

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

**REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES; CBeyond COMMUNICATIONS;
BLACKFOOT COMMUNICATIONS, INC.; U.S. TELEPACIFIC CORP. d/b/a
TELEPACIFIC COMMUNICATIONS; ESCHELON TELECOM, INC.; CHOICE ONE
COMMUNICATIONS INC.; BIDDEFORD INTERNET CORPORATION d/b/a GREAT
WORKS INTERNET; PAC-WEST TELECOMM, INC.; US LEC CORP.; LIGHTSHIP
TELECOM; GLOBALCOM, INC.; MEGAGATE BROADBAND, INC.; BROADRIVER
COMMUNICATION CORPORATION; NETWORK TELEPHONE CORPORATION;
SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC.;
CAVALIER TELEPHONE, LLC; NEW EDGE NETWORK, INC.; CONVERSENT
COMMUNICATIONS, LLC; FDN COMMUNICATIONS; segTEL, INC.**

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October 19, 2004

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The Association for Local Telecommunications Services (“ALTS”), along with the member companies listed above, hereby files its reply comments in response to the Notice of Proposed Rulemaking in the above-referenced proceeding.¹

I. INTRODUCTION AND SUMMARY

The initial comments filed in this proceeding illustrate the fundamental difference between the incumbents’ and competitors’ interpretation of the D.C. Circuit’s decisions in *USTA I* and *II*. The incumbents interpret those decisions as essentially repealing the local competition

¹ See *Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783 (2004).

provisions of the Telecommunications Act of 1996. They argue that some indication that a *single* competitor *might* be able to provide service to some types of customers in certain circumstances means that no unbundling of the UNE is *ever* permitted in such circumstances. Not surprisingly, this approach to the impairment standard results in the elimination of virtually all of the incumbents' unbundling obligations. But neither the statute nor the D.C. Circuit decisions support or permit anything close to this result.

As ALTS explained in its initial comments, the cost-benefit analysis called for by the D.C. Circuit requires only that the Commission determine whether, assuming no significant intermodal competition and based on the available evidence, multiple competitors are able to replicate a piece part of the incumbent network. For the network facilities needed to serve business customers, the focus must be on facilities deployed by non-ILECs because, as the record now exhaustively demonstrates, there are no intermodal competitors in the business markets and the incumbents' non-UNE wholesale offerings are clearly irrelevant to the impairment analysis.

In the case of transmission facilities needed to serve businesses, such as loops and transport that are the focus of these reply comments, (1) the high entry barriers, (2) the wide variation in the level of those entry barriers from one location or interoffice route to another and from one moment in time to another, as well as (3) the high likelihood that much of the facilities deployment since 1996 was inefficient all mandate that the Commission restrict the scope of any inferential findings of non-impairment. The Commission must therefore use an actual competition impairment standard for loops and an impairment standard for transport that hews very closely to actual competition.

The incumbents' proposals for transmission facilities impairment standards must be rejected because they fail these basic requirements. In some cases the incumbents simply assert that no transmission facilities should be unbundled because of their mistaken view that special access is a substitute for those UNEs. Even where they propose specific impairment triggers for transmission facilities, the incumbents ask the Commission to rely on little or no actual competition as the basis for sweeping inferential findings of non-impairment. The most "nuanced" incumbent impairment tests for high-capacity loops and dark fiber loops are based on the characteristics of the wire centers in which loops are located, but those characteristics have nothing at all to do with whether loops have or could be constructed. The incumbents' transport tests are no better. If they focus on the characteristics of an interoffice route at all, they do so, with one exception, by looking at only one end of an interoffice transport route. Only SBC's proposed transport test actually turns on the market characteristics of both ends of an interoffice route, as any transport test must. But SBC's test would produce huge numbers of inaccurate non-impairment findings because it would eliminate unbundling on many routes connecting wire centers in which *no competitor has even established a fiber-based collocation*.

Moreover, with the sole exception of BellSouth, the incumbents propose these tests without providing any information as to which loops or interoffice routes would in fact be eliminated as UNEs if their tests were adopted. Thus, unlike the ALTS's proposals, there is essentially no way for either the Commission or competitors to independently assess the real world consequences of the incumbents' proposals. For this reason as well the Commission should reject the incumbents' proposals.

II. IMPAIRMENT STANDARD

To hear the incumbent LECs tell it, the *USTA I*² and *IP*³ decisions require that the Commission apply the impairment standard so stringently that unbundling obligations either never apply or apply only in the narrowest, most exceptional circumstances. Of course, this approach achieves the incumbents' objective of ending the competition they have so strenuously resisted since 1996. But none of the incumbents' aggressive interpretations of the impairment standard is required under the D.C. Circuit decisions and many of them are foreclosed by those decisions.

In *USTA I*, the D.C. Circuit observed that the availability of UNEs delivers unquestioned *benefits*. This is so because (1) “the more widespread the availability of elements that can be more efficiently provided by the incumbent . . . the quicker competitors will set about to providing the other elements and offering competitive service,” and (2) “access to UNEs may enable a CLEC to enter the market gradually, building a customer base up to the level where its own investment would be profitable.” *USTA I*, 290 F.3d at 424. The court held that, in interpreting and applying the impairment standard, the Commission must balance these benefits with the “costs” of unbundling, namely the potential for foregone innovation and investment and administrative expenses. *See id.* at 424-25. In so doing, the Commission need only make “some effort to make reasonable trade-offs” between the relevant costs and benefits.

In *USTA I* and *USTA II*, the D.C. circuit provided the Commission with guidance as to how to go about making such “reasonable trade-offs.” *First*, the court indicated that the

² *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003) (“*USTA I*”).

³ *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, No. 04-12, 2004 WL 2069543 (Oct. 12, 2004) (“*USTA IP*”).

Commission must account to some degree for differences among “specific markets or market categories.” *Id.* at 426. As explained in *USTA II*, the Commission “is obligated to establish unbundling criteria that are at least aimed at tracking relevant market characteristics and capturing significant variation.” *USTA II*, 359 F.3d at 563. An analysis that accounts for differentials in markets allows the Commission to identify those markets in which it can reasonably conclude that the benefits of advancing competition outweigh the costs of foregone investment. Of course, where no such differentials exist, it follows that national rules are permissible.

Second, the court observed in *USTA I* that “any cognizable competitive ‘impairment’ would necessarily be traceable to some kind of disparity in cost,” and it expressly relied on the Supreme Court’s conclusion that it may be appropriate to unbundle “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.”⁴ In other words, the benefits of unbundling outweigh the costs where there is reason to believe that a particular facility is unusually expensive and difficult to deploy, thus preventing competition from developing.

In seeking to identify “facilities that are very expensive to duplicate,” the D.C. Circuit held that the Commission must distinguish cost differentials that face new entrants in virtually any industry from those that are particularly difficult to overcome and that would render a particular facility “one for which multiple, competitive supply is unsuitable.” *Id.* at 426, 427.

⁴ See *USTA I*, 290 F.3d at 426 (emphasis in original) (quoting *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 510 (2002)).

The D.C. Circuit suggested that the Commission borrow concepts from competition policy analysis (such as the essential facilities doctrine and natural monopoly) to guide its analysis, although the court was careful not to prescribe a particular methodology for doing so. *See id.* at 427.⁵

Third, the court has held that the Commission must explain why the costs of unbundling outweigh the benefits where, as was the case with line sharing, a UNE would be used as an input into a downstream market in which a non-incumbent, facilities-based entity (cable) has the dominant market position, and where incumbent LECs do not have an embedded base of legacy customers. *Id.* at 428-29. In other words, in situations such as these, the Commission must consider whether the benefits in terms of increased competition outweigh the relevant costs in terms of foregone investment and innovation.

Fourth, the D.C. Circuit has held that the Commission must at least explain what relevance, *if any*, the incumbents' non-UNE wholesale offerings have to the impairment analysis. *USTA II*, 359 F.3d at 575-77. This point is of course most importantly relevant to special access. ALTS and other parties explained at length in their initial comments that there is a powerful basis for concluding the availability of special access is *irrelevant* to the impairment analysis. *See, e.g.*, ALTS Comments at 17-34; AT&T Comments at 80-134. This is true even though there are some parties relying on special access as a means of obtaining access to transmission facilities today. This is because, among other reasons, the availability of UNEs is the only

⁵ Before addressing this issue, the court expressly recognized that the “brief passage” in the *AT&T Corp. v. Iowa Utilities Board* decision in which the Supreme Court addressed the impairment standard, offers “little detail as to the ‘right’ way for the Commission to go about its work.” *See USTA I*, 290 F.3d at 425. Indeed, such detail would almost certainly have run afoul of the deference due administrative agencies in construing and applying ambiguous provisions such as Section 251(d)(2). *See generally Chevron U.S.A., Inc. v. Natural Res. Def. Counsel*, 467 U.S. 837 (1984).

constraining influence on the incumbents' opportunities to act on their powerful incentives to discriminate against and force price squeezes upon competitors that buy special access. Even Time Warner Telecom ("TWTC"), the incumbents' "poster child" for special access-based entry, has explained that special access is not a viable means of obtaining transmission inputs in the absence of UNEs. *See* TWTC Comments at 18. In fact, TWTC has already begun to experience the real world anticompetitive behavior in which the incumbents will engage once UNEs are eliminated. It follows therefore that the incumbents' argument that unbundling should be eliminated because competitors are able to rely on special access *in lieu* of UNEs must be rejected.

Similarly, the Commission must reject the incumbents' argument that inputs made available pursuant to "commercial agreements" are substitutes for UNEs. *See, e.g.,* Verizon Comments at 138. As with special access, the only reason the incumbents would ever offer inputs to competitors under commercial agreements on reasonable terms and conditions is if the threat of continued unbundling obligations forced them to the negotiating table. Once UNEs are eliminated, the incumbents have no reason to continue to offer network facilities to competitors on terms and conditions that make competitive offerings sustainable. Moreover, commercial agreements lack the transparency of agreements filed with state commissions, and they are often discriminatory. They therefore serve as independent impediments to entry.

These reasons are by themselves dispositive of whether the Commission should consider the incumbents' non-UNE wholesale offerings as part of the impairment analysis. But these offerings should also be dismissed as irrelevant to the impairment analysis because they *prevent* the growth of facilities-based competition. The incumbents readily admit that the only way a competitor can survive by relying on special access (and likely "commercial agreements") is to

commit to long-term agreements in which competitors must meet volume and term commitments. *See, e.g., Verizon Comments, Declaration of Claire Nogay at 18; Qwest Comments at 70.* As several parties have explained, these long-term agreements effectively increase the cost of facilities-based competition because replacing substantial numbers of special access circuits means missing minimum volume commitments, thus forcing competitors to pay higher prices. *See, e.g., AT&T Comments at 114; The Loop and Transport CLEC Coalition Comments at 60.* Long term agreements also allow the incumbents to lock-up the wholesale market, thus diminishing artificially the addressable markets for competitive wholesalers. UNEs carry none of these costs because a competitor can obtain them at cost-based prices without the need to commit to volume/term agreements. Thus, reliance on incumbents' non-UNE wholesale offerings actually carries many more "costs" in terms of foregone investment and innovation than is the case with UNEs. Eliminating ILEC non-UNE offers from consideration under the impairment analysis therefore makes sense in light of the "trade-offs" required by the D.C. Circuit decisions. In all events, an apples-to-apples comparison between UNEs and special access prices is only possible if the Commission compares the month-to-month special access rates (that do not carry the harmful consequences for facilities-based competition associated with volume and term commitments) with UNE prices.

Fifth, as ALTS has explained, the court held in *USTA II* that the impairment standard adopted in the *Triennial Review Order*⁶ was essentially sound. *See* ALTS Comments at 7. The court only indicated that the Commission must determine for what kind of CLEC it is

⁶ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, 18 FCC Rcd 16978, ¶ 84 (2003) ("*Triennial Review Order*"), *vacated in part, United States Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

uneconomic to deploy a UNE and that the Commission must account for implicit subsidies in state rates. These concerns are both accounted for by simply specifying that the standard is “uneconomic for a reasonably efficient competitor,” a point on which competitors and incumbents agree. *See, e.g.*, BellSouth Comments at 12; Qwest Comments at 13.

Sixth, as ALTS also explained in its initial comments (*see* ALTS Comments at 36), the D.C. Circuit has held that the Commission may adopt a “relatively broad reading of the impairment standard” where it has ensured that unbundling does not undermine the other goals of the Act (as it purportedly did when adopting the broadband exemption). *USTA II*, 359 F.3d at 580. Thus, the adoption of the broadband exemption justifies a broader finding of impairment for DS1, DS3 and dark fiber loops than would be the case in the absence of the broadband exemption. Moreover, as ALTS also explained, the court offered implicit, but unmistakable, support for the conclusion that the Commission may interpret the impairment standard, as it did in the *Triennial Review Order*, as requiring that two, and in some cases three, non-ILEC providers be capable of providing a facility in a particular market before UNEs are eliminated. *See* ALTS Comments at 37, 75.

Finally, it is important to emphasize what the D.C. Circuit has *not* foreclosed as a reasonable means of balancing the competing goals associated with unbundling. It has *not* held that the Commission is precluded from adopting presumptions in favor of unbundling a particular UNE that may be rebutted in particular instances. It has merely held that a national presumption cannot be sustained when the Commission’s chosen means of rebutting the presumption (delegation to the states) is unlawful, thus effectively transforming the presumption into a national rule. *USTA II*, 359 F.3d at 574 (discussing transport presumption).

It has *not* ruled that the Commission is precluded from adopting a route-by-route definition of the geographic market for transport. It has merely required that the Commission explain why that market definition strikes a more appropriate balance than other geographic market definitions (and such an explanation is easily supplied as discussed below). *Id.* at 574-75.

It has *not* even *questioned* the Commission's use of a location-by-location geographic market definition for loops. As explained more fully below, there is no basis for revisiting that approach here.

It has *not* held that, in conducting its impairment analysis, the Commission must ignore entry barriers that could be addressed at some point in the future with regulations targeted at the barriers in question. Rather, it held that, where entry barriers can be narrowly defined, the relevant *unbundling requirements* should be correspondingly narrowly targeted to address the impairment. For example, in *USTA II* the court suggested that the Commission could have reasonably addressed ILECs' failure to perform hot-cuts at the required volumes by retaining unbundled switching in circumstances where those volumes were likely to be reached, even though hot cut issues could be addressed in the future through targeted regulatory intervention. *Id.* at 570.

It should be clear from this summary that the incumbent LECs' have grossly mischaracterized the impairment standard in their comments. Certain of the incumbents' claims not directly refuted above are worth addressing specifically. For example, Verizon creatively, but incorrectly, asserts that unbundling "is an exceptional requirement." Verizon Comments at 6-9, n.9. In support of this claim, Verizon relies solely on the Supreme Court's holding that the statute does not create a "blanket" obligation on incumbents to provide UNEs. *See id.* at 7. But this of course does not show that the obligation is "exceptional," it only shows that the obligation

is not a preexisting, “underlying duty.”⁷ That duty applies where competitors are deemed impaired. Impairment is not found only in “exceptional” circumstances, but rather where, as the D.C. Circuit has explained, an “effort to make reasonable trade-offs” between the relevant costs and benefits of unbundling yields the conclusion that the benefits outweigh the costs.

The incumbents also assert generally that the impairment standard does not create an actual competition test and that the D.C. Circuit has held that no impairment exists where “competition is possible.” *See* Verizon Comments at 12-14; SBC Comments at 29-30; BellSouth at 9-12. True enough, but the Commission’s application of this standard is subject to the requirement, under the APA, that the agency’s decisions be reasonable and not arbitrary and capricious.⁸ Thus, the Commission may only infer from the existence of competition in one market that competition in another market is possible where that inference is reasonable. Where, as is the case with regard to transmission UNEs, the relevant entry barriers vary wildly from one market (*i.e.*, point-to-point transport route or customer locations) to another and from one moment in time to another and where much of the investment in the past has been demonstrated to have been *inefficient* (thus resulting in bankruptcy), few reasonable inferential judgments can be made.

In addition, SBC argues that the FCC cannot order unbundling in a downstream market that is “already competitive.” SBC Comments at 12-13. The real question, however, is whether there is genuine competition in a downstream market from facilities-based competitors such that the overall consumer welfare benefits of requiring UNEs for competitors in the market are

⁷ *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391 (1999).

⁸ *See* 5 U.S.C. § 706(2)(A).

outweighed by the costs of unbundling. The D.C. Circuit has observed that this may be the case with regard to mass market broadband service because the cable operators are both fully facilities-based and hold the dominant position in that market, the incumbent LECs do not have a legacy base of existing customers, and other facilities-based competitors also serve the market. *USTA I*, 290 F.3d at 428-30; *USTA II*, 359 F.3d at 585. But in no event can this observation be made for broadband or packet-based services demanded by *business* customers. As ALTS explained at length in its initial comments, there are no substitutes, either intermodal or intramodal, for DS1 loops and few substitutes for DS3 and dark fiber loops. *See* ALTS Comments at 52-70. To the extent there is *retail* competition in the provision of broadband and packet-based services to businesses, that competition is only possible because the incumbents are required to make DS1, DS3 and dark fiber loops available at *wholesale* to their competitors. The incumbents' assertion that the retail competition in broadband and packet-based services justifies the elimination of unbundling in those markets is therefore wrong. *See* SBC Comments at 15-22; Verizon Comments at 69-70.

The incumbents argue further that the Commission may not discount the relevance of intermodal competitors if they do not make their facilities available at wholesale. *See* Verizon Comments at 18-19; SBC Comments at n.77. But this proposition is not found anywhere in the D.C. Circuit decisions, and there is no basis for thinking it would be. To be sure, it may be reasonable for the Commission to conclude that UNEs should not be available to provide service in a retail market in which multiple facilities-based competitors operate, even if those competitors do not make their facilities available at wholesale. But where there is only a single facilities-based competitor in a retail market, it would seem highly relevant to the overall balance of the competing policy goals to ask whether the facilities-based competitor does or must make

its facilities available at wholesale. Specifically, that question pertains to whether the market in question will be a duopoly in the absence of unbundling, a situation which the Commission has clearly recognized leads to a high risk of umbrella pricing. *See Triennial Review Order* n.1275.

Nor is Verizon correct that false positives (unbundling obligations where there is no impairment) are more costly than false negatives (the absence of unbundling where there is impairment). *See Verizon Comments* at 25-27. This cannot possibly be the case with regard to DS1, DS3 or dark fiber transmission facilities because, as explained, those are all legacy facilities, and the “costs” of unbundling those facilities are relatively small. The transmission facilities for which the purported costs would be more significant, next-generation loops, are all exempted already from unbundling in the mass market. Moreover, the costs of false negatives for transmission facilities are especially high because of the high entry barriers associated with those facilities and the absence of intermodal competitors in the business markets. No unbundling means no competition in the business markets. It is clear therefore that the false negatives carry much greater costs than false positives in the case of transmission UNEs used to serve the business markets.

It should also go without saying that Qwest is incorrect in asserting that the Commission may only find impairment for facilities deployed after 1996. *See Qwest Comments* at 19-23. That a facility was built in 1995 versus 1997 has nothing to do with whether competitors today can efficiently replicate that facility. Moreover, as the Commission recognized in the *Triennial Review Order*, most of the “new” facilities constructed by the incumbents are simply incremental upgrades to existing facilities. *See Triennial Review Order* ¶ 285. In fact, it is the rare exception that an incumbent deploys an entirely new facility for which it does not possess significant first-mover advantages. Thus, even if an incumbent were to deploy a new fiber loop to a commercial

location that had never been served by the incumbent before, the incumbent would benefit from the proximity of its transport network, itself a legacy of its monopoly status prior to the 1996 Act.

The incumbents are equally incorrect that the Commission must rely exclusively on natural monopoly-type characteristics of a UNE to find impairment. *See* Qwest Comments at 15-19; Verizon Comments at 29. As the D.C. Circuit has explained, a natural monopoly exists where “average costs are declining throughout the range of the relevant market.” *See USTA I*, 290 F.3d at 426. The focus of the Commission’s impairment test adopted in the *Triennial Review Order*, however, is on entry barriers, such as the existence of first mover advantages, that are not tied strictly speaking to declining average costs. Yet the D.C. Circuit essentially accepted the *Triennial Review Order* impairment criteria as, at least on their face (and subject to limited exceptions discussed above), a reasonable exercise of agency discretion. *See USTA II*, 359 F.3d at 571-72. Indeed, even SBC agrees that the impairment standard adopted in the *Triennial Review Order* was reasonable, and only questions the Commission’s application of that standard. *See* SBC Comments at 10-11.

Lastly, the incumbents at times incorrectly imply that competitors are not impaired if, having captured *all* of the demand in a relevant market, they can profitably deploy their own facilities. For example, Qwest asserts that the Commission must aggregate the traffic of all potential customers at a particular location when determining impairment. *See* Qwest Comments at 85. This approach ignores basic principles of competition policy generally and minimum

viable scale⁹ (MVS) in particular. The incumbents ignore the barriers, recognized by the Department of Justice in its Horizontal Merger Guidelines, that entrants face in penetrating a market with an entrenched incumbent. In the telecommunications market, these impediments include the inability to obtain building access in whole or in part, the inability to serve certain customers the incumbents have locked-up under long-term contracts and the ability of the incumbent to target customers that have been approached by the CLEC for retention offers.¹⁰ Therefore, it is unrealistic and bad policy to assume that a competitor can, even in theory, capture all of the customers at an end-user location.

III. TRANSMISSION UNES

As mentioned above, the nature of the entry barriers associated with deploying transmission facilities and the fact that many of the existing alternative transmission facilities have been deployed as part of inefficient entry strategies means that the Commission must be very cautious about concluding that competition is “possible” in a location or on a particular route on which there is little or no competitive entry. As explained in ALTS’ initial comments, this means that an *actual* competition standard is appropriate for loops and only limited inferences can be made regarding circumstances in which competition is possible for transport.

See ALTS Comments at 64.

⁹ *See* Horizontal Merger Guidelines § 3.3 (“Minimum viable scale is the smallest average annual level of sales that the committed entrant must persistently achieve for profitability at pre-merger prices. Minimum viable scale is a function of expected revenues, based upon pre-merger prices, and all categories of costs associated with the entry alternative, including an appropriate rate of return on invested capital given that entry could fail and sunk costs, if any, will be lost”).

¹⁰ *See id* (“Factors that reduce the sales opportunities available to entrants include: (a) the prospect that an entrant will share in a reasonably expected decline in market demand, (b) the exclusion of an entrant from a portion of the market over the long term because of vertical integration or forward contracting by incumbents, and (c) any anticipated sales expansion by incumbents in reaction to entry, either generalized or targeted at customers approached by the entrant, that utilizes prior irreversible investments in excess production capacity.”).

In contrast, the incumbents have proposed impairment standards for transmission facilities that rely on extremely broad and unreliable inferences and that incorrectly assume that special access is a substitute for UNEs. As a result, the incumbents' tests would, if adopted, yield vastly more incorrect findings of non-impairment than correct findings of impairment. The incumbents' proposals clearly fail the basic cost-benefit analysis mandated by the D.C. Circuit.

A. Loops

The incumbents' loop impairment tests are overly broad, arbitrary and do not take into account the indisputable route-specific impediments to loop construction. Nor do the incumbents give a reasoned explanation as to why the location-specific tests of the *Triennial Review Order* should be abandoned. None of the tests comes close to providing the "nuanced" analysis demanded by *USTA II*, and they ignore the fact that the *USTA II* court never questioned the location-by-location analysis adopted by the Commission.

For example, the incumbent LECs take evidence that CLECs are able to deploy loops in *some* situations within the many square miles served by certain wire centers to show that competitors are not impaired without access to loops serving *all* locations in those areas. More egregiously, the incumbents assume that *transport* deployment in some wire centers demonstrates that there is no impairment for *loops* in those same wire centers. The tests proposed by Bellsouth, Verizon and SBC asserting that loop unbundling should not occur in wire centers with a certain number of business access lines¹¹ should therefore be dismissed out of

¹¹ SBC's proposal would eliminate all unbundling for loops above DS1 and DS1s unbundling would be eliminated in wire centers with over 15,000 loops. *See* SBC Comments at 88-89. One prong of Verizon's loop proposal would eliminate all loop unbundling in wire centers where there are 5,000 or more total business lines (retail and wholesale). *See* Verizon Comments at 82. Bellsouth would eliminate all loop unbundling in central offices with 5,000 or more business access lines. Because Qwest's proposes to effectively eliminate all loop unbundling, ALTS

hand because these tests bear no relation to places where impairment actually exists. Nor should the incumbents' limited "evidence" of loop deployment carry any weight. The information that they do present is thin at best and, in many cases, highly misleading and vague. For example, they present competitive retail offerings that rely on incumbent loops as inputs as evidence of competitive loop self-deployment and use limited evidence of CLEC deployment of very high capacity loops to prove that CLECs can and do deploy DS1 and DS3 loops.

While it is true, as ALTS noted in support of its own transport impairment test (*see* ALTS Comments at 80-90), that the number of business access lines served by wire centers has relevance to the routes where *transport* may be deployed, the number of business lines in each wire center gives no indication as to where it is economically efficient to construct *loops*. The fact that more loops are self-provisioned in areas of high-density wire centers (*see* Bellsouth Comments at 39) merely indicates that CLECs have built loops to some buildings in higher density areas. However, the number of business lines per wire center indicates nothing as to *which* buildings in these areas competitors can construct loops.

The Commission performed an unbundling analysis for different loop capacities in the *Triennial Review Order* because the costs are similar for different types of loops but the revenue opportunities vary substantially. *See Triennial Review Order* ¶ 206. This approach was firmly based in market realities and the incumbents have presented no data to show that this has changed. As the Commission found, "[c]onstructing loop plant is both costly and time consuming, regardless of the type of loop being deployed," and "most of the costs of constructing loops are sunk costs." *Id.* ¶ 205. The large sunk costs pose obvious and daunting

believes that such an absurd position does not merit serious discussion. *See* Qwest Comments at 5-7 (asserting that the mere availability of tariffed special access services precludes a finding of impairment).

entry barriers, thus justifying broad findings of impairment. The Commission’s separate analysis of different types of loops was also appropriate because each type of loop offers different opportunities for competitors “to offset construction costs in an economically feasible timeframe.” *Id.* ¶ 206. In *USTA II*, the D.C. Circuit did not question any of these findings. Moreover, entry barriers associated with building access and customers’ unwillingness to incur the delay and inconvenience of loop deployment fully justified the use of customer location-specific triggers, rather than triggers that utilize broader geographic markets as the ILECs propose.

The incumbents’ proposed impairment tests for loops obviously and incorrectly assume that special access loops are a substitute for UNE loops. Stripped of this flawed assumption, the incumbents’ proposed tests are unreasonable. *First*, the incumbents do not recognize that the entry barriers associated with building access and other issues can be low enough for the CLEC to serve one customer that demands very high-capacity connectivity, while these same types of entry barriers can, and often do, prevent the same CLEC from serving a second customer in the same wire center that is otherwise indistinguishable from the first served customer.

Second, the incumbent LECs’ proposals ignore the fact that different customers demand different levels of service, which in turn generate different revenue opportunities for the CLEC. All other things being equal, the comparison of construction costs with revenue opportunities leads CLECs to build in certain situations and forces them to lease ILEC capacity in other situations. It is therefore utterly impossible to infer that competition is possible throughout the area served by a wire center for all types of loops based on the existence of competition for one or more customer locations connected to that wire center.

Third, the “error costs” are likely to be far greater under a wire-center test than under a location-by-location standard. This is in part because the Commission’s route-by-route analysis is more accurate than a wire-center based test. But, as discussed, even in the unlikely event that the two tests are equally accurate, false negatives are likely to be much more costly than false positives because competitors’ unbundling rights are largely limited to legacy loop facilities (DS1 and DS3) while the next-generation packet-based loops serving mass market customers are not subject to unbundling under any circumstances. A false negative results in essentially no competition for a particular location at all, while a false positive only results in the unbundling of legacy facilities, with minimal consequences for ILEC investment and innovation incentives.

The incumbents’ tests gloss over important distinctions between customers and rely on unrealistic assumptions that would lead to absurd results. For example, take two businesses, both of which are connected to wire centers that serve 15,500 business access lines and therefore meet SBC’s non-impairment test for DS-1 loops. Business A only needs a DS-1, which generates only \$500-700 per month (*see* NuVox Comments at 11-12) and which requires \$220,000 to construct,¹² is located in a building in which the landlord requires a substantial monthly fee, and is located in an area in which it takes 6 months to negotiate a right-of-way with the municipality. Business B requires 7 DS3s of capacity generating tens of thousands of dollars of revenue (*see* AT&T Comments at 36) and the CLEC faces no significant right-of-way or building access issues. SBC would have the Commission believe that both businesses justify CLEC self-deployment simply because both loops in question are connected to a wire center

¹² *See* XO Communications, *Emergency Petition for Expedited Determination that Competitive Local Exchange Carriers are Impaired Without DS1 UNE Loops*, WC Dkt. No. 04-313, *et al.*, at 27-28 (filed Sept. 29, 2004) (“*XO Petition*”).

with 15,500 business access lines. Such a blunderbuss approach will lead to the type of false negatives that the *USTA II* court cautioned that the Commission must avoid.

Despite their current stance, the incumbent LECs have in the past admitted that CLEC loop deployment decisions are made on a location-by-location basis. For example, in the California and Michigan *Triennial Review Order* implementation proceedings, SBC admitted that potential loop deployment was only possible if certain factual criteria, specific to each customer location, were met.¹³ Although the California commission rejected SBC's test because the commission determined that SBC's proposed criteria were based upon false premises (*e.g.*, the Commission concluded that it costs well in excess of \$50,000 per year to support construction; and that CLEC costs are in fact in excess of the incumbent LECs' costs for identical items (*see California PUC* at 120)), SBC clearly understands that mere wire center density has no bearing on whether loop deployment is possible to particular locations.

In addition, the incumbents improperly rely on aggregate data regarding competitors' loop deployment to show that DS1 and DS3 loops can be self-deployed. The ILECs have apparently not disaggregated their data because it would show that CLECs cannot, in the vast majority of circumstances, self-deploy loops below 3 DS3's of capacity. For example, SBC asserts that "fully 91% of wire centers with 15,000 or more business lines have at least one lit

¹³ See California Public Utilities Commission Comments at 112 ("*California PUC*") ("SBC's potential deployment analysis focused only on locations that: (1) fall within dense urban wire centers and (2) are within 300 feet of existing fiber facilities in those urban wire centers where there is already evidence of existing alternative deployment where one or more alternative carriers have already placed fiber facilities in most of the main streets or rights-of-way. Within the 300-foot corridors, SBC selected only business and government locations with an estimated telecommunications 'spend' of \$50,000."). See *On the Commission's Own Motion to Facilitate the Implementation of the Federal Communications Commission's Triennial Review Determination in Michigan*, Proposal for Decision, Case No. U-13796, at 33-37 (rel. May 10, 2003) ("*Michigan Decision*") attached to Michigan Public Service Commission Comments.

building, and indeed there are on average 10.6 lit buildings in those wire centers. In those wire centers, it is thus clear that CLEC's can and are competing with their own facilities, and it makes no sense to force unbundling of DS1 loops." SBC Comments at 89. Beside the obvious problem that the 10.6 buildings represent only a tiny fraction of the buildings served by a wire center and that competitors are often only able to access a single customer in a building, this information does not even indicate the capacity of the loops in question. Indeed, as discussed below, the evidence indicates that the majority of these loops may simply be OCn circuits and therefore not probative of impairment for DS1 and DS3 (and possibly dark fiber) loops. According to SBC's flawed logic, evidence of one high capacity loop of unspecified bandwidth in most wire centers with 15,000 or more business lines demonstrates that CLECs can easily self-provision DS1 loops.

Similarly, in support of its 5,000 business access line loop trigger, Bellsouth asserts, without further detail, that "86% of the central offices with CLEC lit buildings are in central offices that have at least 5,000 business lines." BellSouth Comments at 45. Again, there is no indication of what kinds of loops these are, the number of loops, or why minimal provisioning of what are most likely very high capacity loops would lead the Commission to believe that CLECs are not impaired in provisioning lower capacity loops. Despite their admissions in other fora, SBC and the other incumbents completely ignore the unique barriers and varying revenue opportunities associated with different loop types and customer locations.

Even on their own terms, the incumbents' tests must fail because they do not show *any* competitive deployment in many of the wire centers which they would remove from the unbundling list. For example, Verizon claims that "competing carriers have deployed fiber in more than half" of the wire centers meeting its 5,000 business access lines test. Verizon

Comments at 82. Therefore, in slightly less than half of these wire centers, there is no competitive fiber at all. Nor does Verizon indicate whether this “competitive fiber” is a loop or transport circuit. Even more striking, under Verizon’s 30 percent or more business access lines trigger, only 1/3 of such wire centers have “attracted competitive fiber.” *Id.* Thus, two thirds of the wire centers taken off the unbundling list under this test would have *no competitors present at all.*

Verizon goes beyond the already overly broad wire center measure to assert that unbundling determinations should be made on an MSA-wide basis. Verizon argues that all UNEs should be eliminated in any MSA where Verizon has qualified for *any measure* of special access pricing flexibility and where CLECs are using special access loops. As noted at length by nearly every carrier in this proceeding, some CLECs are using special access in many of the areas in which they provide service, meaning that all MSAs where pricing flexibility has been granted would not be eligible for unbundling. Verizon would also eliminate unbundling where at least half of the DS1 loops served by the ILEC in that MSA are in wire centers where competing carriers have deployed fiber or are relying on special access. *See id.* at 84. This test again relies solely on the incorrect assumption that special access is a substitute for unbundled loops. It therefore warrants no serious consideration.

It is worth emphasizing, however, that Verizon’s MSA-based test is even more divorced from actual impairment than a wire-center test. An MSA covers a larger, more heterogonous area than a wire center and would therefore only amplify the false negatives of a wire-center based test. While it is true that CLECs often enter the market to serve a segment of an MSA, (*see id.* at 25-26), this fact indicates nothing about impairment for specific elements, especially loops. Verizon would eliminate all unbundling where *any* special access pricing flexibility is

granted. No *loops* would have to be unbundled if, for example, there were one collocated carrier using non-ILEC *transport* in 50 percent of the wire centers in the MSA or in wire centers representing 65 percent of the ILECs transport revenues in an MSA.¹⁴ Therefore, it is absurd for Verizon to argue that such a test would “minimize error costs.” Verizon Comments at 26.

The ILECs present only a smattering of evidence to indicate that competitors have actually deployed loops. Much of this evidence is misleading and flawed and does not contradict the vast amount of evidence indicating that CLECs are unable to deploy loops in most circumstances. Most of the evidence offered by the ILECs to demonstrate CLEC DS-1 and DS-3 self-deployment seems to consist of CLEC marketing information. In relying on this information, the incumbents improperly conflate competitors’ service offerings, which rely heavily on resold ILEC circuits, with CLECs’ own self-deployment. For example, the ILEC UNE Fact Report quotes TWTC as “offer[ing] custom solutions with end-to-end network connectivity’ using its ‘expansive local footprint and nationwide IP backbone’ at ‘transmission speeds from 1.5 Mbps to 10Gbps.” ILEC UNE Fact Report at III-12. While it is true that TWTC has deployed a “nationwide IP backbone,” has a “local footprint” and offers a range of different capacity services at retail, it has stated in multiple proceedings that it is unable to self-deploy DS1 loops.¹⁵ Similarly, the ILEC UNE Fact Report incorrectly concludes that, because XO states that it “offers private line services at speeds ranging from DS-1 to OC-x,” it must be

¹⁴ See *Access Charge Reform*, Fifth Report and Order, 14 FCC Rcd 14221, ¶¶ 148-149 (1999).

¹⁵ See, e.g., TWTC Comments at 4 (“... even in the best of circumstances, TWTC cannot deploy its own DS1 loops...and it usually cannot deploy its own DS3 loops unless it is assured that it can sell multiple DS3 worth of service to particular location.”). In fact, TWTC only self-provisions approximately 25% of its own loops. See *id.* at 5; Verizon Comments at 48 (“Time Warner Telecom . . . serves 17,500 buildings on its network (4,500 through direct connections, plus an additional 13,000 buildings through indirect connections)).

deploying DS1 loops. ILEC UNE Fact Report at III-12. To the contrary, XO recently filed an emergency petition stating that it “it is almost never economic for XO to construct its own wireline loop DS1 facilities” *XO Petition* at iv. McLeodUSA is also singled out for provisioning its own competitive loops “ranging from 128 kbps to 45 Mbps” yet McLeodUSA states that it “cannot economically justify self deployment of DS1 loops.”¹⁶ It is plain then that the few ILEC assertions of CLEC loop deployment, especially for DS1 loops, are unreliable.

In past proceedings, regulators and competitors have rejected or refuted ILEC reliance on CLEC retail offerings to prove CLEC self-deployment. When confronted with, one hand, an ILEC alleging DS1 and DS3 self-deployment based on CLEC website and press release information about retail offerings, with, on the other hand, the CLEC’s own assertions that they do not wholesale DS1 loops, the Michigan state commission found the latter much more persuasive. *See Michigan Decision* at 32-33. Similarly, in its petition for relief from dominant carrier regulation in the Omaha MSA, Qwest claimed that McLeodUSA had “overbuilt” Qwest’s network, because McLeodUSA was serving retail customers in Omaha.¹⁷ Qwest repeats these same arguments nearly verbatim in its comments. *See Qwest Comments* at 35. However, McLeodUSA responded that it is able to compete in Omaha solely because it able to purchase facilities from Qwest.¹⁸ Indeed, Qwest’s own Petition confirmed McLeodUSA’s complete reliance on Qwest’s network for its retail offerings.¹⁹

¹⁶ McLeodUSA Comments, Declaration of Todd Lichtenberg ¶ 4.

¹⁷ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 04-223, at 8-9 (filed Jun. 21, 2004) (“*Qwest Petition*”).

¹⁸ *See* McLeodUSA Comments, WC Dkt. No. 04-223, at 8-9 (filed Aug. 24, 2004).

¹⁹ *See Qwest Petition*, Declaration of David Teitzel at 18.

The information from the state *Triennial Review Order* implementation proceedings reinforces the conclusion that CLECs have not deployed loops in any significant numbers. In all of Verizon's and SBC's California territories, if channelized circuits are excluded, the California Commission determined that there were *no* locations in which the *Triennial Review Order* DS1 loop impairment trigger was met. See *California PUC* at 110-111. In Ohio, even SBC asserted that there were only 31 locations meeting the DS1 provisioning trigger. See *Sprint Comments* at n. 23. In Massachusetts, Verizon only claimed (when it included channelized circuits) that 15 locations met the DS1 wholesale loop trigger.²⁰ If one takes the California Commission's investigation as a guide, it is likely that the actual deployment of DS1s in Ohio and Massachusetts is much lower than even the incumbents asserted.

Evidence of DS3 and dark fiber deployment is equally limited. For example, SBC claimed that there were only 24 locations in Kansas in which either the wholesale or retail trigger for DS-1, DS-3 or dark fiber loops was met. See *Kansas State Corporation Commission Comments* at ¶ 51. In Michigan, SBC asserted that, for DS3 and dark fiber loops, there were only 39 locations that met the self-provisioning trigger and 19 of those met the wholesale trigger. See *Michigan Decision* at 26. However, the Michigan ALJ concluded that only 3 of the locations in fact met the triggers. See *id.* at 29. Because of these defects, it is likely that incumbent assertions of CLEC deployment are considerably lower than they assert. Indeed the QSI study indicated that there were only 130 buildings in 12 states studied that have two or more self

²⁰ See *Verizon Massachusetts, Supplemental Testimony of John Conroy and John White*, D.T.E Docket No. 03-60, at 15-17 (Sept. 19, 2003).

providers of DS3 loops and fewer than 50 buildings in those states where wholesale DS3 or DS1 loops are available.²¹

In fact the incumbents themselves only assert that there are 32,000 (*see* ILEC UNE Fact Report at I-2) CLEC lit buildings out of 739,000 total commercial office buildings²² (approximately four percent) throughout the U.S. However, even this estimate likely greatly overstates the number of buildings served by competitive fiber. As ALTS noted in its comments, a large number of these connections are restricted to individual customers within the building. *See* ALTS Comments at 63. Furthermore, the figure listed on III-4 of the ILEC UNE Fact Report for each carrier simply adds the number of buildings that each carrier is serving with its own loops. Yet, if the incumbents' own assertions in the state proceedings are to be believed, some buildings are served by multiple carriers. *See* Sprint Comments at 46. The incumbents cannot both claim that multiple providers provision loops to many buildings in one context, yet disavow such provisioning in another.

The incumbents are also incorrect that the capability to channelize high capacity loop facilities means that any OCn facility should be counted as capable of providing DS3 and DS1 connectivity. *See, e.g.,* Qwest Comments at 88. The Commission rejected this argument in the

²¹ *See* Gary Ball, *et al.*, ANALYSIS OF STATE SPECIFIC LOOPS AND TRANSPORT DATA, QSI Consulting, at 2-3, (“*QSI Report*”) attached to *ex parte* letter of Thomas Cohen. KDW Group, LLC, to Marlene H. Dortch, Secretary, FCC, CC Dkt. 04-313, *et al.*, (filed Oct. 5, 2004).

²² *See* Sprint Comments at 44 (noting that this figure is based on Department of Commerce data). As Sprint notes, this figure understates the number of buildings because it excludes heavy users of telecommunications traffic such as hotels, universities, hospitals, smaller buildings, some government and military facilities and other categories of buildings. *See id.*

Triennial Review Order and there is no reason to revisit that decision.²³ CLECs can and do serve customers in buildings directly connected to their SONET rings, but these buildings are few in number, and they bear no relevance to the competitors' ability to economically construct laterals of lower capacity. As the California PUC has observed, "[t]he existence of a CLEC using an OCn loop to serve multiple DS3 levels of demand does not prove whether a CLEC that needs less capacity could construct facilities at that location and still recover its costs." *California PUC* at 104. The Michigan PSC came to a similar conclusion when it noted that channelization of OCn loops "does not support the ability to self-deploy stand-alone DS1 capacity loops nor does it impact our DS1 impairment finding." *Michigan Decision* at 29. Moreover, even if channelization of larger loops is possible, carriers deploying lower capacity channelized loops may not be able to recoup the significant expense involved.

Even though loop deployment is plainly uneconomical in the vast majority of cases, the ILECs argue that demand for such services can be aggregated from multiple customers to make loop construction possible. *See, e.g.*, Qwest Comments at 79. The facts do not support this assertion. As noted by the state Commissions, the ILECs in the state proceedings, and the QSI study, few buildings have met the *Triennial Review Order* triggers. Therefore in most cases of CLEC loop deployment, it is clear that carriers did not share construction. In the buildings where there is more than one carrier, the ILECs have offered no evidence that coordinated construction is in fact occurring. This should come as not surprise because competitors are likely to win customers in the same building at different times; sometimes months or years separate

²³ *See Triennial Review Order* n.957 (" [channelizing OCn loops] does not support the ability to self-deploy stand-alone DS1 capacity loops nor does it impact our DS1 impairment finding.").

CLEC customer acquisition in a particular building. This makes it impossible to share construction costs. Even if joint projects were possible, coordinated digging and construction adds additional transaction costs that only the highest capacity loops could support.

Not only are the ILECs overstating the extent to which competitors have deployed their own transmission facilities, but, as mentioned, many of these competitors were forced into bankruptcy because of the extent to which they overextended their networks to areas in which they could not receive an adequate rate of return to support their investment. Therefore, the ILECs are incorrect that what is “possible” for CLECs to build is materially different than what has already been built and deployed. *See, e.g.*, SBC Comments at 10; Verizon Comments at 16. In fact, CLECs have likely built loops to more locations than is economically rational. As a result, many companies that have emerged from bankruptcy now own their networks for pennies on the dollar. Other companies that have avoided bankruptcy have not reached profitability. This is not to say that the Commission need give CLECs special treatment because of their poor investment decisions. Rather, this simply illustrates that investors are unlikely to support construction of transmission facilities as they have in past. For example, of the wireline CLECs listed in the ILEC UNE Fact Report as offering competitive or wholesale fiber (*see* ILEC UNE Fact Report at III-12-III-15), MCI, XO, ITCDeltaCom, McLeodUSA, Neon (*see* QSI Study at 16), the companies purchased by Xpedius (e.spire and Mpower), Abovenet (*see* ILEC UNE Fact Report at I-18) and Lightcore,²⁴ have all gone through bankruptcy. Of those companies not in bankruptcy, Level 3 “is not fully funded and will not generate positive cash flow from operations

²⁴ CenturyTel operates as Lightcore. Lightcore’s fiber optic network was purchased out of bankruptcy from Digital Teleport by CenturyTel in 2003. *See* www.lightcore.net/company_au.php.

for several years.”²⁵ AT&T recently laid-off thousands and is in the process of writing down billions of dollars of assets in preparation for a likely sale.²⁶ TWTC has not achieved cash flow profitability. Moreover, many of these and other companies listed serve an insubstantial number of markets. For example, Grande Communications only offers service in Texas.²⁷ Such small companies’ success or failure should not be considered an accurate barometer for where facilities construction is possible.

Furthermore, as noted above, and contrary to the ILEC’s assertions (*see, e.g.*, Verizon Comments at 54), *USTA II* did not hold that the Commission must ignore entry barriers, such as municipal rights-of-way ordinances and building access impediments, that could be might at some point in the future by targeted action. As an initial point, it is simply not true that local rights-of-way ordinances apply equally to CLECs and incumbents (*see* SBC Comments at 75); CLECs often face unique burdens.²⁸

But even if the Commission wanted to preempt discriminatory or onerous rights-of-way rules, it is not certain that the Commission may do so. For example, although it is clear that Section 253(d) requires that the Commission preempt governmental action that is inconsistent

²⁵ See Larry Dignan, *Accounting puts telecoms on defensive*, NEWS.COM (Feb. 13, 2002), available at http://news.com.com/accounting+puts+telecoms+on+defensive/2100-1033_3-836534.html.

²⁶ See Associated Press, *AT&T CEO Cancels Conference Appearance*, FORBES (Oct 4, 2004), available at <http://www.forbes.com/associatedpress/feeds/ap/2004/10/04/ap1574988.html>.

²⁷ See <http://www.grandecom.com/About/overview.jsp>.

²⁸ See, e.g., Fiber Technologies Networks, L.L.C., *Petition for Preemption Pursuant to Section 253 of the Communications Act of Discriminatory Ordinance, Fees and Right-of-Way Practices of the Borough of Blawnox, Pennsylvania*, WC Docket No. 03-37, at 12-13 (filed Jan. 30, 2003) (noting that the \$2.50 per foot fee to obtain access to municipal rights of way in Blawnox PA does not apply to incumbents); TWTC Comments, WC Docket No. 03-37, at 9-10 (filed Mar. 31, 2004) (noting that Qwest is exempted by Ariz. Rev. Stat § 9-582.E.F from any new franchise or permit requirements throughout Arizona).

with subsections (a) and (b), Section 253 is silent as to whether the Commission must or may preempt government action that implicates subsection (c), the subsection that addresses municipal management of public rights-of-way. *See* 47 U.S.C. § 253 *et seq.* Unsure of its authority, the Commission has often sidestepped the issue of its jurisdiction under 253(c).²⁹ The federal courts have tried to fill the vacuum, but they have come to differing opinions on some of the most critical issues related to subsection (c), including whether non-cost based fees for rights-of-way management are “fair and reasonable”³⁰ and whether the nondiscrimination requirements require consideration of local requirements only or in combination with any state laws that have the effect of prohibiting local fees for incumbent use of rights-of-way.³¹ In light of this legal uncertainty it should be beyond dispute that the Commission may require unbundling to help ameliorate barriers associated with local rights-of-way rules. Indeed, unbundling requirements may be the only way the Commission can act in that area.

Building access issues raise similar problems. To begin with, the ILECs are mistaken that owners rarely limit access to CLECs. *See, e.g.,* Verizon Comments at 53. Verizon cited to a survey filed in June of 2000 to show that building owners generally permit CLECs to enter into buildings. *See id.* The Commission took that report into account and in the same docket, in

²⁹ *See TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e) and 253*, Memorandum Opinion and Order, 12 FCC Rcd 21396, n.268 (1997) (expressly declining to address the jurisdictional question).

³⁰ *Compare City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1180 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002) (describing non-cost based fees as “objectionable” under Section 253), *with TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000) (“*Dearborn*”) (upholding DCH’s determination that the fee of 4% of gross revenues is “fair and reasonable”).

³¹ *Compare TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 80 (2d Cir. 2002), *cert. denied*, 538 U.S. 923 (2003) (holding that the effect of state law must be considered), *with Dearborn*, 206 F.3d at 625 (holding that the effect of state law is generally irrelevant).

October 2000, determined that “. . . there is also meaningful evidence that competitive LECs have in many instances encountered unreasonable demands and significant delay in their efforts to obtain access to buildings.”³²

These problems persist today, and the Commission has not even determined whether it has the authority to address them through targeted regulation. The Commission has banned exclusive access arrangements and has attempted to ensure that CLECs may have access to the building infrastructure for serving tenants, but these rules are ineffective. Nevertheless, although the Commission determined that *discrimination* in building access was a clear problem (*see Building Access Order and FNPRM* ¶ 125), it admitted it was unclear whether Fifth Amendment takings concerns would preclude Commission action on the issue. *See id.* It is not surprising then, that the Commission has not yet issued a final order prohibiting discriminatory building access agreements. Accordingly, as with right-of-way issues, it is possible that unbundling rules are the *only* way to address discriminatory building access policies.

Not content with its overly broad loop test, Verizon attempts to extend the Commission’s mass market fiber-to-the-premises (“FTTP”) unbundling exemption to the enterprise market.³³ SBC makes a similar argument for eliminating unbundling of enterprise dark fiber loops. *See* SBC Comments at 73-74. However, recent Commission precedent makes clear why such a

³² *Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Telecommunications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission’s Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, ¶ 17 (2000) (“*Building Access Order and FNPRM*”).

³³ *See* Verizon Comments at 146 (“[T]he Commission should clarify first and foremost that next-generation fiber-to-the-premises networks are not subject to unbundling obligations, regardless of the customer served.”).

course of action would be improper. In the *MDU Order on Reconsideration*,³⁴ the Commission explained why enterprise fiber loops continue to be subject to unbundling requirements. While the “disincentives faced by carriers seeking to deploy broadband capabilities to single family dwellings also apply in the context of primarily residential MDUs,” (*id.* ¶ 7), for enterprise customers “the record shows additional investment incentives are not needed,” (*id.* ¶ 8), since “enterprise customers [are] already typically . . . served by high-capacity loops.” *Id.* n.26. Accordingly, the Commission “reject[ed] commenters’ categorical assertions that . . . unbundling relief should extend to all multiunit premises.” *Id.* ¶ 8. Verizon and SBC do even attempt to show that the Commission’s analysis was incorrect. Verizon merely repeats that it needs further regulatory relief to facilitate its recent *consumer* FTTP initiatives³⁵ while all of the incumbents trumpet (and overstate) both the extent of CLEC deployment to enterprise customers and the ability of CLECs to reach nearly any business customer via existing ILEC special access circuits. This is obviously no basis for extending the extraordinary FTTP unbundling exemption to enterprise customers.

Finally, the incumbents have presented no new or compelling information about intermodal alternatives to DS1 or DS0 loops. There is no indication that cable modem services

³⁴ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, 19 FCC Rcd 15856 (2004) (“*MDU Order on Reconsideration*”).

³⁵ See generally, *Petition of the Verizon Telephone Companies for Declaratory Ruling, or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises*, WC Docket No. 04-242 (filed June 28, 2004); *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises*, WC Docket No. 04-242 (filed June 28, 2004). In these two petitions, Verizon argues that while the *Triennial Review Order* consumer FTTP decision was necessary to spur investment in fiber facilities to consumers, further relief, including relief from *Computer II* unbundling rules are required before it will fully invest in the consumer fiber market.

can provide the kinds of services that most businesses require. Indeed the ILECs' own data (*see* ILEC UNE Fact Report at A-5) supports ALTS' conclusion that cable's offerings over its HFC infrastructure are highly asymmetrical which, as ALTS indicated (*see* ALTS Comments at 56-57) makes them unsuitable for most businesses. If business class cable modem services really were comparable to DS1 level services, businesses would not be willing to pay 5 times as much for a DS1 as they do for a business cable modem connection.³⁶

Moreover, fixed wireless, specifically Wi-Max cited by the incumbent LECs (*see, e.g.,* ILEC UNE Fact Report at III-20), is a nascent technology at best whose technical specifications were only recently finalized. *See id.* More mature fixed wireless technologies have proven unable to replace ILEC high capacity transmission in many cases, partly because of the inability of CLECs to obtain rooftop building access consistently. *See* XO Comments at 35-36.

In addition, despite the substantial number of pages in the ILEC UNE Fact Report devoted to VoIP as an alternative to mass market switching and DS0 loops, the incumbents own executives have admitted that the inherent attributes of VoIP severely limit its market potential. *See* ALTS Comments at 42-43. Even the incumbents' most optimistic projections indicate relatively few consumers, only 15% of all consumer lines, will adopt VOIP by 2008. *See* ILEC UNE Fact Report at II-7. This number constitutes only 12.3% of the 105.5 million households in 2000.³⁷ Nor does the miniscule number of customers (less than 8% at the most) that replace landline phones with wireless contradict the fact that wireless, like VoIP has inherent limitations

³⁶ Compare Nuvox Comments at 3 (asserting that an average DS-1 generates \$500-700 per month in revenue), with ILEC UNE Fact Report at A-5 (asserting that Cablevision's Business Class Optimum Online costs \$109.95).

³⁷ See Tavia Simmons & Grace O'Neill, HOUSEHOLDS AND FAMILIES 2000, UNITED STATES CENSUS BUREAU, CENSUS 2000 BRIEFS, at 2 (rel. Sept. 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf>.

that preclude wireless from being a substitute for wireline service. *See* ALTS Comments at 40-41. Importantly, VoIP is not an alternative means of loop connectivity, merely a new technology that rides atop existing facilities.

In sum, the incumbents' attempts to eliminate loop unbundling requirements are, especially when stripped of their flawed assumption that special access is a replacement of UNEs, easily dismissed. As ALTS explained in its comments, competitors are impaired without access to DS0, DS1, DS3 and dark fiber loops in all but a tiny number of isolated situations. A "sensible" geographic market definition therefore supports a national finding of impairment for all of these facilities.

B. Transport

The incumbents' arguments regarding transport are, as with loops, fundamentally flawed. For example, the incumbents argue that DS1 transport should not be available in many or most areas based on their claim that DS1 transport is available from a wide array of wholesalers. *See* ILEC UNE Fact Report at III-17. But as ALTS members and numerous parties explained, DS1 transport is not in fact available in the markets in which competitors seek to purchase it and state implementation proceedings of the *Triennial Review Order* confirmed that DS1 transport is virtually never available. *See, e.g.,* AT&T Comments at 62. There is therefore a strong basis for concluding that competitors are impaired on a national basis without DS1 transport.

As ALTS explained, there is only a need for a transport impairment test for DS3 and dark fiber facilities. Even if restricted to these facilities, the incumbents' test proposals are fatally flawed. Several incumbents argue that the Commission should design its transport test based on the fact that competitors deploy transport networks to enter urban markets generally rather than particular point-to-point routes. *See, e.g.,* BellSouth Comments at 42-43. But this is course beside the point. A competitor that deploys fiber in order to serve customers throughout a

defined geographic area does so by deploying connected point-to-point transmission routes. These facilities can only offer competitive pressure on the incumbent's provision of transport on the routes on which the competitors have actually deployed them. If multiple competitors can transport traffic between wire centers A and B, the incumbent's market power is diminished on that particular route. If no competitor, or only one competitor, can transport traffic between wire centers B and C, the incumbent retains market power on that route and unbundling is warranted. Stated differently, the fact that competitors have deployed their transmission capabilities along multiple routes does not in any way diminish the incumbent's market power over the routes on which the competitors have not or likely could not deploy transport.

Moreover, any reasonable assessment of impairment on a particular route or set of routes with particular characteristics must consider *both* ends of the route. BellSouth and Verizon have asserted that the impairment test for transport need only focus on one end of the route. *See* BellSouth Comments at 42; Verizon Comments at 83.³⁸ The Commission rejected this approach in the *Triennial Review Order* (*see Triennial Review Order* ¶ 376) and it is clear that decision was eminently sensible. BellSouth states that it would be too administratively difficult to define routes by focusing on both ends (*see* BellSouth Comments at 42), but this is simply not the case as ALTS demonstrated in proposing its transport test.

³⁸ As with loops, Verizon also proposes that unbundled transport should be eliminated throughout an MSA in which (1) the incumbent has received any level of pricing flexibility and in which competitors are *using special access* service to serve end user customers; or (2) at least half of the DS1 loops served by the incumbent in the MSA are in wire centers where competitors have "deployed fiber" and where competitors in those wire centers have high capacity connections to end users either over their own facilities *or via special access*. *See* Verizon Comments at 83-84. These tests are obviously based on the assumption that special access is a replacement for UNEs and therefore must be rejected.

BellSouth also asserts that competitors design their transport networks to carry traffic back to an aggregation point. From this fact Bellsouth concludes that only the size of the wire center serving the end user customer should count for impairment purposes, because it can serve as a proxy for whether backhaul transport can be self-deployed. *See id.* at 43. But competitors must rely on incumbent LEC loops, except in the rare cases where competitive loop deployment is possible. The only way to achieve adequate scale to compete in the provision of local, access or broadband service in an area is to aggregate traffic associated with loops in multiple incumbent wire centers. In order to aggregate traffic so that it can be backhauled to local switches and routers, competitors must be able to transport the traffic *between* incumbent LEC central offices. Thus, part of the backhaul function described by BellSouth is transport between incumbent LEC wire centers.³⁹

Apparently recognizing the fatal flaws of a transport impairment test that looks solely at one end of an interoffice transport route, SBC at least has proposed a test that requires that *both* ends of a transport route meet the applicable trigger. SBC proposes a test that would prohibit unbundling of interoffice transport between wire centers with 10,000 or more business lines, or between one such wire center and a wire center with between 5,000 and 10,000 business lines. SBC Comments at 69-70. Unfortunately, the use of triggers on both ends of the route is the only reasonable aspect of this test.

To begin with, the SBC test would only permit competitors to unbundle DS1 transport on routes that do not meet its proposed triggers, thus eliminating DS3 and dark fiber interoffice

³⁹ BellSouth asserts further that a route-by-route standard would encourage competitors to try to “game” the transport rules. The argument is essentially that CLECs would be willing to buy *two* UNE transport links in order to avoid purchasing a *single* transport route from a non-UNE source or deploying the single route. BellSouth Comments at 43. But it is highly unlikely that this would ever be a rational strategy for CLECs.

transport entirely. *See id.* In light of the available evidence, this is clearly unreasonable. Low density wire centers have absolutely no chance of ever being served by competitor fiber, let alone for purposes of providing individual DS3 connections. SBC's own data show that, even in the 25 largest MSAs served by SBC, BellSouth, and Verizon, no CLEC has obtained a fiber-based collocation in wire centers serving 32 percent of all access lines within those MSAs. *See id.* at 65. Fiber-based collocations are not conclusive proof of transport competition, but the absence of such collocations does show that there is no chance of competitive supply along a particular route. Thus, DS3 and dark fiber transport would be eliminated under SBC's test in wire centers serving one third of the access lines in the largest cities even though there is no evidence at all that it is "possible" for even a single competitor to establish a *single collocation* in such wire centers.

Furthermore, the number of routes on which it can be demonstrated that multiple competitors have actually deployed transport at DS3 capacity is tiny. For example, even SBC could only justify claiming that 500 total routes (no doubt this number is inflated) in the entire state of California, a state that includes tens of thousands of transport routes, met any of the *Triennial Review Order* transport triggers. The data from *Triennial Review Order* proceedings conducted in other states confirms that actual competition in the provision of DS3 and fiber-based transport exists is very much the exception. This is true even for the dense downtown areas where competition is most concentrated and where, as the incumbents are so fond of pointing out, demand for high-capacity services is concentrated. In New York City, the most competitive market in the country, the self-provisioning trigger for DS3 transport was met on only 44 interoffice routes and the wholesale trigger for DS3 transport was met on only 37

routes.⁴⁰ The same report found that the self-provisioning trigger for dark fiber was met on only 34 routes (no separate analysis was performed for the dark fiber wholesale trigger). *See NY PSC Analysis Attachment 7, p.1.* Competitive entry in mid-sized and smaller cities is also negligible. Only 135 out of over 27,000 routes in all of New York state, which includes such mid-sized cities as Rochester and Albany, met any *Triennial Review Order* triggers. *See NY PSC Comments at 3.* It is clear therefore that a national finding of non-impairment for DS3 and dark fiber could only be premised on the incorrect assumption that special access is an adequate replacement for UNEs. Stripped of this underpinning, the SBC proposal becomes unworthy of consideration.

SBC's treatment of DS1 transport is no better. SBC would eliminate DS1 transport on routes that connect fully 35 percent of the wire centers in SBC's region. As the Commission held in the *Triennial Review Order* (*see Triennial Review Order* ¶ 391) and as the record in this proceeding confirms, competitors cannot justify constructing stand-alone DS1 transport. *See, e.g., Loop and Transport CLEC Coalition Comments at 75-76; TWTC Comments at 4.* Moreover, the record shows that there is no wholesale market for DS1 transport; DS1 transport is simply unavailable from non-incumbent LEC sources. *See, e.g., Comptel/Ascent Comments at 38; McLeodUSA Comments at 19.* There is therefore no basis for eliminating unbundled DS1 transport on *any* route.

SBC's test for DS1 transport would be unreasonable even if applied solely to DS3 and dark fiber transport. SBC asserts that the transport test should begin by identifying those wire

⁴⁰ *See State of New York Public Service Commission, Department of Public Service Staff's Analysis of Switching and Transport Triggers*, Case 03-C-0821, at attachment 5, p. 1, attachment 6, p. 1 (rel. Mar. 31, 2004) ("NY PSC Analysis").

centers in which a *single* competitor has established a fiber-based collocation and extrapolate from those wire centers to determine where a *single* competitor *might* be able to establish a collocation. *See* SBC Comments at 77-78. This approach suffers from four fundamental problems. First, according to SBC, only 85 of the 432 wire centers with between 5,000 and 10,000 business access lines in its territory (20 percent) have a single fiber-based collocator. *See id.* at 78. From the 20 percent of wire centers in which a single competitor has established a single fiber-based collocation, SBC asserts that the Commission could reasonably infer that other competitors could establish a single fiber-based collocation in the other 80 percent of wire centers with between 5,000 and 10,000 business access lines. But SBC offers no basis for concluding that such an inference is reasonable. The simple fact that competitors have collocated in only one in five wire centers with between 5,000 and 10,000 business access lines yields the logical conclusion that collocation is the exception rather than the rule in such wire centers. Given the amount of inefficient entry that has occurred, the fact that AT&T has established collocations in many wire centers solely for the purpose of backhauling long distance traffic directly to its POPs to avoid tandem switched transport access charges, and other factors unrelated to efficient entry for the provision of local, access, or broadband service, there is simply no basis for concluding that SBC's approach is reasonable.

Second, because even a single fiber-based collocator is present in only a small fraction of the wire centers covered by the SBC test, it would eliminate transport on many routes in which no competitor has deployed collocation on both ends of the route. On routes such as these there is essentially no hope that even a single non-ILEC source of transport would develop. No definition of impairment could support this result.

Third, even if a single competitor had established a fiber-based collocation on both ends of all of the routes for which unbundled transport would be eliminated under the test, the SBC test would be clearly unreasonable. Evidence that a single competitor has established fiber-based collocation on both ends of a route only means that the competitor has overcome some of the relevant entry barriers associated with providing transport between the wire centers. It does not mean that the competitor actually transmits traffic between the wire centers in question. There must be adequate revenue opportunities associated with self-provisioning and/or wholesaling between the wire centers in question for the competitor to overcome the remaining entry barriers associated with connecting the two points to permit transmission between them. Absent some evidence that the competitor has done so in a large number of cases, there is simply no basis for inferring that competition is “possible” along the defined routes.

Finally, as discussed above, even if it were the case that one could reasonably conclude that it is possible for a single competitor to provide competitive transport along a particular set of routes, that would be insufficient to demonstrate non-impairment. Any reasonable impairment test for transport must be based on the premise that non-impairment can only be found where it is possible for, in the words of the D.C. Circuit, “multiple, competitive supply” to develop. *See USTA I*, 290 F.3d at 427. A market with high entry barriers and with only one competitor is likely characterized by umbrella pricing that the Commission found harms consumer welfare and that could not possibly justify the conclusion that the costs of unbundling outweigh the benefits.

For all of these reasons, the standards for determining impairment on interoffice transport routes proposed by the incumbents must be rejected. On the other hand, the balanced approach set forth by ALTS in its comments is based on both a sound reading of the *USTA I* and *II*

decisions and a reasonable interpretation of the available evidence regarding interoffice transport deployment.

IV. CONCLUSION

The Commission should adopt unbundling rules in accordance with the discussion herein.

Respectfully submitted,

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October 19, 2004

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