under section 271.

This issue, however, "is not subject to debate." Loop/Transport Coalition at 128. The court clearly rejected this reasoning. It expressly upheld the Triennial Review Order's finding that

> [t]he requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling *regardless of any unbundling analysis under section 251.*

Triennial Review Order ¶ 653. There is no impairment requirement in section 271; it "imposes a separate obligation, even where nonimpairment exists." Loop/Transport Coalition at 128.

The court emphasized, further, that "Section 271 of the Act sets conditions for Bell operating companies … to enter the interLATA long distance market," as each of them have done. USTA II, 359 F.3d at 588. The court recognized that Congress incorporated a trade-off for the BOCs. In return for entry into the in-region long distance market, BOCs would be subject to these specific unbundling requirements indefinitely, separate and apart from other ILECs. Ironically, the BOCs did not challenge these same findings in the UNE Remand Order,[61] nor the incorporation of the section 271 checklist

[61] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 at ¶ 468 (1999) (subsequent history omitted) ("UNE Remand Order").

unbundling requirement in every grant of BOC authority to provide in-region interLATA services under section 271. Plainly, the BOCs are overreaching here, as they are on every issue in this proceeding.

Despite the clarity of the court's rejection of the BOCs' denial of their section 271 unbundling obligations, BellSouth still argues (at 74-75) that while USTA II upheld the Commission's finding in the Triennial Review Order that section 271 is independent of section 251, this does not "foreclose other reasonable interpretations of section 271." That is true only to a limited degree. The Commission cannot add or subtract elements from the section 271 checklist for unbundling. The Act expressly prohibits it.[62] Section 271 sets out a minimum list of unbundled network elements that the BOCs must make available to competitors.

Qwest (at 100) repeats the BOCs' argument that section 271 "does not require the unbundling of broadband," but in fact section 271 does not incorporate *any* exception for network elements used for broadband services, or any other. Properly read, section 271 precludes the Commission from granting the BOCs' requests to eliminate their obligation under section 271 to unbundling checklist UNEs just because they may be used to support "broadband." Section 706 of the 1996 Act – a mere footnote in the codified Act – does not trump section 271(d)(4)'s prohibition against altering section 271's UNE list. Congress also provided in section 10(d) of the Act that the Commission cannot forbear from any section 271 requirements until that section and section 251 have been "fully

[62] Section 271(d)(4) provides that the Commission "may not, by rule or otherwise, limit the terms of the competitive checklist." 47 U.S.C. § 271(d)(4).

implemented" (47 U.S.C. § 160(d)), something that obviously hasn't happened yet. Sprint agrees with other competitive carriers that the BOCs' petitions for forbearance of their section 271 unbundling must be denied, whether or not ostensibly limited to "broadband." See Sprint at 74. Such "relief" is also unnecessary, as the Commission's own report to Congress found advanced services are already "being deployed on a reasonable and timely basis to all Americans," even with section 271 unbundling requirements in place. Id. at 76, n.75.

The Act allows the Commission to determine the appropriate pricing for those section 271 UNEs. The USTA II court upheld the Commission's determination that TELRIC pricing should be limited to circumstances of impairment under section 251. 359 F.3d at 589. However, neither the statute nor the court ruling precludes the Commission from revisiting its decision that cost-based pricing need not apply to elements unbundled under section 271. Triennial Review Order ¶¶ 657-64. Sprint believes the Commission should adopt cost-based pricing for the core network elements required by section 271. As Alpheus remarked (at 80), "[j]ust and reasonable pricing" might necessarily "be equivalent to TELRIC." Cost based pricing of section 271 UNEs would certainly be a major step toward opening BOC markets to competition.

Less clear is the lawfulness of the Commission's determination that section 271 unbundled network elements need not be combined. The USTA II court expressly declined to address this question, because the CLECs' challenge was limited to section 251's nondiscrimination requirement. 359 F.3d at 590. Qwest (at 98) claims there is no

need to apply section 202's nondiscrimination requirement to section 271 unbundling, at least "in the Qwest region," because it provides a tariffed UNE-P substitute (its "QPP" product), offering what it calls "combined UNEs at a reasonable, market-based price." Qwest's current and potential competitors, and its section 271 obligations, however, are not limited to UNE-P market entry. Failing to require BOCs to combine section 271 UNEs based on this rationale would give the BOCs the ability unilaterally to determine what combinations are available.

Verizon (at 159-60) claims that it is not "unreasonable discrimination" under section 202 to refuse to combine section 271 UNEs, because unbundled network elements are not "like" retail services, since the latter are already combined. Such reasoning is circular. To meet the nondiscrimination requirements of section 202, and to meet the market-opening goals of section 271, BOCs should be required to combine section 271 UNEs for requesting carriers *in the same manner they do when provisioning for their own customers.*

The BOCs are silent on the breaking apart of network elements. The Commission should also emphasize that BOCs may not break apart elements that ordinarily are combined, as such conduct would be clearly discriminatory and anticompetitive.

B. Transition Issues

The BOCs contend there is no basis for requiring continued section 251 unbundling where there is no finding of impairment. Yet even they acknowledge the

need for some transition period to avoid disruption to carriers and end-users, if and when a section 251 UNE is removed at any particular location.

Remarkably, the BOCs generally endorse the Interim Order's proposal for a second, six-month transition period of interim pricing based on a 15% interim pricing increase and elimination of new UNE orders.[63] Competitive carriers and consumer representatives universally criticized the proposal as unduly abrupt and damaging to competition. Both sides have challenged the Commission's legal authority for this approach, and whether it comports with USTA II. Loop and Transport Coalition at 151-56.

Qwest's proposal, however, is certainly worse.[64] It focuses solely on UNE-P pricing. While it staircases UNE-P rates over time, it would reprice high-capacity loops and transport at special access rates without any transition whatsoever. It would undermine UNE-L competition and penalize the very CLECs that have invested most in their own facilities.

The Commission clearly must be sensitive to the impact of abrupt changes on carriers, telecommunications consumers, and competition. In Sprint's view, the lack of any consensus on the Commission's transition proposal simply underscores the importance of reducing the competition-damaging uncertainty surrounding UNEs by

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[63] E.g., SBC at 118; BellSouth at 81.

[64] Qwest at 89-92, summarizing Petition of Qwest Communications International Inc. for Rulemaking, WC Docket No. 04-223 (filed Mar. 29, 2004).

issuing updated rules within the initial six-month window.[65] If and when any UNE is removed at any location, the Commission should provide for some reasonable period of time to secure alternate facilities, to transition customers, or to terminate service.

V. CONCLUSION

Emboldened by the USTA II panel's criticisms of aspects of the Triennial Review Order, the BOCs comments betray a strategic disregard for their, and the Commission's, statutory obligations. The BOCs' claims of nonimpairment, and their ever-expanding requests for "regulatory relief," are based on gross misreadings of the facts and the law.

The Commission should recognize the severity and breadth of impairment for high-capacity loops and transport. It should reject proposals to adopt rules based on market size or line counts, which are inevitably arbitrary, do not correlate to impairment, and lack any granular review. Rather, it should adopt an appropriate and relevant impairment review.

There are three alternative proposals for that process. In any instance, the Commission should recognize that requesting carriers are impaired at the vast majority of high-capacity loops and transport routes nationwide. Given the overwhelming presence of impairment in these high-capacity facilities, the Commission could legitimately make a national finding of impairment at all locations for these high-capacity facilities, as MCI

[65] Per the Interim Order (¶ 1), the initial six-month transition will expire six months after Federal Register publication of the order, or March 13, 2005. See 69 Fed. Reg. 55111-12, 55128-35 (Sept. 13, 2004). Chairman Powell has signaled his intention to issue rules by December 2004, if possible. Interim Order, Statement of Chmn. Powell at 2.

recommends. Alternatively, the Commission could adopt a national impairment finding and conduct its own location-specific impairment review, as Sprint proposed, using information solicited from state commissions and reporting from affected carriers, to apply the Triennial Review Order's self-provisioning and wholesaling triggers. Or the Commission could make a standard finding of impairment for all locations except where wholesale carriers self-certify they offer alternatives to the ILEC, as AT&T suggests. Sprint believes any of these three proposals can be justified and sustained, but AT&T's recommendation may be the most appropriate given its combination of ongoing and location-specific application of impairment review and ease of administration.

The Commission should also revise the Triennial Review Order's definition of transport to include entrance facilities, to eliminate discrimination based on technology, service type, or provider classification, and to ensure that wireless carries may secure UNE transport. It should put an end to the continued discrimination against wireless technologies, and it should remove the barriers to CMRS carriers' entry into real, head-to-head competition with wireline local carriers – competition that today is frustrated by special access pricing for transport.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of October, 2004, copies of the Reply Comments in re WC Docket No. 04-313 and CC 01-338 were sent by e-mail or First Class Mail, postage prepaid, to the parties listed below.

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