

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

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

**REPLY COMMENTS OF
THE LOOP AND TRANSPORT CLEC COALITION**

**ADVANCED TELCOM, INC.
BIRCH TELECOM, INC.
BROADVIEW NETWORKS, INC.
ESCHELON TELECOM, INC.
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Summary

In its initial comments, the Loop and Transport CLEC Coalition explained that this proceeding presents the Commission with the obligation to respond to the *USTA II* Court's concerns in a manner that furthers the 1996 Act's statutory mandate to promote competition, particularly competition from facilities-based providers that use unbundled network elements to overcome impairment. The Coalition explained that the fundamental aspects of the *Triennial Review Order*'s impairment analysis remains sound, particularly the Commission's description of the impairment factors, its use of a capacity-specific analysis for high capacity loops and transport, and its use of a route-specific test to determine impairment for these elements. The Coalition urged the Commission to make minor modifications to the impairment standard to respond to the Court's concerns, and to adopt more easily administered impairment tests for loops and transport on a going forward basis.

In their initial comments, the Regional Bell Operating Companies and USTA take a radically different approach. Despite two decisions from the D.C. Circuit requiring the FCC to take a "nuanced" approach and make "granular" findings when the factual circumstances vary decisively across the relevant market, the RBOC tests are neither nuanced nor granular. Instead, the RBOCs offer a variety of alternative (and often overlapping) tests that amount to MSA-wide or, in many cases, quasi region-wide findings of non-impairment. These RBOC proposals are legally unsound and fail to incorporate the very court decisions upon which they purport to be based.

Second, in addition to the legal deficiencies, the RBOC impairment tests are not very accurate. BellSouth, for example, broadly contends that facilities-based competition is possible for transport (and for loops) serving any end office with 5,000 or more business lines.

This assertion of universal availability is flatly inconsistent with the specific CLEC factual information submitted in this docket showing that transport alternatives are spotty at best, and that loop alternatives are virtually non-existent. Moreover, the RBOCs' assertions are belied by the very statistics that they cite, which concede that competitive facilities deployment is rare even for central offices above 5,000 lines and that very few routes are suitable for multiple competitive deployment.

Finally, the RBOCs' assertions that ILEC special access services are a suitable substitute for UNEs is erroneous. The Coalition explained in great detail in its initial comments that CLECs rarely use special access services and when they do, they frequently use special access for reasons unrelated to the existence or non-existence of impairment. Instead, CLECs often have been forced into use of special access by unlawful "no facilities" responses and other examples of ILEC refusals to comply with section 251. In this reply, the Coalition shows that the data the RBOCs rely upon to demonstrate use of special access contains numerous factual and tabulation errors, both of which skew the data in such a way as to make it meaningless.

For these reasons, the Commission should reject the impairment tests proposed by BellSouth, Qwest, SBC, Verizon and USTA. The Commission should adopt an impairment test consistent with the test proposed by the Coalition in its initial comments, and should adopt additional rules to promote facilities-based local competition as described in the Coalition's initial comments in this proceeding.

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AND XO COMMUNICATIONS, INC.

Advanced Telcom, Inc.; Birch Telecom, Inc.; Broadview Networks, Inc.;
Eschelon Telecom, Inc.; Grande Communications, Inc.; KMC Telecom Holdings, Inc.; NuVox
Communications; SNIPLINK, LLC; Talk America Inc.; Xspedius Communications LLC; and
XO Communications, Inc. (hereinafter the “Loop and Transport CLEC Coalition,” “Coalition,”
or “Joint Commenters”), through counsel, hereby submit this reply to the initial comments filed
by the Bell Operating Companies in the above-captioned proceeding.¹ Due to the voluminous
record submitted in this proceeding and the extremely short time period permitted for replies, the

¹ *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order and Notice of Proposed Rulemaking, WC Docket No. 04-313 and CC Docket No. 01-338, FCC 04-179 (rel. Aug. 20, 2004) (“Interim Order and NPRM”).*

Coalition's reply comments address the principal arguments made by BellSouth, Qwest, SBC, Verizon and USTA pertaining to impairment for high capacity loops and transport UNEs. The Coalition may submit additional record information at a later date responsive to other contentions made in this proceeding.

I. INTRODUCTION

Eight years after passage of the Telecommunications Act of 1996 (the "1996 Act"), the fate of local competition is at a crossroad. In its initial comments, the Loop and Transport CLEC Coalition presented the Commission with a clear path for responding to the concerns of the *USTA II* Court in a manner that is consistent with the 1996 Act's statutory mandate to promote competition, particularly competition from facilities-based providers that use unbundled network elements to overcome impairment. As the Commission recognized by a unanimous vote in the *Triennial Review Order*, access to high-capacity loops and dedicated transport are critical to bringing the benefits of facilities-based competition to the American consumer.

These reply comments discuss the principal arguments made by the four Regional Bell Operating Companies ("RBOCs") – BellSouth, Qwest, SBC and Verizon – and their trade association, the United States Telecom Association ("USTA"). The RBOCs and USTA urge the Commission to make broad findings of non-impairment for DS1 and above loops, and for DS1 and above transport. The RBOCs contend that a replacement of the Commission's impairment test is appropriate, and offer several, often overlapping, standards upon which the Commission could find non-impairment for loops and transport. As shown below, the RBOCs' tests are inconsistent with the very decisions they purport to implement, are overbroad as a factual matter

and incorrectly rely on “proof” that competitive carriers are using tariffed special access services without impairment.

II. THE IMPAIRMENT TESTS PROPOSED BY THE RBOCS FOR HIGH CAPACITY LOOPS AND TRANSPORT FAIL TO MEET THE LEGAL STANDARDS REQUIRED BY THE 1996 ACT, THE SUPREME COURT, AND THE D.C. CIRCUIT

In their comments, the RBOCs and USTA propose impairment tests for high capacity loops and transport. While the individual proposals differ in several respects, they share the same central features: they define the relevant geographic and service markets in extremely broad terms; they do not measure actual competitive entry, but instead use a variety of proxy measurements that have little to do with actual competition; and they all result in broad, semi-regional findings of non-impairment for high capacity loops and transport. This section examines the RBOC impairment test proposals and demonstrates that they do not comply with the directives established by the D.C. Circuit Court of Appeals and the Supreme Court.

A. The Supreme Court and the D.C. Circuit Have Provided Detailed Guidance Regarding Impairment Analysis Required By The 1996 Act

Since 1996, a number of Supreme Court and federal Courts of Appeals decisions have expressly examined elements of the Commission’s impairment analyses, and have established guidelines for an impairment test. These requirements have been discussed extensively in the Coalition’s initial comments and by others in this proceeding. A brief review of the most important points is helpful to frame the discussion of the RBOC tests.

The Supreme Court's Iowa Utilities Board Decision²

In 1999, the Supreme Court found that the Commission's original impairment standard was too open ended, and required the establishment of a "limiting standard." In that decision, the Court found:

- The Act requires the Commission to articulate "some limiting standard."
- The Commission went too far in apparently considering that any increase in cost or decrease in quality to the competitive LEC would constitute impairment.
- The Commission must consider the availability of elements outside the incumbent's network.
- Justice Breyer's concurring opinion added that the impairment standard must balance social costs and benefits, and that the impairment analysis must center on incumbent LEC advantages that derive from their status as monopolies.

The D.C. Circuit's USTA I Decision³

The D.C. Circuit Court found that the Commission's multiple findings of blanket national impairment for most UNEs did not adequately reflect an analysis of competitive impairment in any particular market.

- The Court held that the Commission "may not 'loftily abstract[] away from all specific markets,' . . . but must instead implement a 'more nuanced concept of impairment.'"⁴
- The Court did not find that the Commission is prohibited from making national findings of impairment, but it did find that all impairment findings must include an analysis of "specific markets or market categories."⁵

² *AT&T vs. Iowa Utilities Board*, 525 U.S. 366 (1999) ("*Iowa Utils. Bd.*").

³ *United States Telecom Association v. FCC*, 290 F.3d 415 (2002) ("*USTA I*").

⁴ *United States Telecom Association v. FCC*, 359 F.3d 554, 569 (2004) ("*USTA II*") (quoting *USTA I*, 290 F.3d at 423, 426).

⁵ See *USTA I*, 290 F.3d at 426.

- The Court found that the Commission’s findings of impairment were too broad, and remanded them. In doing so, the Court identified the type of cost analysis that the Commission must undertake:
- The Court recognized that a cost analysis would provide the foundation for an impairment finding: “Of course any cognizable competitive ‘impairment’ would necessarily be traceable to some kind of disparity in cost.”⁶
- The Court noted that cost advantages realized by incumbent LECs would provide the basis for an impairment finding, but specified that such cost advantage must be linked in some way to the incumbent LEC’s status as a natural monopoly. The Court noted that this did not require an analysis under the essential facilities doctrine.⁷
- The D.C. Circuit Court also required that the Commission consider the impact of state-ordered cross-subsidies and whether these result in incumbent LEC services being priced above or below cost.⁸

The Commission’s Triennial Review Order

The Commission assimilated the guidance provided by the Supreme Court and the D.C. Circuit in the impairment tests it adopted in the *Triennial Review Order* (“TRO”) in 2003.⁹

In that order, the Commission established an impairment test for unbundled high capacity loops and transport that includes the following characteristics and considerations:

- Consideration of operational and economic barriers to competitive entry, including:
- Scale economies, sunk costs, first-mover advantages, absolute incumbent cost advantages, and barriers within the control of the incumbent.
- Actual marketplace evidence (to be viewed as the most persuasive evidence) as to whether competitive carriers are providing retail services in the relevant market without UNEs.

⁶ *USTA I*, 290 F.3d at 426 (emphasis added).

⁷ *USTA I*, 290 F.3d at 427.

⁸ *Id.*, 290 F.3d at 422-23.

⁹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 03-36 (rel. Aug. 21, 2003) (“TRO”).

- Intermodal competition, cost studies and modeling.
- The availability of ILEC tariffed services (to be accorded little weight).

In response to the *USTA I* decision, the Commission found that its impairment test must take a granular approach, considering specific customer classes, geography, the types of competitive services involved, and the types and capacity of the facilities involved. For enterprise market facilities, the Commission considered impairment for each of the following capacities: DS1, DS3, dark fiber and OCn level facilities. The Commission also found that impairment should be analyzed on a route-specific basis.

Subsequently, the *TRO* was reviewed by the D.C. Circuit. In reviewing the *TRO*'s impairment tests, the court noted that the Commission cured several of the flaws identified by the *USTA I* decision,¹⁰ but still remanded the Commission's impairment analysis for further consideration. The court also provided extensive guidance as to what an appropriate impairment test must entail. That guidance – and the standards by which the RBOCs' proposed impairment tests must be judged – are discussed in the following section.

B. The *USTA II* Decision Requires a Nuanced Impairment Analysis That Examines Costs In Specific Markets or Market Categories

In *USTA II*, the D.C. Circuit provided its most recent evaluation of the Commission's impairment tests. That evaluation is the law of the case, and sets the standard by which all proposals, including the RBOCs' proposals, must be judged. As explained in the Coalition's initial comments, the court specifically refrained from any conclusive criticism of the

¹⁰ *USTA II*, 359 F.3d at 571.

impairment standard adopted in the *TRO*.¹¹ Indeed, the court noted that the Commission modified its test to address the Supreme Court's concerns that the Commission's original test was too open-ended, and concluded that "the [Triennial Review] Order's interpretation of impairment is an improvement over the Commission's past efforts . . ." ¹² The court found that the Commission "plausibly connects" its analysis of costs to those barriers to entry that are related to structural impediments to competition, including sunk costs, incumbent LEC absolute cost advantages, first-mover advantages, and operational barriers to entry that are in the sole control of the incumbents.¹³ In discussing these factors, the court noted that its *USTA I* decision and the concurring opinion of Justice Breyer in *Iowa Utils. Bd.* required an impairment analysis that is related to the incumbent LEC's monopoly power. The court noted that these decisions did not require an application of an essential facilities test. Indeed, the court noted that the phrase "at a minimum" in § 251(d)(2) of the 1996 Act required the Commission to "reach a bit beyond natural monopoly," and consider other factors in conducting its impairment analysis.¹⁴

The court specifically addressed the route-specific impairment analysis established in the *TRO*, and noted that the incumbent LECs opposed this level of granularity in the impairment analysis, favoring instead an analysis that applied on a Metropolitan Statistical Area ("MSA") basis. The court noted the *USTA I* decision's admonition to apply a "nuanced" concept of impairment, and refused to require an MSA-based impairment test.¹⁵ Indeed, the court acknowledged that "it may be infeasible to define the barriers to entry in a manageable

¹¹ Initial Comments at 22-30 (discussing the general impairment standard).

¹² *USTA II*, 359 F.3d at 571.

¹³ *Id.*, 359 F.3d at 572.

¹⁴ *Id.*, 359 F.3d at 572.

¹⁵ *Id.*, 359 F.3d at 574-75.

form, *i.e.*, in such a way that they may usefully be applied to MSAs (or other plausible markets) as a whole”¹⁶ Instead, the court articulated a standard for perfecting a route-by-route analysis, instructing the Commission to consider facilities deployment along similar routes when conducting such an impairment test.¹⁷

C. The Impairment Tests Proposed By the Incumbent LECs Fail to Meet the Standards of USTA I, USTA II and Iowa Utils. Bd.

The tests promoted by the RBOCs in their comments fail to meet the statutory standard for an impairment analysis, as defined by the Supreme Court and the U.S. Court of Appeals for the D.C. Circuit. In general, all the proposed tests share the same flaws: 1) they are grossly overbroad in defining geographic markets and service categories, and thus fail to allow the kind of “nuanced” analysis required by the Act and the courts; 2) they refuse to look at critical economic and market factors, which makes impossible an analysis informed by antitrust principles; and 3) they focus on hypothetical, as opposed to actual, competitive entry as evidence of non-impairment. The specific failings of the various proposed tests are discussed in detail below.

1. The RBOCs Proposed Impairment Tests Fail To Provide The Nuanced Analysis Required By The D.C. Circuit

Perhaps the greatest failure of most of the RBOCs’ proffered impairment tests is their refusal to differentiate between loops and transport and between the capacity of the facilities being considered for unbundling. Instead, the RBOCs’ offer a one-dimensional analysis that treats DS1, DS3, OC3, OC12, OC48 and dark fiber facilities as fully

¹⁶ *Id.*, 359 F.3d at 574-75.

¹⁷ *Id.*, 359 F.3d at 575.

interchangeable, and that treats facilities on the loop side or the transport side of the incumbent LEC wire center as if they are the same.

For example, BellSouth, SBC and Verizon propose some form of test based on the number of lines served out of a given wire center. These line counts are a proxy for, among other things, the total amount of access revenues from customers served by that wire center, and the number of fiber-based collocation arrangements in that wire center. The theory appears to be that if one competitive carrier has a fiber-based collocation in the wire center, that is proof that fiber self-deployment is feasible for all competitors; similarly, a high level of access revenues generated out of the wire center supposedly supports an assumption that competitive LECs can extract enough revenue to justify building their own loops and transport. But these tests do not identify the types of services that are generating the special access revenues (whether DS1 or OC48), or whether the services are purchased from one large customer or many small ones. BellSouth acknowledges that its proposal does not differentiate between DS1 and OCn capacity facilities – indeed, BellSouth asserts that the Commission should avoid an analysis of individual DS1 services or the markets for such services.¹⁸

Similarly, BellSouth, Qwest, SBC, Verizon and USTA all cite to examples of the deployment of competitive fiber networks– frequently referencing a “Fact” Report prepared by their outside law firm¹⁹– as proof that competitive LECs face no impairment in deploying their own high capacity facilities. The implicit argument is that if a competitive carrier has built its own fiber networks anywhere within a geographic area, this constitutes proof that all competitive

¹⁸ BellSouth Comments at 48-49.

¹⁹ Peter W. Huber, *et al.*, *UNE Fact Report 2004*, submitted by BellSouth, SBC, Qwest and Verizon (Oct. 4, 2005) (“*Huber Report*”).

LECs can self-deploy high capacity loops and transport ubiquitously throughout that area (typically an MSA). These tests are careful to avoid asking what services the fiber network is designed to provide – they do not differentiate between a carrier that sells OC12 transport to other carriers and a carrier that sells a DS1-based set of voice and data services to a small business customer. The RBOC approach turns rational analysis on its head, and cannot be squared with the D.C. Circuit’s mandate for a granular analysis, or the Commission’s actions in implementing that mandate.

In the *Triennial Review Order*, the Commission changed its impairment analysis in response to the *USTA I* decision and the Supreme Court’s decision in *Iowa Utils. Bd.* The Commission acknowledged that its earlier blanket finding of impairment for virtually all UNEs was no longer sustainable, and that it was adopting a nuanced and granular analysis. For this reason, the *TRO*’s impairment analysis expressly differentiated between small and medium business customers and large enterprise customers²⁰ in defining competitive service markets, and differentiated among DS1, DS3, OCn and Dark Fiber loop²¹ and transport²² facilities.

The Commission expressly noted that this granular analysis was required by the Supreme Court in *Iowa Utils. Bd.* and by the D.C. Circuit Court in its *USTA I* decision:

In the *Triennial Review NPRM*, the Commission asked many questions about whether and how to make the unbundling analysis more granular by considering such factors as specific services, specific geographic locations, the different types and capacities of facilities, and customer and business considerations. Subsequently, the *USTA [I]* decision directed us to approach the section 251(d)(2) impairment analysis by considering “market-specific variations in

²⁰ *TRO* ¶¶ 124-29.

²¹ *TRO* ¶¶ 311-327.

²² *TRO* ¶¶ 380-393.

competitive impairment.” . . . [W]e will apply several types of granularity in our unbundling analysis, including considerations of customer class, geography, and service. . . . [W]e will also inject granularity into our analysis by considering types and capacities of facilities. . . . [W]e find that additional granularity takes into account “the state of competitive impairment in [a] particular market,” and adds the needed “balance” to our unbundling rules that the courts have required.²³

These Commission findings were not disturbed by the *USTA II* decision – the court expressly noted that the Commission issued varied impairment findings based on the capacity level of the facilities, and the court did not disturb that finding.²⁴ Indeed, the court cited with approval the Commission’s decision to examine OCn transport facilities as a distinct market category for purposes of its impairment test, and noted that “all petitioners appear to accept that finding.”²⁵ In so doing, *USTA II* expressly embraced an impairment analysis that takes capacity-specific characteristics into account when considering the costs of self-deployment, and the market for specific telecommunications services.

The Coalition’s initial comments, like the comments submitted by other competitive carriers participating in this proceeding, provide extensive evidence of cost and revenue data that are specific to loops and transport at different levels of capacity.²⁶ Under the mandate of the Supreme Court in *Iowa Utils. Bd.* and the D.C. Circuit in *USTA I* and *USTA II*, the Commission is compelled to consider this specific market data.²⁷ Conversely, accepting the undifferentiated analytical approach proposed by the RBOCs and USTA would require that the

²³ *TRO* ¶ 118 (footnotes omitted) (quoting *USTA I*, 290 F.3d at 422 and citing *Iowa Utils. Bd.*, 525 U.S. at 430 [Breyer concurrence] and *USTA I*, 290 F.3d at 427).

²⁴ See also Initial Comments at 36.

²⁵ *USTA II*, 359 F.3d at 573.

²⁶ See generally Initial Comments at 75-84, 92-113.

²⁷ See, e.g., *USTA II*, 359 F.3d at 569.

Commission “loftily abstract[] away from all specific markets”²⁸ – a tack that would directly violate the standard set by *USTA I* and *USTA II*.

2. The RBOCs’ Reliance On The Number Of Business Lines Served By A Wire Center As The Sole Proxy For Competition Makes Impossible The Nuanced, Monopoly-Focused Analysis Required By The Supreme Court And The D.C. Circuit

BellSouth, SBC and Verizon all propose impairment tests for loops and transport that ostensibly have one measurement – the number of business lines served out of a given wire center. Specifically, BellSouth proposes that the Commission should make a finding of no impairment for high capacity and dark fiber loops and transport provided out of any incumbent LEC central office that serves 5,000 or more business lines. Verizon also uses that formula, although for a more limited test. SBC proposes different measures that range from 5,000 to 15,000 lines. These measures are actually proxies for several other variables, however.

In the BellSouth model, for transport, BellSouth contends that wire centers that serve 5,000 business lines or more are also characterized by larger volumes of special access revenues from end user customers, and larger numbers of fiber-based collocation arrangements by competitive carriers. For loops, BellSouth argues that central offices with 5,000 or more lines also reflect a higher number of fiber-based collocation arrangements, reflect a higher number of buildings “lit” by competitive carriers, and are characterized by competitive LECs that use more special access circuits than UNEs. From these asserted correlations, BellSouth asserts that the Commission can infer impairment.²⁹

²⁸ *USTA II*, 359 F.3d at 569 (citing *USTA I*, 290 F.3d at 423).

²⁹ BellSouth Comments at 39-50.

The Verizon line-count test would apply to all high capacity facilities. Verizon would eliminate unbundling for all high capacity loops and transport out of wire centers that serve 5,000 or more business lines, or in wire centers where business lines account for 30 percent or more of total lines. Like the BellSouth test, Verizon's line count is a proxy for fiber collocations, available special access revenues from customers and competitive LEC purchases of special access services.³⁰

SBC proffers a different line-count test, one that is limited to DS1 transport and loops. Specifically, SBC argues that DS1 transport UNEs should be eliminated in all wire centers serving 10,000 or more business lines, and in wire centers serving 5,000 – 10,000 business lines if at least one fiber-based collocation arrangement is in that wire center. SBC explains that its line count is a proxy for fiber-based collocation and available special access revenues from customers.³¹ For DS1 loops, SBC would eliminate unbundling out of all wire centers that serve 15,000 or more business lines. In this case, the line count is a proxy for lit buildings.³²

These line-count tests all share the same theory: 1) they identify wire centers that generate high volumes of access revenues from end user customers, which purportedly supports the inference that competitive LECs can generate enough revenues to make it cost-effective to self-deploy loop and transport facilities; 2) these wire centers are characterized by some fiber-based collocation, which means that at least one competitive LEC has deployed a fiber facility,

³⁰ Verizon Comments at 82.

³¹ SBC Comments at 78-79.

³² SBC Comments at 89.

and this supports the inference that all competitive LECs can similarly deploy their own facilities in the area served by the wire center.

This proposed “one size fits all” standard for impairment cannot be squared with the courts’ mandates for a more “nuanced” and “granular” approach. In the *Triennial Review Order*, the Commission adopted a route-specific analysis (for transport) and a location – specific analysis (for enterprise loops) for the application of its self-provisioning and wholesale triggers.³³ It did so in direct response to the Supreme Court’s requirement that the Commission establish a “limiting standard” that examined a competitive LEC’s ability to self-provision or purchase UNE-equivalents from another competitive provider.³⁴ The Commission’s market-specific approach was upheld by the D.C. Circuit in *USTA II*, which found that the Commission had authority to conduct such a granular analysis.³⁵

Although the RBOCs attempt to make their tests sound granular, there is no doubt that the intended impact is akin to a blanket finding of non-impairment. BellSouth claims that its line-count test would result in a finding of non-impairment for high capacity loops and transport in 27 percent of all its central offices.³⁶ In fact, however, because competitive LECs tend to provide service in areas of the highest customer concentration, it is certain that this 27 percent figure represents a much higher proportion of offices in the geographic areas served by competitive carriers. In fact, BellSouth’s test likely would result in a finding of non-impairment for the vast majority of lines serving medium- and large-sized business throughout its nine-state

³³ *TRO* ¶¶ 328-340, 394-404.

³⁴ *Id.* at ¶ 394 (citing *Iowa Utils. Bd.*, 525 U.S. at 388-89).

³⁵ *USTA II*, 359 F.3d at 569, 575.

³⁶ BellSouth Comments at 39.

service territory.³⁷ BellSouth's proposed test therefore would establish a kind of geographic impairment analysis much larger than Metropolitan Statistical Areas ("MSAs") or even states – it would establish as a single market most, if not all, medium and large business lines throughout the entire BellSouth service territory. It is apparent that the SBC and Verizon tests – based on the same predicate as the BellSouth test – would have a similar impact.

This is the epitome of "loftily abstract[ing] away from all specific markets" -- which the *USTA I* and *USTA II* decisions expressly prohibit.³⁸ The D.C. Circuit has made abundantly clear that, if the Commission wishes to make an impairment, or non-impairment, finding of broad geographic scope, it must do so by considering the relevant operational and economic factors, in an analysis that is related to incumbent LEC monopoly control of the facilities in question.³⁹ As the court stated, "[a]ny process of inferring impairment (or its absence) from levels of deployment depends on a sensible definition of the markets in which deployment is counted."⁴⁰ An impairment test that uses a single proxy measurement to establish a regional market for the vast majority of all high capacity loops and transport used to serve

³⁷ In the non-proprietary affidavit of BellSouth witness Padgett, BellSouth lists the wire centers that would fall within the 5,000 business line test, and states that its test would eliminate unbundling for 6,047,300 business lines. Padgett Affidavit, Redacted Exhibit SWP-1, last page. That number of business lines is greater than the *total number of small and medium sized business lines served by all incumbent LECs throughout the nine-state BellSouth service territory*, as reported by the Commission in its most recent Local Telephone Competition Report. That number is 5,569,835. This figure was calculated from Local Telephone Competition: Status as of December 31, 2003, Table 6 (which lists the number of end-user switched access lines served by ILECs, per state) and Table 11 (which lists the percentage of total ILEC lines provided to residential and small business customers, per state). By taking all ILEC switched access lines in the nine BellSouth states, and multiplying them by the inverse of the residential and small business line percentages, the total number of medium and large business switched access lines per state is derived. The sum of such lines in the nine BellSouth states is 5,569,835.

³⁸ *USTA I*, 360 F.3d at 423; *USTA II*, 359 F.3d at 569.

³⁹ *USTA II*, 359 F.3d at 572.

⁴⁰ *USTA II*, 359 F.3d at 574.

medium- and large-sized business customers does not allow a nuanced analysis of natural monopoly characteristics that create barriers to competitive entry. The loop-count tests proposed by BellSouth, SBC and Verizon therefore cannot meet the courts' standards, and must be rejected.

3. Several Incumbent LECs Have Proposed Impairment Tests That Apply On An MSA-Wide Basis – The Commission Has Already Rejected This Approach As Violative Of The D.C. Circuit's Mandate For A Nuanced Analysis

USTA⁴¹ and apparently Qwest⁴² argue that the relevant geographic market for the loop and transport impairment tests should be the Metropolitan Statistical Area. BellSouth and SBC also make substantial references to competitive activity on an MSA-specific basis, although it is not clear whether they are proposing an MSA-specific impairment test as an alternative to their respective loop-count tests.⁴³ Verizon's comments make so many contradictory arguments that its position on impairment tests is incoherent – for high capacity impairment tests, Verizon proposes both the broadest definition of geographic market – a national finding of non-impairment for all high capacity facilities – and the narrowest – individual services and customers.⁴⁴ Verizon includes among these arguments a call for an MSA-specific test for high capacity facilities,⁴⁵ and so we address it here.

⁴¹ USTA Comments at 21-22.

⁴² Qwest does not articulate a specific test for loop and transport impairment, but raises several arguments concerning MSA-specific data. *See, e.g.*, Qwest Comments at 79, 88-89.

⁴³ *E.g.*, BellSouth Comments at 36; SBC Comments at 64-68.

⁴⁴ *Compare* Verizon Comments at, *e.g.*, 30, 65 (national) *with* 65-84 (specific customers and services).

⁴⁵ *E.g.*, Verizon Comments at 26-27.

In making their arguments for an MSA-based test, several of the incumbents repeat their arguments from the Triennial Review proceeding that the MSA is an appropriate market measure because it served as the basis for the Commission's analysis when it awarded pricing flexibility to incumbent LECs for certain special access services.⁴⁶ The incumbents quote the Commission's *Pricing Flexibility Order*, which states that "MSAs best reflect the scope of competitive entry" and are a "logical basis for measuring the extent of competition."⁴⁷

In the *TRO*, the Commission expressly considered the incumbent LEC arguments in favor of an MSA-based impairment test for high capacity transport, and rejected it: "We also consider, but decline to adopt, an analysis of transport markets on a broader scale, such as a city, MSA, or other zone and reject these approaches as too over- and under-inclusive."⁴⁸ Moreover, the Commission expressly considered – and rejected – incumbent LEC arguments that the MSA was an appropriate market definition because it was used by the Commission in the *Pricing Flexibility Order*:

The [MSA] measure does not indicate that the competitive fiber facilities connect to collocations in any other incumbent LEC central offices. The measure may only indicate that numerous carriers have provisioned fiber from their switch to a single collocation rather than indicating that transport has been provisioned to transport traffic between incumbent LEC central offices. Therefore, we find that Commission approval for special access pricing flexibility, finding that competing carriers have made "irreversible sunk investments," is not sufficiently tailored to identify where requesting carriers are not impaired without unbundled transport.⁴⁹

⁴⁶ SBC Comments at 77; USTA Comments at 21-22; Verizon Comments at 25.

⁴⁷ *Access Charge Reform*, 14 FCC Rcd 14221, ¶ 72 (1999) (cited and quoted by Verizon at 25 & n.20).

⁴⁸ *TRO* ¶ 402.

⁴⁹ *TRO* ¶397.

The Commission's rejection of the MSA test for transport was appealed to the D.C. Circuit. In *USTA II*, the court expressly acknowledged the Commission's authority to so hold, provided that such a decision is fully explained and supported on the record. The court acknowledged that "it may be infeasible to define barriers to entry . . . in such a way that they may usefully be applied to MSAs" ⁵⁰ The Commission found the arguments against an MSA-based market definition compelling last year, and the record in the instant proceeding provides additional compelling evidence to support a reaffirmation of that decision.

4. The Incumbent LECs Fail To Provide Any Justification For Departing From The Route-Specific Impairment Analysis That The Commission Adopted In The *Triennial Review Order*

Several of the incumbent LECs argue that the Commission should abandon its determination to conduct an impairment analysis for transport on a route-specific basis, and for loops on a location-specific basis. BellSouth's sole arguments against route-specific impairment analysis for transport are assertions that competitive LECs do not enter markets on a route-by-route basis, and that route-specific analysis would allow uneconomic gaming. ⁵¹ Qwest argues that, for transport, route-specific analyses are irrelevant because many networks do not provide direct point-to-point connections, but instead route traffic between points on an indirect route. ⁵² Verizon argues that a route-specific impairment test would constitute "overwhelming

⁵⁰ *USTA II*, F.3d at 575.

⁵¹ BellSouth Comments at 42-43; Padgett Affidavit, Attachment 4, at ¶ 15.

⁵² Qwest Comments at 77-78.

granularity,”⁵³ and further asserts that, in *USTA II*, “the court found that the Commission had improperly defined individual loop and transport routes as unique markets.”⁵⁴

In the *Triennial Review Order*, the Commission considered and rejected arguments similar to those raised by BellSouth and Qwest. These carriers place nothing in the record of the instant proceeding that would justify a reversal of the Commission’s earlier decision. As to Verizon’s argument that a route-specific analysis would be “overwhelming,” this is an odd argument from a company that later proposes impairment tests that are disaggregated into specific categories of services and customer classifications, including wireless, broadband and long distance services, and “large enterprise” customers.⁵⁵ Verizon’s arguments in this regard are internally inconsistent and inherently contradictory, and should be disregarded.

As to Verizon’s assertion that the D.C. Circuit vacated the Commission’s route-specific impairment analysis, this argument is wrong on its face. In the *USTA II* decision, the D.C. Circuit considered, and did not vacate, the Commission’s use of a route-specific impairment analysis for transport.⁵⁶ The court instructed the Commission that, when it did conduct its route-specific analysis, it must consider facilities deployed along similar routes as part of its transport test. It also required that the Commission further explain its decision to

⁵³ Verizon Comments at 26-27.

⁵⁴ Verizon Comments at 33; USTA appears to make a similar argument at page 15 of its Comments.

⁵⁵ Verizon Comments at 60-81. The Joint Commenters argue that Verizon’s highly disaggregated categories for impairment tests are overly burdensome and impracticable in a later section of these comments.

⁵⁶ *USTA II*, 359 F.3d at 575. The court did not address the Commission’s impairment findings for loops, other than its vacatur of the Commission’s referral of an impairment analysis to the states for DS3 and dark fiber loops. The court’s solicitude for the route-specific transport impairment analysis is also implied for the location-specific loop impairment analysis.

adopt a route-specific analysis. At the same time, however, the court acknowledged that “it may be infeasible to define barriers to entry . . . in such a way that they may usefully be applied to MSAs (or other plausible markets)”⁵⁷ These statements demonstrate that the D.C. Circuit expected the Commission to refine – and perhaps broaden – its route-specific approach, not to revert back to the blanket categories the court criticized in *USTA I*. The RBOCs’ attempt to convince the Commission to sweep away competition so indiscriminately invites further reversal from the *USTA II* court.

5. The RBOCs’ Proposals To Rely On Hypothetical, Not Actual, Competition Ignores The Monopoly-Focused Analysis Required By The Supreme Court And The D.C. Circuit

The RBOC-proposed impairment tests explicitly and implicitly rely heavily on factors that have nothing to do with actual competitive entry or real competition in local service markets. As discussed below, this aspect of the RBOCs’ proposed impairment tests is fundamentally incompatible with the mandates of the Supreme Court and the D.C. Circuit that the Commission conduct a nuanced analysis that specifically considers cost and operational factors linked to the incumbents’ natural monopoly status.

The RBOC impairment tests – including those based on business line-counts in specific wire centers, and those based on MSA-specific data concerning competitive deployment of fiber facilities – all reflect the same premise: 1) the largest population centers and central offices typically include a competitive carrier with a fiber-based collocation and other fiber network facilities, which proves that any competitive carrier can self-deploy fiber loops and transport, and also makes route-specific analysis unnecessary; 2) once a full fiber network is in

⁵⁷ *Id.*, 359 F.3d at 575; *see also*, Initial Comments at 31-36.

place, individual DS3 and DS1 circuits can be provisioned at low incremental cost, which makes service- or capacity-specific analysis unnecessary; 3) these geographic markets and central offices also contain at least one customer that purchases large volumes of telecommunications services, which proves that there is enough revenue to support the build out of fiber loops and transport; and 4) all of this leads to the conclusion that there is no impairment for any loops or transport to customers in that MSA, or served out of that office.⁵⁸

This general analytical approach is founded on several fundamental assumptions regarding costs and revenues. First, the RBOCs raise a number of arguments focused on the cost of network construction and self-provisioning. They argue that incumbents and competitive carriers both face essentially the same costs in building networks. Moreover, once a core fiber network is built, the RBOCs assert, deriving individual channels – such as DS1 loops and transport – only requires a small incremental cost. Qwest sums up these arguments in its assertion that “the mere fact that it costs a great deal of money to deploy a fiber network is ultimately irrelevant.”⁵⁹

Second, the incumbents argue that the Commission should assume competitive carriers may draw from all available revenues in the defined geographic market in order to support the cost of construction. This argument is usually couched as a response to the D.C. Circuit’s instruction to the Commission to define “economic” competitive entry in its impairment analysis. The incumbents typically argue that the definition of economic competitive entry

⁵⁸ BellSouth Comments at, *e.g.*, ¶¶ 47-49; Qwest Comments at, *e.g.*, 78, 83-84; SBC Comments at 84-92; USTA Comments at 15-19, 22; Verizon Comments at, *e.g.*, 36-47; *see generally Huber Report*.

⁵⁹ Qwest Comments at 83. *See also, e.g.*, BellSouth Comments at 42-43, 48-49; SBC Comments at 62-69; Verizon Comments at 36-47.

posits an “efficient” competitor that will design its network to provide every service that may generate revenues, and add sufficient capacity to accommodate the entire addressable market.⁶⁰

Finally, the incumbents take the position that the impairment test need not measure actual competitive entry at all, but must focus its inquiry to whether competitive entry is possible. For example, Verizon extracts from the *USTA II* decision references to whether “competition is possible” or “whether a market is suitable for competitive supply” and concludes that no actual competitive entry need be considered in the Commission’s impairment test.⁶¹ As discussed below, all three of these assumptions are demonstrably violative of orders from the Supreme Court and the D.C. Circuit.

The RBOC arguments that the actual costs of deploying fiber facilities are “irrelevant” are flatly inconsistent with the directives of the Supreme Court. In *Verizon v. FCC*, the Supreme Court addressed this issue directly:

⁶⁰ *E.g.*, BellSouth Comments at 12-13; Verizon Comments at 22-23.

⁶¹ Verizon Comments at 12 (citing *USTA II*, 359 F.3d at 575, 571); *see also, e.g.*, BellSouth Comments at 9-10, 42 n.147; *USTA* Comments at 22.

[E]ntrants may need to share some facilities that are very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology). In other words, Justice Breyer makes no accommodation for the practical difficulty the FCC faced, that competition as to “unshared” elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements jointly necessary to provide a desired telecommunications service. Such is the reality faced by the hundreds of smaller entrants (without the resources of a large competitive carrier such as AT&T or WorldCom) seeking to gain toeholds in local-exchange markets....⁶²

The D.C. Circuit quoted and followed similar language in its *USTA I* decision.⁶³

This language establishes two fundamental principles that wholly undermine the incumbent LECs’ proposed analytical method: 1) costs do matter, and *they must be analyzed on an element-by-element basis*, not on the macro network-wide basis urged by the incumbents; and 2) the Commission’s impairment analysis *must accommodate competitive entry by multiple competitive carriers, including small entrants with limited resources*, and cannot adopt the incumbents’ assumption that, if one carrier deployed a fiber network somewhere, then all competitors can build fiber networks everywhere.

In addition, the incumbent LECs’ arguments for ignoring specific costs, assuming collection of potential revenues, and accepting potential – as opposed to actual – competition as a measure of competitive entry all fall short of the antitrust-informed principles contemplated by the Supreme Court and by the D.C. Circuit Court in its *USTA I* and *USTA II* decisions.

⁶² *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 510 n.27 (2002). In its comments, BellSouth expressly recognizes this court mandate, citing the *Iowa Utilities Bd.*, *USTA I*, and *Verizon v. FCC* decisions for the proposition that the impairment analysis must expressly consider whether the ILEC facilities for which unbundling is sought are “‘bottleneck’ or ‘very expensive to deploy’ facilities.” BellSouth Comments at 2 & n.2.

⁶³ *USTA I*, 290 F.3d at 426.

In *Iowa Utils. Bd.*, Justice Breyer opined that the Communications Act requires an impairment test that examines whether any cost advantages an incumbent LEC has over a competitive entrant flows from the incumbent's status as a natural monopoly.⁶⁴ In *USTA I*, the D.C. Circuit relied on this language, finding that the Commission's impairment analysis must be "linked (in some degree) to natural monopoly . . ."⁶⁵ This finding was reiterated and expanded by the D.C. Circuit Court in *USTA II*, where the Court found that the Commission is fully empowered to "reach a bit beyond natural monopoly . . ."⁶⁶ in establishing its impairment test. The D.C. Circuit Court went on to define barriers to entry that can reasonably be considered as part of this natural monopoly-based impairment analysis: sunk costs, incumbent LEC absolute cost advantages, first-mover advantages, and operational barriers to entry within the control of the incumbent LEC.⁶⁷

These variables mean nothing if, as the incumbent LECs propose, their tests yield a blanket finding of non-impairment without considering evidence of impediments to actual competitive entry by real carriers with real business plans. As the Joint Commenters demonstrate in their initial comments, and in this reply, factors such as franchising and right-of-way rules that discriminate in favor of RBOCs, the inability to obtain building access, state-specific and service-specific incumbent LEC pricing practices for Special Access, and many other factors determine whether a competitive LEC is impaired absent access to UNEs. All of these factors are related to advantages that the incumbents enjoy due to their historic position as

⁶⁴ *Iowa Utils. Bd.*, 525 U.S. at 429-30.

⁶⁵ *USTA I*, 290 F.3d at 427.

⁶⁶ *USTA II*, 359 F.3d at 572.

⁶⁷ *Id.*, 359 F.3d at 571-72 (citing with approval *TRO* at ¶¶ 75, 90, 89 and 91 and related footnotes).

natural monopolists with guaranteed rates of return and a subsidized mandate to provide ubiquitous service throughout their service territories. The Supreme Court and the D.C. Circuit have mandated consideration of these factors, yet such analysis is not possible under the incumbents' proposed tests.

Finally, in support of their assertions that the Commission's impairment analysis need not consider actual competition at all, the incumbents cite to the *USTA II* decision's statement that the Commission must consider "intermodal competition when determining whether a market is suitable for competitive entry."⁶⁸ The incumbent LECs misread the *USTA II* decision, however. In mandating consideration of intermodal competition, the court was not finding that the Commission could find impairment without competitive entry. To the contrary, the court ruled that the Commission could find impairment if it first found that intermodal competition existed, and if such actual competition constituted a basis for a finding of non-impairment.

In fact, the *TRO* does allow for a finding of non-impairment in the absence of actual competitive entry, but only in very strictly limited circumstances. The Commission expressed its view clearly when discussing the self-provisioning trigger for transport:

In applying the self-provisioning trigger, we find that actual competitive deployment is the best indicator that requesting carriers are not impaired, and therefore, emphasize that this quantitative trigger is the primary vehicle through which non-impairment findings will be made. However, we recognize that this trigger identifies only the existence of actual competitive

⁶⁸ *USTA II*, 359 F.3d at 571 (cited in BellSouth Comments at 42 n.147; Verizon Comments at 12).

facilities and does not address the potential ability of competitive LECs to deploy transport facilities along a particular route.⁶⁹

The Commission then listed a number of factors that could result in a finding of non-impairment, even if the self-provisioning trigger was not fully met. These factors include a review of available effective technologies, right-of-way access, topology, and several other factors.⁷⁰ These factors are fully consistent with the natural monopoly-based analysis required by the courts, and they have been broadly addressed in the record of the Triennial Review proceeding, and in the initial and reply comments of competitors in the instant proceeding. For the reasons discussed above, the incumbent LECs' proposed impairment tests fall far short of the standards set by the Supreme Court and the D.C. Circuit, and so must be rejected.

6. The Service-Specific And Customer-Specific Tests
Proposed By Verizon Are Impracticable And Do Not
Comply With The D.C. Circuit Standards

As noted above, Verizon argues for every conceivable type of geographic and market definition for its high capacity impairment tests – national, MSA, wire center, line-count, and customer- and service-specific. In doing so, Verizon has proposed both the broadest and narrowest definitions of markets proposed by any party, and its failure to reconcile the inherent contradictions in these arguments renders its comments incoherent. Regardless, the Joint Commenters are compelled to demonstrate that Verizon's service-specific and customer-specific tests are inconsistent with the directives of *USTA I*, *USTA II*, and *Iowa Utils. Bd.*

Verizon argues that some facilities and services provided to certain classes of customers, are subject to such robust competition that they should be subject to a national finding

⁶⁹ *TRO* ¶ 410.

⁷⁰ *Id.*

of impairment. Verizon argues that no high capacity transport or loop UNEs should be allowed for provision of: services to large enterprise customers,⁷¹ packet-switched broadband services,⁷² wireless services,⁷³ long-distance services,⁷⁴ or entrance facilities.⁷⁵ It also argues that the combination of loop and transport UNEs called enhanced extended loops or EELs should be eliminated because they look like special access services.⁷⁶

First, we agree with Verizon's reading of the *USTA I* and *USTA II* decisions, and Verizon's conclusion that, in those decisions, the D.C. Circuit requires a nuanced and granular analysis in applying the impairment test.⁷⁷ Indeed, in *USTA II*, the D.C. Circuit Court quoted its finding in the *CompTel* case⁷⁸ that the Act expressly allows for service-by-service impairment analysis, and that specific telecommunications services cannot be excluded from the Commission's impairment tests.

While the Commission has the discretion to conduct the service-specific analysis, the analyses urged by Verizon are impermissible under *USTA I*, *USTA II* and related cases. Most importantly, Verizon offers no analysis of the specific markets it proposes, or whether barriers to competitive entry exist, but instead relies on general assertions that the market for broadband, high capacity, wireless and long distance services are "robustly competitive," and concludes that

⁷¹ Verizon Comments at 67-68.

⁷² *Id.* at 69-70.

⁷³ *Id.* at 71-73.

⁷⁴ *Id.* at 73-74.

⁷⁵ *Id.* at 80-81.

⁷⁶ *Id.* at 75-76.

⁷⁷ *Id.* at 66.

⁷⁸ *Competitive Telecommunications Association v. FCC*, 309 F.3d 8, 12 (D.C. Cir. 2002) ("*CompTel*") (cited with approval, *USTA II*, 359 F.3d at 592).

there can be no impairment to any competitive carrier that provides any of these services. Yet these broad assertions fail to meet the applicable legal test that Verizon itself identifies. Verizon cites *USTA II* as requiring that impairment must be justified by a submission of “substantial evidence”⁷⁹ and notes that, “as courts have held, ‘conclusory and unsupported remarks,’ ‘mere assertions,’ and ‘[a]necdotal evidence’ all do not constitute substantial evidence.”⁸⁰

For the Commission to conduct the requisite analysis on all of the potential customer and service markets that Verizon proposes would be unreasonably burdensome and impracticable. The RBOCs have not offered evidence in the record of this proceeding sufficient to support such a super granular analysis. Moreover, such an extreme disaggregation is unnecessary – the impairment analysis that the Joint Commenters provide in their initial comments and in these reply comments provide a workable alternative that fully meets the granularity and substantial evidence standards required by the courts. The Joint Commenters’ impairment test examines as separate markets DS1 loops, DS1 transport, DS3 loops and DS3 transport, and conducts a fact-based, fully documented impairment analysis on the route-by-route basis that the Commission earlier adopted, and that the D.C. Circuit has expressly found to be within the Commission’s discretion. Because a reasonable and practicable alternative is readily available to the Commission, it should reject the Verizon proposals.

⁷⁹ Verizon Comments at 8-9 (citing *USTA II*, 359 F.3d at 582).

⁸⁰ Verizon Comments at 9 (citing *Timpinaro v. SEC*, 2 F.3d 453, 459 (D.C. Cir. 1993); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 866 (D.C. Cir. 2001); *United States v. Undetermined Quantities of Various Articles of Drug . . . Equidantin Nitrofurantoin Suspension*, 675 F.2d 994, 1000 (8th Cir. 1982)).

III. THE RBOC TESTS WOULD RESULT IN A SIGNIFICANT NUMBER OF ERRONEOUS IMPAIRMENT FINDINGS

In addition to the legal deficiencies described above, the RBOCs' impairment tests suffer from a debilitating factual error as well. As a general matter, the impairment standards proposed by the RBOCs are overly inclusive and, on the whole, fail to identify accurately routes (or wire centers) where multiple competitive alternatives exist. As a result, use of the RBOCs' impairment tests would create an unacceptable risk of false positives and false negatives in the Commission's impairment determinations.

A. The RBOCs' Impairment Tests For Transport Fail To Identify Where Alternatives To ILEC Facilities Exist

As discussed above, BellSouth, Verizon and SBC each proposes an impairment test based on the number of business lines present in a central office. Their claim is that the level of competitive deployment to central offices above a certain threshold line count (usually 5,000 business lines) demonstrates that CLECs are not impaired in deploying transport to any central office above that threshold line count. The impairment standard proposed by BellSouth, for example, would preclude a finding of impairment for unbundled high capacity transport in all wire centers with 5,000 or more business lines.⁸¹ BellSouth asserts that this standard is appropriate because of the "strong" relationship between wire centers that serve 5,000 business lines or more and the existence of fiber-based collocation arrangements and/or high special access revenues in those offices.⁸²

⁸¹ See BellSouth Comments at 39.

⁸² *Id.* In support of its conclusion, BellSouth states that "[t]he presence of fiber-based collocation provides a readily accessible indication of the level of competition in an area, as it clearly show that alternative networks have been deployed and are accessible from a particular central office." *Id.*

BellSouth contends that there is a radical shift in the availability of alternative networks in central offices with more than 5,000 business lines as compared to those with fewer than 5,000 business lines. Specifically, BellSouth claims that 72 percent of its central offices with 5,000 or more business have at least one fiber-based collocation arrangement, while only 3.1 percent of central offices with fewer than 5,000 have at least one fiber-based collocation arrangement.⁸³ BellSouth's own data do not show a radical shift at the 5,000 line threshold, however. Fifty percent (213 of 429) of the central offices above 5,000 business lines have one or no fiber-based collocators present in the office.⁸⁴ This is consistent with data that the RBOCs report in the *Huber Report*. According to the *Huber Report*, only 16 percent of the approximately 9,900 wire centers served by the Bell Companies have one or more fiber-based collocators.⁸⁵ Almost half of the Bell Company wire centers above 5,000 lines have no fiber-based collocators.⁸⁶ Indeed, when all of BellSouth's wire centers below 25,000 business lines are considered, the data show a significant percentage of central offices with three or fewer collocators:

⁸³ *Id.* at 39-40.

⁸⁴ BellSouth Comments, Padgett Aff., Exhibit SWP-1.

⁸⁵ *Huber Report*, p. III-7.

⁸⁶ *Id.*, p. III-28 & Table 17.

Business Lines	Total COs	Percent of end offices with collocators				
		0	1 or fewer	2 or fewer	3 or fewer	4 or more
<5,000	1159	1123 (96.9%)	1147 (99%)	1158 (99.9%)	1158 (99.9%)	1 (0.01%)
<10,000	1358	1213 (89.3%)	1296 (95.4%)	1335 (98.3%)	1348 (99.3%)	10 (0.007%)
<15,000	1452	1234 (85%)	1340 (92.3%)	1395 (96%)	1426 (98.2%)	26 (1.8%)
<20,000	1508	1244 (82.4%)	1354 (89.8%)	1414 (93.8%)	1452 (96.3%)	56 (3.7%)
<25,000	1540	1245 (80.8%)	1359 (88.2%)	1420 (92.2%)	1463 (95%)	77 (5%)

Sources: BellSouth Comments at 39, Padgett Aff., Table 1, and Padgett Ex. SWP-1.

According to BellSouth’s own data, 80.8 percent of its central offices below 25,000 business lines have *no* fiber-based collocators at all, 88.2 percent have one or fewer collocators, 92.2 percent have two or fewer collocators, and approximately 95 percent have three or fewer. This is hardly widespread deployment of competitive facilities.

Instead, what the RBOC data show is that multiple competitive deployment is very rare. Fewer than five percent of BellSouth’s wire centers with 25,000 or fewer business lines have more than three fiber-based collocation arrangements.⁸⁷ Similarly, the *Huber Report* data shows that approximately four percent of RBOC wire centers have four or more collocators and approximately three percent have five or more collocators.⁸⁸

Even SBC recognizes that 5,000 business lines is not an appropriate threshold for a finding of non-impairment. Acknowledging that only 20 percent of its central offices with 5,000 to 10,000 business lines have one or more fiber-based collocators (and, thus, that 80

⁸⁷ See Table, above.

⁸⁸ *Huber Report*, Tables 4 & 10.

percent have no collocators), SBC proposes an impairment standard for DS1 transport that would permit a finding of impairment except (1) where both central offices have 10,000 or more business line or (2) on routes between one central office with 10,000 or more business lines and one with 5,000 or more business lines. Although the SBC 10,000 line standard suffers from the same theoretical flaws as the BellSouth test, including over-inclusiveness, it is notable that the SBC test would not permit a finding of non-impairment for two central offices of 5,000 lines.⁸⁹

More fundamentally, because the RBOC line count tests are not route-specific, they provide little assurance that competitive alternatives are available where CLECs need transport. In fact, very few competitive carriers are in a position to offer wholesale facilities to other CLECs. As Michael Duke of KMC explained, although KMC has deployed its own transport facilities and established collocations in certain ILEC central offices and IXC POPs, its network was “engineered and sized based on the KMC business model, which *did not contemplate a wholesale transport or loop provisioning service.*”⁹⁰ As such, KMC does not offer whole transport services to other competitive carriers and “would have to undertake extensive changes to its existing network, including the redesign and upgrade of [its] existing transport network” to do so.⁹¹

⁸⁹ SBC’s own data undermines its 10,000 line threshold. SBC admits that only 56 percent of its central offices with 10,000 or more business lines have at least one fiber-based collocator and only 35 percent have two or more.

⁹⁰ Declaration of Mike Duke, Director of Government Affairs, KMC Telecom Holdings, Inc., ¶¶ 16-17 (Oct. 1, 2004) (“Duke Decl.”).

⁹¹ *Id.*, ¶ 18; *see also* Declaration of Dan J. Wigger, Vice President-Network Engineering & Operations, Advanced TelCom, Inc., ¶ 39 (Oct. 1, 2004) (“Advanced TelCom does not believe it would be economically rationale to wholesale its modest amount of additional capacity, as it anticipates the use of that capacity to meet its growth plan for each metro area.”) (“Wigger Decl.”).

This limited availability of wholesale transport facilities is encountered by many Coalition members. Advanced TelCom, for example, reports that one alternative wholesale provider is available on 20 percent of its routes, while multiple providers are present on only 5-10 percent of its routes.⁹² Similarly, Broadview reports that a non-ILEC provider is available on only 25 percent of its transport routes, whereas Eschelon found a non-ILEC provider on less than 20 percent of its routes.⁹³ Application of the RBOC line count tests would create a significant instance of “false negatives,” *i.e.*, erroneous findings of *non-impairment* when impairment exists. Put another way, the RBOCs’ broad tests would leave many CLECs in a situation where, for a majority of their routes, neither UNEs nor competitive transport are available.

Likewise, the RBOCs’ line count tests are not an accurate predictor of where a CLEC is able to self-provision transport facilities. In fact, the evidence submitted by Coalition members attest that the operational difficulties and high sunk costs of self-deployment make it unlikely that they can deploy interoffice transmission facilities unless a highly concentrated level of customer demand already exists. For example, XO, which is among the better-capitalized CLECs in the market today, has found building backbone fiber optic transport facilities to be “an incredibly expensive undertaking” that requires a minimum of 9 to 12 DS3s of traffic on a route

⁹² Wigger Decl. (Advanced TelCom), ¶ 45.

⁹³ See Declaration of Rebecca H. Sommi, Vice President – Operations Support, Broadview Networks, Inc., ¶ 8 (Oct. 1, 2004) (“Sommi Decl.”); Declaration of David A. Kunde, Executive Vice President of Network Operations and Engineering, Eschelon Telecom, Inc. ¶¶ 6, 9 (Oct. 1, 2004) (“Kunde Decl.”). See also Declaration of Anthony Abate, President and CTO, SNiP LiNK, LLC, ¶¶ 18-19 (Oct. 1, 2004) (competitive transport providers exist on only a few routes in the nation’s fourth largest MSA) (“Abate Decl.”); Declaration of Warren Brasselle, Executive Vice President – Network Operations, Talk America Inc., ¶ 9-10 (Oct. 1, 2004) (DS1 transport not offered by competitive suppliers, competitive DS3 transport available on approximately 35 percent of its routes) (“Brasselle Decl”).

before construction makes economic sense.⁹⁴ Moreover, XO has found that it may take up to a year to obtain the necessary rights-of-way, collocation and equipment and to build the fiber. This experience was echoed by most of the Coalition members including Advanced TelCom, which will not consider fiber construction on any route until it accumulates at least 15 DS3s of traffic on that particular route.⁹⁵ SNIp LiNK also has found that it is uneconomic to deploy its own transport until it accumulates an OC-12 of traffic; Eschelon reports that it cannot build additional transport facilities because existing public conduits and rights-of-way are unavailable.⁹⁶

In sum, a test based upon line density by itself is not sufficient for the Commission to conclude that non-impairment exists on competitive routes, or in a wire center for that matter. The number of business lines in a central office does not predict accurately those instances where a competitive carrier is able to overcome the barriers to entry present in the dedicated transport market. Accordingly, the Commission must reject proposals for any impairment test that rely primarily on factors such as line density as a proxy for non-impairment.

⁹⁴ Declaration of Wil Tirado, Director of Transport Architecture, XO Communications, Inc., ¶¶ 33-38 (Oct. 1, 2004) (Tirado also noting that placing fiber underground can cost \$400,000 to \$700,000, while placing fiber on poles can cost \$42,000 per mile) (“Tirado Decl.”). Moreover, it “normally takes approximately 6 months to obtain the rights-of-way, apply for collocation and equipment; and it takes an additional 3 months to actually build the fiber, and install/test the equipments. . . . This aggregate delay of more than one year provides the ILECs with significant “first mover” advantages over us.” *Id.*

⁹⁵ Wigger Decl. ¶ 36.

⁹⁶ Abate Decl. ¶ 10; Kunde Decl. ¶ 11.

B. The BOCs' Impairment Standard For High Capacity Loops Also Fails To Identify Where Alternative High Capacity Loops Exist

As in the case of high capacity transport, none of the BOCs proposes an impairment standard that accurately measures the availability of alternative high capacity loops for competitive carriers. BellSouth and Verizon again endorse a finding of non-impairment for all central offices with 5,000 or more business lines; SBC also proposes a similar bright-line, wire center-based test for impairment, except it believes the appropriate threshold is 15,000 business lines (for DS1 level loops only).⁹⁷ Qwest simply proposes no impairment in any wire center where special access alternatives are available. For many of the same reasons as are discussed above, the standards proposed by the BOCs and the data submitted in support of them simply do not provide the Commission with the primary information it needs to make a determination of non-impairment –whether CLECs have reasonable access to wholesale high capacity loops.

There is no doubt that the RBOC tests overstate the number of buildings where competitive facilities have been deployed. Indeed, a study by Economics and Technology, Inc. (“ETI Study”) reveals that the BOCs are the exclusive provider of DS1 and DS3 services to roughly 98 percent of all buildings.⁹⁸ Similarly, an analysis of the state impairment records conducted by QSI Consulting reveals that only 130 building in a total of 12 states, including highly populated states like New York, California, Texas, Florida and Illinois, have two or more

⁹⁷ SBC Comments at 85.

⁹⁸ *Competition is Access Markets; Reality Or Illusion*, Economics and Technology, Inc., pages IV, 11, 16 (Aug. 2004) (“ETI Study”).

CLECs that have self-deployed DS3 loops and no building has two or more CLECs that have self-deployed DS1 loops.⁹⁹

This evidence is supported by the Commission's own data. As reported in the FCC's Local Competition reports for the period ended December 31, 2003, CLEC-owned facilities are used to connect to end users 23 percent of the time. By contrast, UNEs are used 61 percent of the time.¹⁰⁰ Significantly, when cable television loops – which are used almost exclusively for DS0 level residential customers – are removed from this data, competitive LECs supply their own loops for 3.6 million lines, just 1.98 percent of the total switched access lines in the country.¹⁰¹

Notably, the *Huber Report* substantially overstates the number of CLEC-provided end user lines. The *Huber Report* claims that CLECs provide 88 million voice grade equivalents (“VGEs”) to end user customers, more high capacity lines (says Huber) than the RBOCs themselves.¹⁰² Official FCC statistics demonstrably disprove this assertion. According to the FCC's Local Competition data, CLECs provided approximately 25 million non-resale lines.¹⁰³ As discussed above CLEC-owned facilities (excluding cable television loops) account for nearly 3.6 million of those lines, far below the 88 million VGE number that the *Huber Report* cites. FCC-reported statistics, which are governed by rigorous reporting definitions, provide a more reliable basis for any comparison of CLEC and RBOC lines. To illustrate, consider the following examples of the disparity between FCC statistics and the RBOC VGE data:

⁹⁹ QSI Study at 11-12.

¹⁰⁰ Local Telephone Competition, Status as of December 31, 2003, Tables 3 and Chart 3.

¹⁰¹ See Initial Comments at 103.

¹⁰² *Huber Report*, page I-9.

¹⁰³ Local Telephone Competition, Status as of December 31, 2003, Table 3.

Company	VGEs Reported by The <i>Huber Report</i>	VGEs Reported by Carriers on FCC Form 477
XO	16.7 million	1.1 million
Allegiance	1.4 million	0.5 million
Xspedius	3.4 million	1.7 million
KMC	6.7 million	0.3 million
Total of CLECs cited above	28.2 million	3.6 million

Thus, the *Huber Report* data are overstated by nearly 10 times (28 million versus 3 million) for the CLECs discussed above. The disparity between the VGE numbers cited by the *Huber Report* and the VGE data in the FCC 477 forms may be explained in large part by the *Huber Report*'s inclusion of VGE information for CLECs' provision of voice and data services to large carrier customers.

Further, the declarations submitted by members of the Loop and Transport Coalition debunk the myth perpetuated by the BOCs that CLEC fiber networks are now so extensive that they readily can be – and routinely are – extended as necessary to service new customers.¹⁰⁴ Some small carriers, such as SNiP LiNK, do not have networks that extend to end users and believe it is not likely that they will ever be able to deploy loops.¹⁰⁵ Other carriers, like XO, KMC and Xspedius, have deployed one or more fiber rings in selected metropolitan areas, but have not been able to deploy adequate facilities to reach most its customers without access to

¹⁰⁴ SBC Comments at 85.

¹⁰⁵ Abate Decl. ¶ 9.

unbundled network elements from the ILECs. These carriers report that the cost of constructing building laterals, even for a relatively short distance, are prohibitive.

Without question, the barriers that prevent the self-deployment of high capacity loops are high capital costs and operational difficulties. Typically, in order for a competitive carrier to construct a fiber lateral, it must first (1) negotiate a building access agreement with the building owner, (2) obtain one or more municipal franchises, depending upon the route of the lateral, and (3) obtain public and private right-of-way licenses for the route of the lateral.¹⁰⁶ Coupled with the extraordinary costs associated with connecting office buildings to the carrier's network, which XO estimates at approximately \$220,000 per building,¹⁰⁷ carriers rarely have the capital or customer demand to justify self-deploying the laterals needed to serve end users. As noted by KMC, "[i]t is difficult to balance the goals of efficient capital deployment and the timing needs of customers given the additional time and economic constraints associated with building fiber laterals."¹⁰⁸ Indeed, ATI, which previously has deployed facilities to only 17 buildings, reports that it has not constructed a new lateral in over three years and would not attempt a lateral in this environment.¹⁰⁹ XO, has connected fiber rings to fewer than one percent of the potential building in its markets and has found alternative wholesale loops available in

¹⁰⁶ Duke Decl. ¶ 8.

¹⁰⁷ Tirado Decl. ¶ 17.

¹⁰⁸ Duke Decl. ¶ 8.

¹⁰⁹ Wigger Decl. ¶ 18.

fewer than five percent of the buildings it seeks to service.¹¹⁰ Xspedius, too, has connected to only 600 buildings in 20 states.¹¹¹

Finally, the RBOCs own data support the proposition that loop deployment is very limited. The *Huber Report* states that CLECs have deployed fiber facilities to serve fewer than 32,000 buildings nationwide.¹¹² This number is significantly overstated, for it does not report the capacity of the service provided to such buildings, and the data count as multiple buildings when two or more CLECs have deployed facilities to the same building. In addition, in many state proceedings, the ILECs listed as “customer premises” containing competitive fiber those buildings, such as 60 Hudson Street and 1 Wilshire Blvd., that house well-known carrier hotels. Thus, the number of end user locations that have access to competitive fiber loops likely is significantly smaller than the 32,000 buildings claimed. Nevertheless, even accepting the aggregate number of buildings reported in the *Huber Report*, CLECs have deployed fiber to fewer than five percent of the nation’s commercial office buildings.¹¹³ Thus, any standard that finds non-impairment for an entire wire center (regardless of size) would generate a significant number of false negative impairment determinations.

IV. THE FACT THAT CLECS USE SOME SPECIAL ACCESS FACILITIES DOES NOT SHOW LACK OF IMPAIRMENT, BUT RATHER HIGHLIGHTS RBOC VIOLATIONS OF SECTION 251

As the Coalition explained in its initial comments, CLECs use Special Access loops and transport predominantly for lack of other options at the time of ordering, not because

¹¹⁰ Tirado Decl. ¶ 16.

¹¹¹ See Declaration of James C. Falvey, Senior Vice President, Regulatory Affairs, Xspedius Communications, LLC, ¶ 20 (Oct. 1, 2004) (“Falvey Decl.”).

¹¹² *Huber Report*, p. III-4.

¹¹³ Compare *Huber Report*, p. III-4 with *Triennial Review Order*, fn. 856.

they expect to compete effectively relying upon them.¹¹⁴ A simple line count of Special Access usage masks the underlying causes of those levels — typically stemming from the RBOCs' prior, long-standing refusals to comply with the Commission's unbundling rules. In other words, the RBOCs frequently have engendered the very circumstances that compelled CLECs to use Special Access, the frequency of which they now cite as "evidence" that CLECs voluntarily chose Special Access over UNEs and that there would be no impairment if unbundling is no longer required. The Coalition urges the Commission not to reward the RBOCs for their conduct. In any event, even an analysis of the evidence the RBOCs offered reveals that Special Access is not so prevalently used, and that it is in no way a reasonable, economic substitute for cost-based unbundling, such that the presence of Special Access guarantees non-impairment.

A. RBOC Special Access Usage Figures Are Overstated

In their comments, the RBOCs have reported numbers purporting to show that CLECs rely on Special Access facilities to a large extent. Analysis has revealed that these tallies are in a significant number of instances unsubstantiated, in error, or simply meaningless, placing in doubt the entire "studies" from which they were derived.

1. Verizon — Exhibit 10A to Verses/Lataille/Jordan/Reney Declaration

Verizon's Special Access numbers are extremely flawed in at least two ways.

First, they are the product of an apparent mathematical error. Exhibit 10A to the Verses/Lataille/Jordan/Reney Declaration records and compares CLEC use of DS1 UNEs versus DS1 Special Access, and derives that only 8.8 percent of DS1s used by CLECs are UNEs. Yet the chart on which this assertion is based contains a clear error. Twice, the exhibit lists as

¹¹⁴ Initial Comments at 55-60.

“Grand Total Verizon” a number of circuits that purports to be the total number of UNE DS1s ordered by carriers. This figure is used by Verizon as a starting point calculation, before it subtracts usage by the “big 3” carriers or by wireless providers, respectively. In the chart, Verizon inexplicably lowers the “Grand Total Verizon” and reports DS1 usage through a substantially lower number in its final calculation. The table below,¹¹⁵ which reflects calculations produced by Verizon in Exhibit 10A, demonstrates the error:

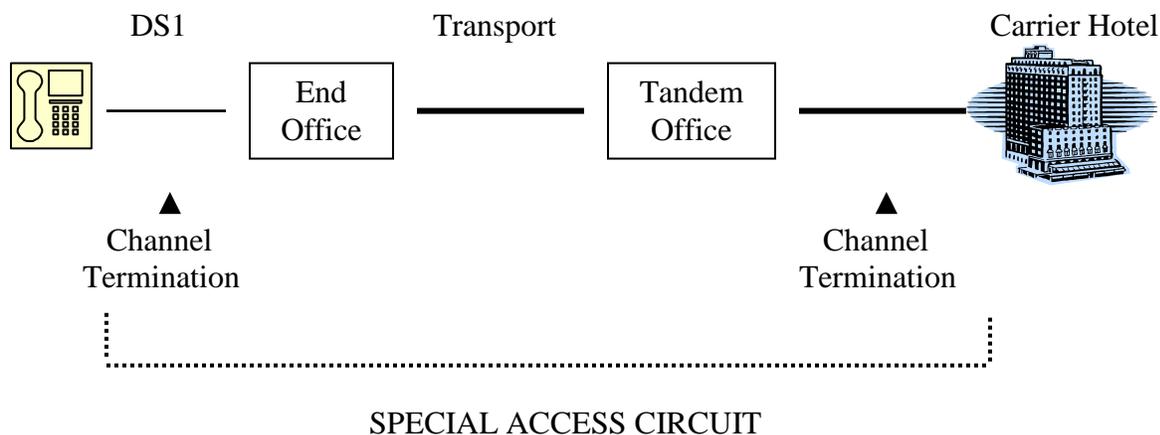
	DS1 Special Access	DS1 UNE Loops and EELs	% DS1s that are UNEs
Grand Total Verizon (line 3 of Exhibit 10A)			XX%
Grand Total Verizon (line 3 of Exhibit 10A)			XX%
Total Less “Big 3” and Wireless Carriers			8.8% (Exh. 10A)
With correct numbers			13.13%

Verizon simply switched the total number of DS1 UNEs to a much lower number, which, ignoring other problems with this data as discussed below (see Section IV.B) resulted in DS1 UNEs being undercounted by almost half. The effect of this error is to reduce the percentage of circuits ordered as UNEs reported by Verizon, again almost by half.

Separate from this gross error, Exhibit 10A is also suspect in its counting methodology. Verizon counted DS1 Special Access circuits by “channel terminations,” which it

¹¹⁵ This table has been redacted, because Verizon has requested confidential treatment of Exhibit 10A. The final percentage figure appearing in this table are quoted in the public version of the Verses/Lataille/Jordan/Reney Declaration. The Coalition has populated this table, and the one following, in a separate Attachment 1 filed under seal. The Coalition has also provided, for comparison, a copy of Exhibit 10A, which does not list any CLEC proprietary information, under seal as Attachment 2.

explains “include both end user and POP [channel terminations].” This methodology results in double-counting of circuits, especially where the CLEC is not collocated and thus has to terminate the DS1 both to the Verizon end office and again at the end of the contiguous transport facility. In such instances, the configuration is as follows:



This diagram illustrates the fact that DS1 special access circuits provided to non-collocated CLECs have two channel terminations. By counting the channel terminations of Special Access circuits, and not simply the number of DS1s invoiced to CLECs, Verizon may have as much as doubled the number of reported DS1 Special Access circuits leased to CLECs in its territory. In that event, Verizon’s figures should look like this:

	DS1 Special Access	DS1 UNE Loops and EELs	% DS1s that are UNEs
Grand Total Verizon			XX%
Total Less “Big 3” and Wireless Carriers			23.2%

In all, assuming its underlying numbers of circuits and UNEs are correct (which the Coalition contests, *see above* Section IV.B), Verizon appears to have underreported DS1

UNEs by more than 264 percent (8.8 percent compared to 23.2 percent). Accordingly, its argument that “special access enables competing carriers to compete”¹¹⁶ is significantly overstated. It is not clear, based on the information submitted, the extent to which other RBOCs committed similar errors.¹¹⁷

2. Coalition Members Rely On Special Access For A Small Proportion Of Transport And Loop Facilities.

The RBOC Special Access figures are also suspect simply in comparison to the numbers that Coalition members have reported. According to the *Huber Report*, “more than 90 percent of the high-capacity loops that carriers purchase ... are sold as special access as opposed to UNEs.”¹¹⁸ Again, as an initial matter, this reference to “carriers” rather than “CLECs” is telling. Are wireless carriers included in this figure? Are interexchange carriers (“IXCs”) included? If so, wireless or IXC providers should not be considered in an analysis of whether wireline CLECs are impaired. The fact that Verizon does not simply use the acronym “CLEC” is a strong indication that many of the “carriers” using Special Access are not those at issue in this proceeding.

It is equally significant that this statement has no supporting data at all. But as a substantive matter, this number simply does not represent the experience of any of the 10

¹¹⁶ Verizon Comments at 57.

¹¹⁷ The Coalition notes that obtaining Confidential Information in this docket took as much as 10 days to accomplish, and that even public comments were obtained only by repeated calls to counsel. Several RBOCs filed their comments only on paper, and are, thus, the comments were not immediately available on the FCC ECFS system. The Coalition was not able to analyze all of the RBOC data in the short time period available for reply comments, and its members will continue to analyze the information the RBOCs provide in support of their reported numbers.

¹¹⁸ *Huber Report*, p. I-1.

members of the Loop and Transport Coalition, which include some of the more competitive CLECs operating in the country today.

Talk America reports that “less than 10% of [its] DS3 circuits have been purchased as Special Access.”¹¹⁹ As to Advanced TelCom, only 5 percent of its DS1 circuits are Special Access.¹²⁰ XO orders only 23 percent of its DS1 circuits as Special Access.¹²¹ Xspedius has the highest percentage: 31 percent of its DS1 circuits are Special Access, but that includes its facilities in Tampa, Florida, where UNEs are priced virtually the same as Special Access but much more trouble to obtain.¹²² Without the Tampa anomaly, Xspedius has only 23 percent of its DS1s as Special Access.¹²³ For KMC, Special Access represents only 20 percent of its DS1s nationwide, and only 17 percent when Florida and Minnesota are not considered.¹²⁴ Generally, these numbers do not fully reflect the extent to which CLEC Special Access circuits carry non-qualifying services that could *not* have been ordered as UNEs. If these are excluded, as they should be, the relative use of Special Access versus UNEs stated above can be expected to drop even further.

It is therefore apparent that Coalition members as a matter of fact rely on UNEs extensively, and the RBOC numbers regarding Special Access usage are seriously overstated relative to this large swath of the CLEC community. Even the numbers of Special Access

¹¹⁹ Brasselle Decl. ¶ 15 (Talk America).

¹²⁰ Wigger Decl. ¶ 52 (Advanced TelCom).

¹²¹ Tirado Decl. ¶ 44 (XO).

¹²² Falvey Decl. ¶ 36 (Xspedius).

¹²³ Falvey Decl. ¶ 36 (Xspedius).

¹²⁴ Supplemental Declaration of Mike Duke, Director of Government Affairs, KMC Telecom Holdings, Inc., ¶ 9 and Attachment (Oct. 19, 2004).

circuits used by CLECs should not be interpreted as evidence that CLECs are able to absorb the much higher Special Access prices to any degree. As discussed in Section IV.B below, CLECs use Special Access to the extent that they do because of RBOC intransigence in provisioning, or converting facilities to, UNEs, aiming to survive until the situation can be rectified.

B. The Degree to Which CLECs Have Resorted to Special Access Does Not Demonstrate Lack of Impairment, But Is a Testament to the RBOCs' Success in Denying UNE Access

In its initial comments, the Coalition provided six factors unrelated to impairment that have forced CLECs to use Special Access services in some circumstances.¹²⁵ Even to the limited extent that the Coalition believes the RBOCs' numbers may be sound (*see* Section IV.A), a snapshot showing CLEC use of Special Access today would be misleading without consideration of these factors. A few of those factors are discussed further below.

1. The "No Facilities" Problem

Beginning in 2000, RBOCs responded to CLEC orders for UNEs — particularly EELs — by sending reject notices indicating "no facilities available." These CLEC orders were, however, subsequently provisioned — after a new order and payment of substantially higher rates — as Special Access. The CLECs were "willing" to place these revised orders, because the option of losing the customer entirely was unthinkable, and the opportunity for later conversion to UNEs seemed plausible if not an entitlement.

¹²⁵ Loop and Transport CLEC Coalition Comments at 55-60. The Coalition explained six factors that militate against finding non-impairment due to Special Access usage: (1) "no facilities orders"; (2) ILEC commingling prohibitions; (3) ILEC refusals to combine elements; (4) "non-qualifying service" restrictions; (5) instances where UNE rates are close to Special Access levels; and (6) where circuits are "locked in" under long-term contracts. *Id.*

The reason that Special Access facilities become available where unbundled facilities allegedly were not present was consistently suspect. The RBOCs typically explain that new facilities had to be constructed, which required converting the order to Special Access.¹²⁶ Yet as Xspedius explains as to its own “no facilities” notices, “when ordered as Special Access, the same circuits are provisioned with alacrity.”¹²⁷ The provisioning interval does not seem to reflect the amount of time necessary to install new circuits in the ground. It is reasonable to suspect that the facilities were there all along — possibly as fiber that was installed but not “lit” — but were reserved for provisioning as Special Access in order to raise CLEC costs of service and delay their entry.

The problem continues today. Broadview reports that since January 1, 2004, when it began tracking “no facilities” orders from Verizon, through August 9, 2004, 161 of 341 orders — or 47.2 percent — have been denied for “no facilities.”¹²⁸ In order to reach its customers, Broadview agreed to take Special Access circuits for 97 facilities, which means that 28.4 percent of its high-capacity orders were provisioned as Special Access just this year.¹²⁹ Previously, when these “no facilities” situations occurred, Verizon permitted Broadview to convert the facilities to UNEs after 90 days of service. Under its new policy, however, Verizon requires a complicated “disconnect” and “reconnect” order before it will convert facilities, which

¹²⁶ See, e.g., *DS1 and DS3 Unbundled Network Elements Policy*, Verizon Carrier Notification Letter (July 24, 2001) (“While these tariffs also state that Verizon is not obligated to provide service where facilities are not available, Verizon generally will undertake to construct the facilities required to provide service at tariffed rates[.]”), available at < http://www22.verizon.com/wholesale/clecsupport/content/1,,east-wholesale-resources-clec_01-07_24,00.html>.

¹²⁷ Falvey Decl. ¶ 38 (Xspedius).

¹²⁸ Supplemental Declaration of Rebecca H. Sommi, Vice President – Operations Support, Broadview Networks, Inc., ¶ 3 (Oct. 19, 2004).

¹²⁹ Sommi Suppl. Decl. (Broadview). See also Sommi Decl. ¶ 15 (Broadview).

both incurs additional charges and endangers customer service. The additional ordering charges are still not known.¹³⁰

Eschelon has experienced a significant amount of “no facilities” orders as well. In Qwest territory, Qwest had 10 percent of its July 2004 DS-1 orders rejected for “lack of facilities.”¹³¹ In August 2004, that number grew to 14.5 percent¹³² of DS-1 orders. In such situations, Eschelon faces a delay of 60 to 90 days just to get a new service-ready date and obtain a price quote for obtaining alternate facilities.¹³³ Yet because these alternate facilities are at much higher Special Access rates, Eschelon generally cancels the order altogether.¹³⁴ The fact that Eschelon has twice found “no facilities” rejects to be in error renders the process extremely suspect.¹³⁵

Several CLECs, including XO, Focal, and AT&T, have questioned the “no facilities” phenomenon before state agencies, such as the New York Public Service Commission,¹³⁶ as well as during the *Triennial Review* proceeding.¹³⁷ In the *TRO*, the

¹³⁰ Sommi Supplemental Declaration ¶ 6 (Broadview).

¹³¹ Declaration of Laurie A. Larson, Senior Director, Service Delivery, Eschelon Telecom, Inc., ¶ 5 (Oct. 19, 2004).

¹³² Larson Decl. ¶ 6.

¹³³ Larson Decl. ¶ 11.

¹³⁴ Larson Decl. ¶ 13.

¹³⁵ Larson Decl. ¶¶ 14-16.

¹³⁶ Case 02-C-1233, Proceeding on Motion of the Commission to Examine the Provision of High-Capacity Facilities by Verizon New York Inc., XO Cross Motion (Oct. 21, 2002); Allegiance, AT&T and XO’s Opposition to Verizon’s Motion to Stay Proceeding (Oct. 21, 2002).

¹³⁷ CC Docket No. 01-338, Letter from Patrick J. Donovan to William Maher, Chief, Wireline Competition Bureau (Nov. 21, 2002) (on behalf of XO Communications); CC Docket No. 96-98, Letter from Andrew D. Lipman to Dorothy Attwood, Chief, Common Carrier Bureau (Sept. 28, 2001) (on behalf of Adelphia Business Solutions, Inc.,

Continued on next page

Commission discussed the “no facilities” problem in the context of “routine network modifications,” and held that ILECs must “activate loops that are not currently activated,” rather than simply issue a “no facilities” reject.¹³⁸

The Coalition urges the Commission to consider the “no facilities” issue in the broader context of responding to the *USTA II* court’s inquiries. The Commission should recognize that many Special Access circuits in use today are the result of “no facilities” rejects, and could well have been – and should have been – provisioned as UNEs. As Xspedius explains, it is not possible or practical to file complaints on every order reject to uncover the true genesis of “no facilities” notices.¹³⁹ Coupled with the ILECs’ refusal to convert special access facilities, this latter-day decision cannot undo the extent to which the numbers presented by the RBOCs are skewed.

2. Delayed And Rejected Conversions

Under the *Supplemental Order*, which had governed conversions since 1999 (and continues to govern today, despite the *Triennial Review Order*’s new architectural restrictions), the Commission ordered ILECs to provide enhanced extended links (“EELs”) to CLECs.¹⁴⁰ This requirement included the obligation to convert loop/transport combinations, then provided as

Broadslate Networks, Inc., Focal Communications Corp., Madison River Communications, LLC, Mpower Communications Corp., and Network Plus, Inc.).

¹³⁸ *TRO* ¶ 633.

¹³⁹ Falvey Decl. ¶ 38 (Xspedius).

¹⁴⁰ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 99-370, 15 FCC Rcd. 1760, 1762 ¶¶ 4-6 (1999) (“*Supplemental Order*”).

Special Access, to a UNE combination at TELRIC rates for qualifying services.¹⁴¹ Circuits that could be certified as in use for local service were eligible immediately for conversion.¹⁴²

The ILECs were, and have been, characteristically dilatory in honoring conversion requests. Xspedius suffers significant delays — as did e.spire, whose assets Xspedius purchased out of bankruptcy — in the form of “endless negotiations and foot dragging, delayed conversion requests, [and] requirements for circuits to be disconnected and reconnected.”¹⁴³ Xspedius also faces “threats from the ILECs to impose exorbitant conversion charges.”¹⁴⁴ XO also “continues to face” high conversion charges, and “is currently embroiled in a dispute with BellSouth” whereby every conversion of a Special Access DS1 is incurring a “conversion charge” almost equal to the Special Access non-recurring charge.¹⁴⁵ The net result is that the supposedly unbundled EEL will cost as much as Special Access. XO is presently contesting the conversion charge, and thus remains forced to use Special Access DS1s against its will, and greatly increasing its costs of service.

¹⁴¹ *Id.* at 1760 ¶ 2.

¹⁴² Several of the RBOCs contend that *USTA II* vacated the Commission’s EEL conversion rules. SBC Comments at 92-94; BellSouth Comments at 37-38; Qwest Comments at 71-76. The *USTA II* Court did not hold that conversions are unlawful. Rather, in light of its remand to the Commission with directions to consider the relevance of the availability of ILEC tariffed Special Access to an impairment analysis for high-capacity DS1s and DS3s, see Loop and Transport Initial Comments at 38-40, it is plain that the Court did not foreclose the Commission from requiring conversions from Special Access to UNEs. At worst, the issue was remanded to the Commission for further consideration in light of the extent to which the Commission finds CLECs are impaired without access to high capacity loop and transport UNEs. To the extent that the Commission concludes that entry without UNEs is “uneconomic,” a finding which the Coalition has advocated in these and its Initial Comments, and given the ILECs’ campaign to compel CLECs to order Special Access to retain any hope to compete, rather than endure ILEC-erected obstacles to order UNEs, EEL conversions must also be required.

¹⁴³ Falvey Decl. ¶ 37 (Xspedius). *See also* Tirado Decl. ¶ 45 (XO).

¹⁴⁴ Falvey Decl. ¶ 37 (Xspedius).

¹⁴⁵ Tirado Decl. ¶ 47(XO).

In a perverse and self-serving bit of advocacy, Verizon argues that the fact that CLECs in its territory have been denied conversions for so long is further demonstration that they are not impaired.¹⁴⁶ It crows that “[o]ne of Verizon’s largest purchasers of special access services has waited an average of nearly two years, and in some cases more than seven years, to convert its special access circuits to UNEs.”¹⁴⁷ This outrageous delay of its own making, Verizon nonetheless argues, demonstrates that the CLEC did not need UNEs in the first instance. In other words, Verizon so efficiently violated federal law that the Commission should simply abolish that law.

The Commission should reject this argument and instead focus on the significance of denied or delayed conversions to the question of CLEC impairment: CLECs are subsisting on Special Access not by choice, and not as part of their intended business plan, but rather as a result of intransigent ILEC conduct. CLECs are now buckling under tremendous costs of service, and stymied in their ability to reach new markets. The fact that some CLECs are not bankrupt does not demonstrate that Special Access is a viable method of entry, or that cost-based unbundling is a luxury.

3. The “Check The Box” Factor

There is a corollary to the “no facilities” problem, in that it was engendered by the prevalence of UNE order rejects in Verizon’s territory, which also leads to an “overstatement” in “voluntary” CLEC Special Access usage. Specifically, the Coalition believes that Verizon’s Special Access usage figures may be influenced by a new ordering policy that the RBOC

¹⁴⁶ Verizon Comments at 77. *See also* Qwest Comments at 72; SBC Comments at 93; BellSouth Comments at 37.

¹⁴⁷ Verizon Comments at 77.

adopted for all UNE “HiCap Services” (DS1 or DS3 loops, transport, or EELs) in August 2003.¹⁴⁸ Under that policy, Verizon offers CLECs in the former Bell Atlantic region the option of automatically requesting a UNE “HiCap” facility as Special Access if the order comes up “no facilities” when ordered as a UNE. In other words, CLECs could “check the box” if they prefer to submit only one order for the facility, rather than experience the delay and hassle of having to re-submit the order as Special Access if the UNE order is rejected. The option is available only prior to Verizon’s setting a FOC date for the facility.

The process is automatic. If a UNE order comes up “no facilities” within Verizon’s system, it automatically becomes a Special Access order and is provisioned as such. Although this process can save carriers weeks in provisioning intervals, leaving aside the validity of the “no facilities” categorization, it may well result in inflated Special Access numbers. It gives Verizon the right to provision any DS1 or DS3, or EEL, as a Special Access circuit, no questions asked. Accordingly, it is possible that some of the DS1 and DS3 loops that Verizon reports as Special Access could or should have been UNEs. For any CLEC that has lived through a “no facilities” process while trying to secure a prospective customer, however, that trade-off may be necessary. The business need to ensure that they do not lose a customer while waiting for Verizon to provision what section 251 requires may justify foregoing one’s statutory and regulatory rights, at least temporarily.

¹⁴⁸ See Verizon Carrier Notification Letter (Aug. 13, 2004), available at <http://www22.verizon.com/wholesale/library/local/industryletters/1,,east-wholesale-resources-2003_industry_letters-clec-08_12,00.html>.

In this context, Verizon's estimates of DS1s and DS3s "purchased as special access service" are markedly less significant.¹⁴⁹ Accordingly, the Commission should not abandon its finding of nationwide DS1 and DS3 impairment based on this RBOC "evidence."

4. The Significance of "Qualifying Services"

Another factor underlying Special Access use is the "qualifying service" distinction that the *Triennial Review Order* adopted, or expanded. Under the *TRO*, UNEs are available only for "qualifying services."¹⁵⁰ These include "local exchange service, such as POTS, and access services, such as xDSL and high-capacity circuits,"¹⁵¹ or those services "offered by requesting carriers in competition with those telecommunications services that have traditionally been within the exclusive or primary domain of incumbent LECs."¹⁵² A CLEC may, however, also provide non-qualifying service over a UNE,¹⁵³ so long as that UNE remains used in qualifying services.¹⁵⁴

The "qualifying service" restriction is more narrow for high-capacity EELs.¹⁵⁵ High-capacity EELs must be used for "a 'significant amount of local exchange services.'"¹⁵⁶ This restriction has survived appeal.¹⁵⁷ CLECs thus cannot use unbundled EELs unless they can certify in several ways that the facility will be used for local service. Accordingly, they must

¹⁴⁹ See Verizon Comments at 59.

¹⁵⁰ See generally *TRO* ¶¶ 135-153.

¹⁵¹ *TRO* ¶ 135.

¹⁵² *TRO* ¶ 140.

¹⁵³ Non-qualifying services include international and information services. See *TRO* ¶ 146.

¹⁵⁴ *TRO* ¶ 143.

¹⁵⁵ See generally *TRO* ¶¶ 595-619.

¹⁵⁶ *TRO* ¶ 590 (quoting *Supplemental Order*, 15 FCC Rcd. at 1760 ¶ 2).

¹⁵⁷ See *CompTel v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).

sometimes obtain these element combinations as Special Access, and when they do such circuits should not be counted as part of the base upon which relative UNE use is measured.

That is not the case, however, for all Special Access facilities. Many of them were indeed for “qualifying services,” but these circuits, in the circumstances that were presented to CLECs by the RBOCs, could only be obtained, or maintained, as Special Access. Thus, of the Special Access numbers that the RBOCs report, only some legitimately are Special Access under the rules, and many are likely facilities that should have been provisioned as UNEs, and would have been but for ILEC intransigence. This factor again renders the RBOCs’ figures suspect, or at the least inconclusive, as evidence of CLEC non-impairment.

C. The Significance of Special Access Discounts Is Grossly Overstated

The price increase imposed by Special Access is significant. The Coalition has compiled a short study comparing UNE rates versus Special Access, and the comparative difference.

	UNE	Special Access	% Increase
Verizon-New York DS3 Transport ¹⁵⁸	\$711.09 \$15.21 per mile \$801.75 channel termination	\$825.00 \$155.03 per mile \$2425.59 channel termination	
15-mile route	\$1740.99 total/month	\$5575.95 total/month	320%
SBC DS3 Transport ¹⁵⁹	\$114.00 \$10 per mile \$107.00 channel termination	\$2,250 \$92.00 per mile \$620.00 channel termination	

¹⁵⁸ Sommi Decl. ¶ 14 (Broadview).

¹⁵⁹ Brasselle Decl., Attachment A (Talk America) (UNE DS3 transport rates for Zone 1; Special Access rates under 1-year contract).

	UNE	Special Access	% Increase
Per Mile	\$341.00 total/month	\$4,410.00 total/month	12,933%
BellSouth-Florida DS1 Loops	\$68.86 per month	\$132.25	192%
BellSouth-Florida DS3 Loops ¹⁶⁰	\$386.88 per month	\$2300.00 per month	594%

In an attempt to obfuscate the anticompetitive pricing that they seek to create, the RBOCs assert, in the most general terms, that their term and volume discounts for Special Access are meaningful and widely used. Verizon, for example, states that it “offers significant discounts” off special access “base rates,” and that “competing carriers are availing themselves of these discounted rates.”¹⁶¹ Note that Verizon, neither in its comments nor its supporting declaration, indicates the degree to which CLECs “avail themselves” of the discounts, either through absolute numbers or on a percentage basis.¹⁶² Similarly, SBC states that it has “a variety of volume and term plans,” including the “Managed Value Plan.”¹⁶³ Like Verizon, SBC does not indicate the number or percentage of CLECs that are eligible for these plans.

Review of RBOC tariffs reveals that Special Access discounts generally are modest and available for the most part only to very large carriers that can make large revenue commitments. The following table outlines the eligibility requirements for the discounts mentioned in the RBOCs’ comments.

¹⁶⁰ Tirado Decl., Attachment B (XO) (UNE DS3 rate for Zone 1; DS3 Special Access on month-to-month contract).

¹⁶¹ Verizon Comments at 62.

¹⁶² See Verizon Comments at 62; Declaration of Verses *et al.* ¶ 60.

¹⁶³ SBC Comments at 68.

RBOC Offer	Minimum Term Commitment	Revenue Commitment	Discount %
Ameritech Managed Value Plan	5 Years	\$10 million, with 95% Access Service Ratio each month ¹⁶⁴	9% Year 1 11% Year 2 12% Year 3 13% Year 4 14% Year 5
BellSouth Premium Service Incentive Plan ¹⁶⁵	3 Years	Year 1 \$0 – 4.0 mil	22.25%
		Year 2 \$0 – 4.0 mil	22.50%
		Year 3 \$0 – 4.0 mil	23.00%
BellSouth Transport Savings Plan	5 Years	Year 1 >\$600 mil	5.5%
		Year 2 >\$600 mil	9.0%
		Year 3 >\$600 mil	12.5%
Pacific Bell Managed Value Plan	5 Years	\$10 million, with 95% Access Service Ratio each month	9% Year 1 11% Year 2 12% Year 3 13% Year 4 14% Year 5
Qwest Contract Tariff Case No. 03-004	1 Year	\$30.6-\$40.5 mil Minimum DS1s: 4500 Minimum DS3s: 70	10%-25%
SNET Pricing Flexibility Contract Offer No. 1 ¹⁶⁶	Available 11/18/03 to 1/18/04 // Expires 12/31/05, not renewable	4 x [carrier's previous 3 months of recurring charges]	50%
SWBT Managed Value Plan	5 Years	\$10 million, with 95% Access Service Ratio	9% Year 1 11% Year 2

¹⁶⁴ According to SBC witness Parley Casto, the 95 percent Access Ratio requires that the CLEC retain 95 percent of its leased facilities as Special Access. Casto Decl. ¶ 22. If a CLEC tries to use a greater proportion of UNEs, the MVP is no longer available.

¹⁶⁵ The Premium Service Incentive Plan and the Transport Savings Plan are not available for new contracts as of June 24, 2004.

¹⁶⁶ Only available to carriers that also purchase service under (1) the Managed Value Plans from Ameritech, SWBT or PacBell, and (2) Contract Offer No. 1 from Ameritech, SWBT or PacBell. In addition, at least 4 percent of the carrier's revenue commitment must represent capacity converted from another carrier to SNET.

RBOC Offer	Minimum Term Commitment	Revenue Commitment	Discount %
		each month	12% Year 3 13% Year 4 14% Year 5
Verizon Commitment Discount Plan	2 to 7 Years	DS1 "High Capacity"	No Discount Available
	3 or 5 Years	DS3 "High Capacity" (must be all existing DS3s in use by the CLEC in VZ territory)	3 Years 10% 5 Years 35%

From this table it is clear that the tens to hundreds of millions of dollars that must be spent to get a discount will preclude many CLECs from using volume and term discounts. Many of the volume commitments exceed the total gross revenues of small CLECs. The RBOCs' tariffed discounts thus will fail to ensure that CLECs will not suffer price squeezes if forced to use Special Access. Indeed, the discounts will have little effect, as most are in the 10 percent to 15 percent range. At that level, the discounts will do little to soften the sharp cost-of-service increases that forced Special Access use will impose on CLECs. Further, where Special Access rates exceed RBOC costs by an average of 40 percent or more,¹⁶⁷ the vast majority of discounted rates available to CLECs (outside of Connecticut) will still exceed costs by 20 percent or more. In short, the importance that RBOCs place on their volume and term Special Access discounts is unwarranted, and should not be given much credence, if any, in the Commission's analysis of the impact of Special Access on impairment.

¹⁶⁷ See generally ETI Study. ETI demonstrates that RBOC rates of return on Special Access have reached an average of 43.7, up as much as 69.1 percent from the rates of return the RBOCs earned prior to the 1999 *Price Flexibility Order*. *Id.* at 28.

The RBOCs claim that UNEs are simply a means by which CLECs “reduce their costs and earn higher profits,”¹⁶⁸ as if the margins CLECs already enjoy by using Special Access are quite comfortable. Yet the difference in the cost of service between Special Access and UNEs is not one of degree — it is the difference between a price squeeze and a reasonable return. CLECs would be impaired if forced to use only Special Access, especially under rates that are ever-increasing now that the RBOCs’ have obtained pricing flexibility.¹⁶⁹ Indeed, CLECs are already impaired by the degree to which they must use Special Access, which is clear from the empirical pricing data provided herein. This situation would dramatically worsen if high-capacity loops and transport were excluded from UNEs entirely.

The RBOCs’ discount plans, while not meaningful in terms of their cost advantages, are significant in one key respect: they further demonstrate why the RBOCs’ Special Access figures are suspect. That is, CLECs may have accepted circuits as Special Access — perhaps for one of the reasons explained in Section IV.B above — and lessened the attendant cost burden by paying under a volume or term plan. They must stay on those plans to avoid termination penalties, and thus cannot convert to UNEs. Thus, to the extent that CLECs qualify for some kind of discount, which is probably much smaller than those detailed above, those discounts become “golden handcuffs” that prevent them from converting to UNEs. This is yet another reason why the Commission should be cautious when examining the RBOCs’ “data” purporting to show that CLECs use Special Access voluntarily and without impairment.

¹⁶⁸ BellSouth Comments at 38. SBC terms UNEs as conferring “a price break — and hence higher profits[.]” SBC Comments at 94.

¹⁶⁹ *See supra* note 167

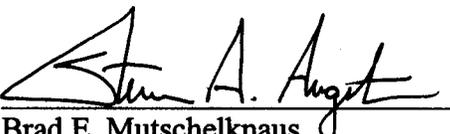
V. CONCLUSION

For the foregoing reasons, the Commission should reject the impairment tests proposed by BellSouth, Qwest, SBC, Verizon and USTA. The Commission should adopt an impairment test consistent with the test proposed by the Coalition in its initial comments, and should adopt additional rules to promote facilities-based local competition as described in the Coalition's initial comments in this proceeding.

Respectfully submitted,

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