for these OCn-level facilities.[259] If, for example, Qwest is correct that a wholesaler truly can deploy facilities across the nation,[260] they would be fiber facilities, and that wholesaler will have to do so without UNEs.

Simply put, there is no actual or potential competitive deployment of DS-1 or DS-3 transport facilities below the capacity thresholds.[261] Instead, the record establishes that what competition there is beneath the capacity thresholds depends on competitors constructing fiber-based OCn-level facilities, and then channelizing these facilities and providing DS-1 and DS-3 channels to other competitors on a wholesale basis. In other words, as a result of the application of the FCC's capacity thresholds, the only relevant additional consideration is *actual* wholesale offerings by competitive fiber providers.

We therefore turn to what the record establishes about this wholesale competition and how it can be identified.

2. Wholesale Competition

The Commission should account for the possibility of wholesale competition either by relying on the capacity thresholds, by applying the wholesale triggers, or, in the

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259 This is true even if Qwest were right that a CLEC considering whether to deploy facilities would consider all the traffic possible in a building or a route. Qwest Comments at 85. This would merely suggest that CLECs would be willing to build OCn level facilities in more places. But a CLEC that needs OCn level facilities cannot obtain them as UNEs. Moreover, Qwest is wrong. It has become clear that CLECs cannot pursue a strategy of build it and they will come.

260 Qwest Comments at 88.

261 The ILECs do assert that fixed wireless and cable providers may be able to deploy loop facilities below the capacity thresholds. BOC Report at III 20-25. But they present virtually no evidence that any such deployment has occurred nor even evidence that it would be economic on a widespread basis.

case of transport, by relying on the presence of four fiber-based collocations by the same carriers at either end of a transport route.

a. The Commission May Rely on Capacity Thresholds to Account for Wholesale Competition

The ILECs assert that some CLECs have deployed facilities above the capacity thresholds and are willing in some instances to channelize those facilities to provide facilities below the capacity thresholds on a wholesale basis.[262] But in the state cases the ILECs presented almost no evidence showing that wholesalers exist anywhere in the country.[263] The list of carriers they provide who have sometimes offered facilities at

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262 *See, e.g.*, BOC Report at III-10 (*If* a single large customer in a building requires enough capacity to spur deployment of competitive fiber to a building, all the other tenants can buy competitive capacity in smaller increments. . . .").

263 Nor do they present such evidence here. Only one of the CLECs they cite (AboveNet) has more than 10,000 route miles according to the ILECs' figures. BOC Report at III-5, III-6. The ILECs do not show that these CLECs are wholesaling below the capacity thresholds. Similarly, Verizon discusses the bids it took to provide facilities to Verizon out-of-region, and the availability of facilities from competing providers. But the bids concerned entrance facilities at the OC-48 or OC-192 level. Verizon Cuddy Decl. ¶ 6. With respect to loops, Verizon says that as it attempted to serve customers out of region, it received bids from CLECs to provide DS-1s and DS-3s in some buildings. But there were relatively few locations with even two alternative providers, and these providers may have been relying on ILEC special access facilities. Verizon Cuddy Decl. ¶ 14. In any event, if Verizon is correct, application of the wholesale triggers would eliminate unbundling to these locations.

Similarly, SBC says that CLECs supply "over a third of the wholesale market for DS-1 and DS-3 services." SBC Casto Decl. ¶ 11. But SBC's estimate is based on a study it does not provide, and not on data from the state cases, which both sides could thoroughly examine and test in discovery. Moreover, even if true, this means that SBC provides nearly two thirds of such facilities directly. Moreover, many of the CLEC wholesalers likely are relying on ILEC special access (or UNEs) as an input, and this would not form a basis for a finding of non-impairment for reasons we detailed in our initial Comments and further document below. Finally, application of the wholesale trigger or the fiber-based collocation test would in any event presumably eliminate unbundling on the routes/locations where such facilities are available at wholesale.

wholesale[264] does not show the extent of that wholesaling or where it occurs. And the QSI report from the state cases shows that there is very little wholesaling of this sort. AT&T's comments make clear why this is so – even where a CLEC has self-deployed loop or transport facilities, there are barriers to becoming a wholesaler at levels below the capacity thresholds.[265] Given the very small number of routes on which such wholesale facilities are offered, it would be reasonable for the Commission to simply make a national finding of impairment below the capacity thresholds, as MCI explained in its comments.

b. The Commission May In the Alternative Continue to Rely on Wholesale Triggers to Account for Wholesale Competition

If the Commission wants to go farther – and capture those few instances in which there are enough wholesalers that other CLECs are not impaired – it can do so by applying the wholesale trigger. The wholesale trigger precisely captures those instances in which CLECs have deployed high capacity facilities and made them available to other CLECs at the relevant capacity levels. AT&T explains how the wholesale trigger could be applied.[266] The ILECs do not contest that the wholesale trigger would be readily administrable. To the contrary, they make clear that this would be feasible.[267]

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264 BOC Report at III-12.

265 AT&T Comments at 46.

266 *Id.* at 64.

267 SBC Comments at 72 n.241 (dispute in states over application of the triggers was largely a legal dispute).

c. The Commission May Establish a Fiber-Based Collocation Test to Account for Wholesale Competition

For transport, the Commission can also apply the fiber-based collocator test that MCI proposed: finding non-impairment on any route on which four CLECs had fiber-based collocations on each end of the route. As MCI explained, and as the ILEC comments themselves make clear, such a test would be readily administrable.[268] It would capture virtually all instances in which there are two or more wholesalers on a route (or even two or more retailers). The QSI report shows that in most instances in which CLECs have fiber-based collocations on each end of a route, they are *not* providing transport on that route below the capacity thresholds, let alone wholesaling on that route. So in virtually all instances in which there are two wholesalers, there will be at least four fiber-based collocators, making that test a reasonable proxy to use instead of the wholesale trigger. The test also captures all potential deployment that can reasonably be expected, as deployment is unlikely to occur except where there is already fiber-based collocation. The test goes further than need be in that regard, because, as we have seen, the capacity thresholds already eliminate unbundling for all CLECs that could self-deploy transport. In essence, the fiber-based collocation test operates as a potential deployment test grafted on top of the potential deployment test of capacity thresholds. But if belt and suspenders regulation is wanted, the fiber-based collocation test is a reliable and administrable pair of suspenders.

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[268] BOC Report at III-6 ("Fiber-based collocation provides a straightforward and reliable indicator of the presence of competitive fiber.").

3. The ILECs' Proposals for Unbundling Are Grossly Overinclusive and Unlawful

On the other hand, the ILECs' proposals both for high capacity transport and loop unbundling are overbroad and irrational. At the outset, the ILECs' "evidence" significantly overstates the extent even of OCn-level deployment.[269] For example, the BOC Report estimates that CLECs provide 88 million voice grade equivalent lines, while FCC reports show the number in fact is 25 million, of which only 6.9 million are over CLEC-owned facilities.[270] The more granular ILEC data is similarly unreliable. For example, the BOC Report asserts that XO, Allegiance, Xspedius, and KMC have 27.3 million VGEs collectively,[271] while these CLECs' Form 477 reports show they in fact provide 3.6 million VGEs. There is not nearly as much competitive fiber in the ground as the ILECs assert.

a. The ILECs Misconceive the Commission's Task

The conceptual problems with the ILECs' proposals extend far beyond their misstatement of the facts. All are premised on the notion that the Commission's task is to predict where deployment of fiber facilities is possible, and then to eliminate unbundling of any facilities in these locations, including unbundling of facilities below the capacity thresholds. Thus, for example, if the Commission concludes that it is possible for multiple CLECs to deploy OCn level transport between two central offices, the ILECs

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269 *See* ATT Comments at 71-74. The ILECs rely, for example, on unreliable data from GeoTel. Verizon Comments at 43-44.

270 *Compare* BOC Report at I-9 *with Local Telephone Competition: Status as of December 31, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau (June 2004), *available at*: <http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0604.pdf>.

271 BOC Report at I-9.

believe the Commission should eliminate unbundling even of DS-1 level transport between those two offices.

But the ILECs' tests do not accurately predict where CLECs can deploy OCn level fiber. Moreover, the relevant question before the Commission is whether a competitor can get a DS-1 or DS-3 circuit on a wholesale basis, and not whether it can self-deploy OCn-level fiber. As we have just shown, CLECs that need only DS-1 or DS-3 clearly cannot themselves construct these facilities. The (erroneous) assertion that other CLECs might be able to self-deploy OCn-level fiber in offices that have a single fiber-based collocator (or that have a specified number of business lines) does nothing to help a carrier that needs only a DS-1 circuit. To that carrier, the only relevant consideration is whether the collocated CLEC actually has deployed transport and loops and is willing to provide them on a wholesale basis.

b. The ILECs' Tests for Transport Unbundling Are Overbroad and Irrational

The error costs of the ILECs' proposed approaches to transport are particularly high because they would eliminate unbundling where there is very little basis to conclude that deployment of even OCn level facilities is possible. The ILECs recognize that fiber-based collocation is a good proxy for where such deployment is possible.[272] But the

[272] Verizon Comments at 45 (fiber-based collocations do not show that "there actually is fiber directly between each of these wire centers, but it does show where, in the court's word, it is 'possible' to establish connections between wire centers"); SBC Comments at 77 ("the best indicator of whether a wire center generates sufficient traffic to justify competitive facilities deployment is fiber-based collocation."); BOC Report at III-29 ("fiber-based collocation provides a straightforward (albeit conservative) indication of which wire centers are served by competitive fiber); BellSouth Padgett Aff. ¶ 6 ("Fiber-based collocation provides a readily accessible indication of the level of competition in an area.").

ILECs rely on fiber-based collocation to suggest findings of non-impairment far beyond what is warranted.[273] For example, the ILECs assert that "[m]ore than half of all BOC wire centers with 5,000 or more business lines now have fiber-based collocation. . . . It is therefore reasonable to conclude that other wire centers that meet this criterion could economically support competitive fiber as well."[274] On that basis, SBC proposes eliminating unbundling of *all* DS-3 transport and DS-1 unbundling in on routes between offices with 10,000 business lines, or routes between one such office and offices with 5,000 or more business lines. And Qwest proposes elimination of all unbundling everywhere.[275]

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[273] The ILECs assert that fiber-based collocation is a conservative measure of collocation because it does not account for competitors that have bypassed ILEC facilities, such as those that send traffic to data centers or collocation hotels. BOC Report at III-28. But the ILECs apparently recognize how limited such deployment is, because even they do not attempt to develop an impairment test that explicitly measures such deployment.

[274] BOC Report at III-28; *see also* BellSouth Comments at 40 (proposing elimination of unbundling in central offices with 5,000 or more business lines); Verizon Comments at 82 (same). Verizon makes the even more absurd proposal to eliminate unbundling of all high capacity facilities in all markets (Verizon Comments at 65; *see also* Qwest Comments at 80) despite its recognition of the need for a nuanced approach (*id.* at 66) and its recognition that CLEC deployment of high cap loops, for example, targets particular buildings. *See infra.* Verizon also proposes eliminating unbundling in MSAs in which a significant portion of the MSAs have attracted competitive facilities. Verizon Comments at 83. This proposal must be rejected for the same reasons as the nationwide proposal. Finally, Verizon proposes eliminating unbundling in wire centers in which business lines account for 30 percent or more of total lines. Verizon Comments at 82. This, too, is absurd. A wire center could have 100% business lines but have relatively few total lines, or be located far from CLECs' networks, in which case deployment would not be possible. Verizon says that today only one-third of such wire centers have attracted any competitive fiber. *Id.* And SBC, although it recognizes that fiber-based collocation is "the best indicator of whether a wire center generates sufficient traffic to justify competitive facilities deployment" advocates applying its proposed test only to DS-1s, but not DS-3s, a distinction that has no factual basis whatsoever.

[275] Qwest Comments at 89.

These tests and proposals should be rejected.

i. It is Irrational to Rely on a Single Collocation, Rather than Collocation Pairs

First, the ILECs impermissibly count individual collocations, rather than pairs of collocations.[276] Thus, if MCI has a fiber-based collocation at one central office (X) and AT&T at another (Y), the ILECs presume that MCI and AT&T can both transport traffic between these offices. Indeed, in proposing elimination of unbundling between offices with one fiber-based collocator and others where *no* fiber-based collocators exist, the ILECs go even farther.[277] This is irrational. The ILECs themselves say that "[a] competing carrier is . . . able to route traffic from any ILEC wire center it reaches to any point on its *own* network."[278] But the majority of transport routes between central offices with more than 5,000 business lines do *not* have the same CLEC collocated at both ends of the route.[279]

The ILECs nonetheless assert without any supporting evidence that CLECs can "daisy-chain,"[280] even though the Commission expressly found that they cannot.[281] In the

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276 *See, e.g.,* BOC Report at III-7 (16% of wire centers have at least one fiber-based collocation).

277 BellSouth Comments at 44.

278 BOC Report at III-8 (emphasis added).

279 Pelcovits Reply Decl. ¶ 41 (filed on behalf of 27 CLECs on October 19, 2004). Dr. Pelcovits ran a simulation using BellSouth's data because BellSouth was the only ILEC to provide the underlying data. The simulation showed that in central offices with more than 5,000 business lines, there was only a 44% chance of finding the same CLEC collocated at both ends of a route, a 21% chance of finding two or more CLECs, and only a 13% chance of finding three or more. *Id.*

280 *Id.* at III-17; *see also id.* at III-29 ("interconnections among CLEC networks ensure that any wire center with collocated fiber can be used to reach any other wire center with collocated fiber").

example above, this would presumably mean that a CLEC could purchase transport from MCI from the point at which it is collocated (X) to some theoretical point where MCI and AT&T are both collocated, and then purchase transport from there to the point at the other end of the route where AT&T is collocated (Y). Despite their assertion, however, the ILECs offer *no* evidence that CLECs routinely do this, or that it would be economic for them to do so.

Indeed, Verizon implicitly recognizes that it is difficult for CLECs to daisy chain. It says that when it attempted to extend its own coverage out of region and evaluated proposals of competing providers, one important factor was the geographic coverage of those providers.[282] Presumably, this was because Verizon could not readily negotiate and rely on a daisy chain of transport from many providers. Nothing in the ILEC submissions puts into question the Commission's previous conclusion that CLECs would be impaired if they had to daisy chain, because this "would raise costs, increase provisioning time intervals, and make maintenance and repair more difficult.[283]

The ILEC assertion that access to high capacity facilities is available from several consolidators does not eliminate the problem with daisy chains.[284] If such consolidators did exist, they would have pairs of fiber-based collocations. And a fiber-based collocator test, such as the one MCI proposed, would count these consolidators towards a finding of non-impairment. But the ILECs want to count fiber-based collocations as evidence of non-impairment even on routes where there are *not* pairs of fiber-based collocators – in

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281 *Triennial Review Order* ¶ 402.

282 Cuddy Decl. ¶ 11-12, 16.

283 *Triennial Review Order* ¶ 402.

284 BOC Report at III-19, III-20.

other words, even where such consolidators do not exist. And such consolidators do not exist on most routes. The evidence on consolidators largely concerns announcements of future intentions, not actual deployment. The existence of consolidators should they provide a basis for finding non-impairment only where they actually deploy facilities.

In sum, the ILEC failure to account for collocation *pairs* is the first critical way in which the ILEC tests are overbroad.[285]

ii. It is Irrational to Rely on the Presence of a Single Competitor, Rather than at Least Four Competitors, Because the Presence of a Single Competitor Does Not Suggest that Wholesale Services at the DS-1 or DS-3 Level Are Available

Second, the ILECs incorrectly presume that the presence of even a *single* fiber-based collocator is determinative. This would be wrong even if their assertion was limited to routes on which the same individual CLEC was collocated at both ends of the route. The existence of one CLEC that may potentially be capable of transporting traffic along a route does not demonstrate non-impairment on that route. That is because all that is relevant is wholesaling, as we have shown above, and the existence of a single retailer does not demonstrate the existence of even one wholesale alternative. To the contrary, the QSI report shows that many retailers do not wholesale at all. There is no evidence (empirical or economic) that suggests that a *single* retail competitor will routinely provide DS-1 and DS-3 facilities at wholesale.

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[285] BellSouth suggests that a requirement of CLEC collocation at both ends of a route might result in gaming, because a CLEC could then purchase UNEs to and from some third point to obtain UNE transport on a route. But if the ILECs are correct that a CLEC with fiber-based collocations can readily transport traffic from one to the other with little cost, the CLEC would surely choose to use its own facilities in this circumstance, rather than purchasing two sets of transport UNEs.

Unable to show that the existence of a single fiber-based collocator demonstrates either that efficient CLECs generally can self-deploy transport, or that these single CLECs will wholesale their services, the ILECs are reduced to arguing that the nature of loops and transport are such that "even a single fiber cable can put severe price pressure on the ILEC's service."[286] That is false. The ILECs ignore the basic economic truth that a market with only two competitors is not a competitive market, but a duopoly market. In such a market, both market participants will have an interest in – and be capable of setting – duopoly rates. The likelihood of noncompetitive pricing is particularly high in a market where both competitors are also retailers and thus have the additional incentive of trying to maintain high retail prices. That is why, in setting the wholesale trigger at two in the *Triennial Review Order*,[287] the Commission concluded that "the risk of umbrella pricing is high when only one wholesale competitor enters the market," and further acknowledged that even two wholesalers did not "ensure the market is fully competitive."[288]

iii. It is Irrational to Rely on the Presence of a Single Competitor On a Route, Because the Presence of a Single Competitor Does Not Suggest that Other CLECs Either Can or Will Construct Competitive Fiber Facilities Along the Same Route

Additionally, the existence of a single CLEC providing transport above the capacity thresholds does not show that others can generally also build competitive facilities (even if they have sufficient traffic to warrant use of large OCn facilities). In

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286 BOC Report at III-26.

287 *Triennial Review Order* ¶ 413 n.1275.

288 *Id.*; *see also* Pelcovits Reply Decl. ¶ 43 (explaining fallacy in ILEC argument that one wholesale alternative is enough).

most instances where there is a single fiber-based collocator on both ends of a route, there are *not* multiple fiber-based collocators on both ends of the route.[289] And there is no reasonable basis to expect anything different. The Commission set the retail trigger at three precisely because any fewer number of competitors do not provide a reasonable basis for extrapolation. Indeed, at the time of the *Triennial Review Order*, BellSouth proposed a test based on the presence of three or more competitive providers – not the single provider on which it now relies.[290]

In suggesting the Commission was wrong to require three retail providers before generalizing about non-impairment, the ILECs ignore the well-know fact that many CLECs deployed collocations and fiber in the late 1990s even where it turned out that such deployment was uneconomic. So deployment by a single CLEC does not demonstrate that such deployment was economic even for *that* CLEC, much less for others. Moreover, the economics of deployment for one CLEC – especially the first CLEC to collocate at a central office – often will be very different from the economics for other CLECs.

As MCI explained, and as the Commission found in the *Triennial Review Order*, there are a host of factors that affect whether deployment of transport is economic on a particular route. One of the most critical of these factors is the distance over which fiber will have to be deployed.[291] Thus, in determining whether fiber-based collocation is

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289 *See* Pelcovits Reply Decl. (showing that in central offices with 5,000 business lines, there is a single fiber-based collocator on both ends of a route 44% of the time, but two collocators or more only 21% of the time, and three or more only 8% of the time).

290 *Triennial Review Order* ¶ 401 n.1243.

291 *See* BOC Report at III-10 ("The availability of high-capacity services over competitive fiber is determined by the proximity of competitive fiber to any given

economic in a particular central office, a CLEC must evaluate how far that central office is from its existing network. This will vary significantly from CLEC to CLEC. Some central offices may be located close to the networks of multiple CLECs because the density of traffic in these and nearby central offices made it efficient for many CLECs to build networks nearby. Other central offices may be located near the network of only a single CLEC.

A CLEC determining whether to become the second or third CLEC to deploy transport to a central office will also have to evaluate the aggregate revenues available to determine whether the market will reasonably support another CLEC. Such revenues vary significantly even for offices with more than 5,000 business lines.[292]

Finally, the CLEC must consider the ILECs' willingness and ability to groom additional special access circuits onto a CLECs' facilities. In a number of offices to which MCI might otherwise be able economically to deploy transport facilities, MCI is not doing so because ILEC grooming restrictions prevent it from quickly getting its existing customers onto its own transport facilities.

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location."). The ILECs go on to say that the availability of high capacity services is not determined "by the bandwidth required by any customer, or subset of customers, along the route." *Id.* Of course, deployment is determined *both* by distance and bandwidth. But even on very short routes, CLECs cannot self-deploy facilities below the capacity thresholds, as the evidence in both the Triennial Review Order and these proceedings demonstrates. *See, e.g.,* AT&T Comments at 42, 47.

[292] For example, BellSouth shows that 29.4% of central offices with more than 5,000 lines have at least $2 million in special access revenues, but 25% of these offices have special access revenues of less than $600,000, BellSouth Padgett Aff. ¶ 10 – likely explaining some of the difference in deployment. *Cf.* Verizon Verses/Lataille/Jordan/ Reney Decl. Ex 6 (showing that CLECs had constructed loops to fewer than 30% of buildings where revenues were between $500,000 and $2,000,000, and more than 60% of buildings where revenues were more than $6,000,000).

In sum, the existence of a single fiber-based collocator by itself says virtually nothing about whether it would be economic for other CLECs to collocate at that central office.[293]

To the contrary, the existence of a single fiber-based collocator, rather than multiple collocators, is strong evidence that it would *not* be economic for multiple carriers to collocate at the particular central office, either because that office is too far from networks of other CLECs, is not large enough to support competition from multiple carriers, or for other reasons. The ILECs own evidence shows that only between 53% and 66% of wire centers with one fiber-baser based collocator have a second fiber-based collocator, and only between 34% and 45% have a third, and only between 22% and 31% have a fourth.[294] This data establishes that there are a great many offices in which it makes economic sense that there be only one alternative provider, and that the chances of their being more than two providers even in those locations where one carrier is able to collocate are even more slim.

Moreover, as MCI explained in its Comments, the loop and transport market is a mature market and there is no reason to expect significant additional fiber based collocations where they have not otherwise occurred. AT&T has explained that it has

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[293] Qwest suggests that loops and transport facilities do not have natural monopoly characteristics and therefore the Commission cannot find impairment. Qwest Comments at 86. But a loop has always been considered the very paradigm of a natural monopoly. And the very factors the Commission recognized as causing impairment with respect to these facilities – such as high sunk costs – are ones the D.C. Circuit recognized as causing impairment. *USTA II*, 359 F.3d at 572.

[294] BellSouth's assertion that central offices with 5,000 or more business lines account for 90% of central offices with one or more fiber-based collocations (BellSouth Comments at 4) may establish impairment for central offices below that threshold, but says nothing about the percentage of central offices above 5,000 lines and at various possible break points thereafter that have fiber-based collocations.

largely completed its rollout,[295] and this is true of MCI as well. Thus, on routes that today only have a single fiber-based collocator at each end of the route, it is generally unlikely that multiple CLECs will be able to deploy their own facilities in the future. Of course, if they did, CLECs would then lose access to transport as a UNE under MCI's proposed fiber-based collocation test, making the cost of error negligible. This is particularly so since any CLEC that had sufficient traffic to deploy OCn facilities could not use UNEs in any event.

iv. It is Irrational to Extrapolate Based on the Presence of a Single Competitor to Predict That Competition Is Possible Along Routes Where There Is No Competitive Presence

More irrational still, the ILECs extrapolate even beyond routes on which there is one fiber-based collocation on each end of a route.[296] They argue that because slightly more than half of central offices with more than 5,000 business lines have at least one fiber-based collocation, the Commission should find non-impairment between *all* offices with these line counts.[297] But, as we have shown, there is no good reason to assume that multiple competitive supply is possible even in offices with 5,000 business lines that already have a single fiber based collocator. There is even less reason to make such an assumption in offices that do not have even one collocator. The facts that make

295 AT&T Comments at 48 (describing virtual end of AT&T's roll out).

296 *See, e.g.*, SBC Comments at 77-78.

297 The ILECs do not further break down this data. Thus, even if the ILECs are correct that slightly over half the central offices with more than 5,000 lines have one or more fiber-based collocators, it may well be that far less than half of central offices between 5,000 and, for example, 25,000 lines have one or more fiber-based collocator, but that every central office with more than 25,000 lines does, and that this explains the aggregated figure of slightly more than half. In other words, the cutoff the ILECs have chosen is arbitrary.

competitive transport economic – including such things as the distance of the customer from the central office and the density of the route – simply do not permit of such generalizations. Thus, Dr. Pelcovits shows in his reply declaration that the number of business lines in a central office fails to account for 40% of the variance in deployment between central offices.[298]

Moreover, to the extent that any extrapolation can be made from the ILEC data, it is that deployment for multiple CLECs is *not* generally possible on the routes they would remove. After all, eight years after the Telecommunications Act, barely half of these offices have even a single fiber-based collocator, and far fewer of the routes have a single fiber-based collocator on each end of the route. Fewer still have multiple fiber-based collocators on each end of the routes between them, let alone collocators that have actually deployed transport on these routes and are providing transport at wholesale. The ILECs' own data shows that even in wire centers with 5,000 or more business lines, fewer than a quarter of wire centers have even two fiber-based collocators, fewer than 15% have three fiber based collocators, and many fewer than that have four fiber-based collocators.[299] SBC's data, for example, show that only 5% of wire centers with 5,000 to 10,000 business lines have even two collocators, and only 35% of wire centers with more

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298 Pelcovits Reply Decl. ¶ 36.

299 The ILECs say that 53% of wire centers with more than 5,000 business lines have one or more fiber-based collocators. BOC Report at III-29. They say that between 53% and 63% of wire centers with one fiber-based collocator have a second, and between 22% and 30% of those with one have a third, and between 14% and 23% of those with three have a fourth. *Id.* at III-17. *See also* Pelcovits Reply Decl. ¶ 39 (only 28% of BellSouth offices with more than 5,000 business lines have 4 fiber-based collocators, the same number that have zero, and only an additional 10% have three or more).

than 10,000 business lines do.[300] The number of wire centers with four or more fiber-based collocators is certainly far less. Such data provides absolutely no basis for concluding that multiple CLECs can deploy transport on all routes among wire centers with 5,000 or more business lines.

SBC's proposed test is only slightly less irrational. It too would eliminates unbundling on all routes from offices with 5,000 business lines to those with 10,000 or more business lines even though, under SBC's own data, only 5% of the offices with 5,000 to 10,000 business lines have even two or more fiber-based collocators. As for SBC's proposal to eliminate unbundling among all offices with 10,000 or more business lines, SBC's data show that 65% of the time this would eliminate unbundling of offices that have zero or one fiber based collocators. And even in the other 35% of offices, it would eliminate unbundling on every route between those offices even though the same CLEC likely is not collocated in most of these offices, let alone there being multiple CLECs that have collocation pairs.

To use the words of the D.C. Circuit, the error costs of the ILECs' proposals are extremely high. The same is true for ALTS' 40,000 line proposal, which is not supported by any evidence. These proposals would eliminate unbundling on tens of thousands of routes where there has been little or no deployment. Even if there are routes where some CLECs potentially can self-deploy transport but have not yet done so, the error cost would be high because the proposals would simultaneously eliminate unbundling for the many efficient CLECs who might want to use transport on these routes but do not have sufficient traffic to do so economically. The ILECs' proposal would eliminate transport

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300 SBC Comments at 78.

for these CLECs based on the theoretical possibility that other CLECs might someday deploy transport and provide it at wholesale. But such a possibility provides no help to the CLECs that need wholesale facilities today. Moreover, the ILECs' proposals would almost certainly result in elimination of impairment on hundreds or thousands of routes where no CLECs can economically deploy transport, based on erroneous extrapolations dependent upon a single variable – line count.

These tests fail the basic requirement set out in *USTA II.* They reach conclusions about one route based on competition on a different route, without explaining how the two routes "are similarly situated with regard to the 'barriers to entry' that the Commission says are controlling."[301] The ILECs' own data vividly demonstrates, for example, that offices that have over 5,000 business lines vary wildly in characteristics, such as the amount of revenue that is available in the office and the distance from the office to the customer, that are critical to determining whether transport competition is possible to that office. There is little or no correlation between the factors identified by the ILEC and the factors the Commission has found create barriers to entry in the transport market.

In contrast, MCI's four fiber-based collocator proposal has extremely low error costs and is much more closely correlated to the factors that create or relieve impairment. It captures virtually all routes where multiple wholesalers (or even multiple retailers) have already deployed transport, as well as nearly all routes where such deployment is possible. Because the transport market is a mature market, there likely are few routes where multiple CLECs can deploy transport today but are not even collocated. And to

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301 *USTA II,* 359 F.3d at 575.

the extent there are such routes, the harm of continued unbundling on such routes is non-existent, as the only CLECs permitted to rely on UNEs on those routes are those that clearly cannot self-deploy UNEs – those that need capacities under the capacity thresholds. Moreover, if deployment is truly economic on such routes, such deployment certainly will occur, as it has in the past, and unbundling will then be eliminated once the threshold of four fiber-based collocators is reached.

c. The ILECs' Tests for Loop Unbundling Are Overbroad and Irrational

The ILEC loop proposals are equally devoid of evidentiary support. BellSouth and Verizon assert there should be a finding of non-impairment for all buildings connected to wire centers with 5,000 or more business lines.[302] Verizon also asserts that unbundling should be eliminated throughout MSAs in which there has been significant deployment of competitive facilities.[303] SBC asserts that for DS-3 loops, there should be a blanket finding of non-impairment. For DS-1 loops, SBC suggests finding non-impairment for all buildings connected to wire centers that have 15,000 or more business lines, because 91% of such wire centers ostensibly have at least one lit building. And Qwest again proposes elimination of all unbundling everywhere.[304]

In support of these proposals, the ILECs first say that in the precise locations where CLECs have deployed high capacity loops, "[t]here can be no serious argument" that any customer in the buildings can receive competitive access at any capacity.[305] That

302 BellSouth Padgett Aff. ¶ 22; Verizon Comments at 82.

303 Verizon Comments at 83.

304 Qwest Comments at 81.

305 BOC Report at III-31.

is not so. Even assuming that first CLEC is serving the building economically, which often will not be the case, the presence of this individual CLEC does not show even that individual CLEC could serve the whole building at all capacity levels, because there may be issues with access to the whole building, as well as costs of multiplexing at different capacity levels than the CLEC is already serving.[306] Moreover, the fact that a single CLEC can deploy loops to a building does not show that multiple CLECs can do so, as these CLECs may be collocated farther from the building, for example. And, at a minimum, any CLEC that could deploy its own facilities to serve the building would have to obtain sufficient traffic to warrant deployment of facilities above the capacity threshold. As with transport, the only evidence the ILECs present on deployment of loops below the capacity thresholds concerns CLECs that have deployed loops above the capacity thresholds and then channelized them (and there is very little evidence even of that).[307] But if the CLEC obtained enough traffic to cross the capacity threshold, it would already lose access to UNEs to the particular location in question.

In any case, the most the ILEC argument could justify would be elimination of unbundling in the specific locations where multiple CLECs had self-deployed loops (in a version of the retail or wholesale triggers). But the ILECs again want to go much farther, suggesting that fiber-based collocation is evidence of non-impairment with respect to all buildings connected to a particular wire center.[308] Indeed, BellSouth and Verizon assert

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306 Verizon Comments at 53-54.

307 BellSouth makes the blanket assertion that CLECs were not forthcoming in discovery in the state proceedings. BellSouth Padget Aff. ¶ 23. That is not so. And BellSouth had every opportunity to contest any discovery issues in those proceedings.

308 BOC Report at III-31.

there should be a finding of non-impairment in all wire centers with 5,000 or more business lines even if there is no fiber-based collocation at a particular wire center, and SBC makes a similar proposal with a slightly higher line count.

These are preposterous proposals. To begin with, BellSouth does not even present data on the percentage of buildings connected to wire centers for which CLECs have self-deployed loops. It makes no claim that CLECs have self-deployed facilities in more than 50% of such buildings – or even 5% of such buildings.[309] And even if it had, this would be no basis to presume CLECs could self-deploy in other buildings in this category. Unlike a collocation transport test, where it is reasonable to presume that a CLEC that has a fiber-based collocation at *both* ends of a route could potentially transport traffic along the route, fiber-based collocation is by no means a sufficient condition to conclude that a CLEC could deploy loops to all buildings connected to that wire center. Whether it could deploy loops would be determined instead by the length of the loop it would have to construct as well as a number of other factors that have nothing to do with whether a CLEC can serve other customers out of the same central office.[310]

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[309] All that BellSouth asserts is that of the central offices with CLEC lit buildings, 86% are in central offices with more than 5,000 lines. BellSouth Padgett Aff. ¶ 24. Of course, this does not even answer the question of what percentage of central offices above 5,000 lines had lit buildings, much less the percentage of buildings that are lit.

[310] *Cf. Triennial Review Order* ¶ 341 ("The presence of a single competitive LEC's collocated transport facility as a trigger for purposes of protecting consumers from anticompetitive pricing, *i.e.*, the purpose of our pricing flexibility rules, is not sufficient evidence that facilities-based competitive entry into a market at the local loop level is feasible."); Verizon Comments at 38 ("competitors with fiber networks target even more precisely the specific buildings where that demand is concentrated); *id.* at 49 ("In the smaller MSAs, competing carriers have carefully targeted their facilities to the limited areas within those MSAs in which there is demand for high-capacity services."); *id.* at 50 (CLECs have deployed fiber to 50% of buildings with $2-$4 million in telecommunications expenditures).

SBC's proposal for loops is no better. For DS-3 loops, with no support whatsoever SBC suggests a blanket finding of non-impairment. For DS-1 loops, SBC suggests finding non-impairment for all buildings connected to wire centers that have 15,000 or more business lines, because 91% of such wire centers ostensibly have at least one lit building – in another words one building in which a single CLEC serves at least part of that building. But these same wire centers have far more buildings attached to them that are not lit. And there is absolutely no basis to assume that the buildings that are not lit are similar to those that are lit. The available revenues may differ radically among buildings; the distance from the central office of the various buildings may also differ significantly; and many of the wire centers may not even have fiber based collocations.

SBC does not deny this, but purports to justify its test by asserting that CLECs know which buildings are lit and have not provided that information. But in asserting that 91% of wire centers with 15,000 or more business lines have at least one lit building, it is clear that SBC has access the necessary information.[311] Moreover, CLECs did provide this information in state proceedings, and SBC could have brought discovery challenges if it thought they were not doing so in an adequate manner. That evidence showed relatively little deployment of loops of any sort, and virtually none below the capacity thresholds. And if the Commission were to apply the triggers, it could readily oversee a discovery process in which CLECs were required to provide the information.

BellSouth asserts that CLECs can readily deploy OCn facilities to buildings near their networks and channelize them. BellSouth Comments at 47. But BellSouth ignores that in many instances CLECs often will not have sufficient traffic to make it worthwhile to deploy such facilities. If they did, they could not obtain access to UNEs in any case.

[311] SBC Comments at 89.

As with the ILECs test for transport, their loop tests fail because there is little or no correlation between the factors they identify and the barriers to entry the Commission has identified in the loop market. The reasons there are competitive fiber built to a particular central office has virtually no bearing at all upon whether it is possible for competitive providers to deploy loop facilities to an office served from that wire center. Because buildings that happened to be served off of a particular wire center are not "similarly situated with regard to the 'barriers to entry' that the Commission says are controlling,"[312] the ILECs' tests must be dismissed out of hand.

4. Special Access Does Not Obviate Impairment

Much of the ILECs' argument on loops and transport proceeds from the premise that CLECs should be denied use of UNEs because in many instances they are currently using special access to compete. The ILECs, however, do not address even the basic arguments as to why special access is irrelevant.

In its opening comments MCI explained at length that: (1) the statute precludes the Commission from considering special access; (2) consideration of special access would be unadministrable especially since the ILECs can raise special access rates and lower retail rates at will; (3) there are many services and locations in which MCI cannot rely on special access today, and (4) now that the ILECs have section 271 authority, CLECs will be hampered in their ability to rely on special access in the future.

The ILECs do not address the first two of these arguments at all, even though the D.C. Circuit made clear in *USTA II* that administrability was one basis on which the Commission might well reject consideration of special access. With respect to

312 *USTA II,* 359 F.3d at 575.

administrability, for example, MCI explained that the Commission would have to, but could not, compare every special access rate to every retail rate across a range of services, especially given the distance-sensitive nature of special access rates. Other commenters made the same point.[313] The ILECs say absolutely nothing about how such a comparison could be conducted, suggesting without any evidentiary support that special access can give rise to blanket findings of non-impairment everywhere.

a. Competitors' Reliance On Special Access Services Is Not Economic

Other commenters also joined MCI in demonstrating that CLECs cannot rely on special access even today except in relatively select areas for specific services.[314] In response, the ILECs argue that CLECs rely on special access today far more than they rely on UNE loops and transport. This claim is significantly overstated.[315] Indeed, many CLECs explained in their comments their extensive reliance on UNE loops and transport.[316]

In any event, the ILECs can hardly rely on the absence of substantial use of UNEs to date – which largely stems from hurdles the ILECs have thrown in the way of such use, as well as the EELs restrictions imposed by the Commission[317] – as evidence that CLECs can rely on special access facilities. As for the fact that CLECs have relied on special access, that shows only that CLECs have been able to serve some locations for

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313 *See, e.g.*, AT&T Comments at 114-122; Covad Comments at 81-83.

314 *See, e.g.*, Paetec Comments at 5, Covad Derodeff Decl. ¶¶ 44-45; AT&T Comments at 98, 100.

315 *See* AT&T Comments at 96.

316 *See, e.g.*, Covad Comments at 67, 69-70; Momentum Telecom Comments at 5-9; XO Tirado Decl. ¶ 44.

317 Mills Decl. ¶¶ 9-10, 12-13.

some types of services to date. MCI has depended on special access in the provision of some services because of legal and other barriers the ILECs devised to use of UNEs.[318] But there are many areas MCI has not been able to serve and many services it has not been able to provide because special access rates are too high.[319] For example, MCI offers business local exchange service only within a limited distance from its network.[320] Similarly AT&T has abandoned provision of several local services using special access.[321] And even where carriers are relying on special access today, such as the ILEC poster-child Time Warner Telecom, they are often not doing so profitably.[322] This is because the ILECs have set rates for special access services at nearly three times their incremental costs.[323] Indeed, AT&T has shown that in many instances special access rates alone are higher than the retail rates.[324] Moreover, Drs. Ford and Pelcovits demonstrate that requiring CLECs to rely on special access instead of UNEs, even at today's prices, would reduce CLEC output dramatically.[325]

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318 *Id.*

319 *Id.* ¶¶ 16-21.

320 *Id.* ¶¶ 18-20.

321 AT&T Comments at 98, 100.

322 AT&T Comments at 97.

323 MCI Comments at 159. *See also, e.g.* Mayo/MICRA/Bates/White Analysis ¶ 112 (in 2003, RBOCs earned 43.7% returns on special access); AT&T Comments at 93-94.

324 AT&T Comments at 100.

325 G. Ford & M. Pelcovits, *Unbundled Elements, Special Access and Impairment for Wireline and Wireless Services*, appended to Pelcovits Reply Decl.

b. Competitors Will Not Be Able to Rely On Special Access Services to the Same Extent in the Future

As for services on which CLECs have been able to rely on special access to date, there is every reason to think they will not be able to do so to the same extent in the future. To begin with, as ALTS and Time Warner Telecom explain, if UNEs are eliminated, one force constraining the price of special access will be eliminated.[326] Additionally, and more important, the BOCs' recent entry into the interLATA market will give them every incentive over time either to raise special access rates or to reduce retail rates in order to price squeeze competitors out of the retail market. The Commission has long recognized that the potential for a price squeeze in such circumstances.[327] Certainly, the mere risk of a price squeeze will impair MCI's ability to enter into long term contracts with enterprise customers, as it will have to take into account the risk that ILECs will raise the rates on special access during the course of the contracts.

The ILEC arguments to demonstrate that this is not so only confirm that it is so. Thus, in explaining why it has not served many large enterprise customers up until now, Verizon only underscores how different the market is today:

> Historically, Verizon has not been a major competitor in the provision of service to large enterprise customers. . . . This was due principally to the fact that Verizon had generally been precluded from providing interLATA services. . . . Since Verizon could not, until recently, offer interLATA transport between large enterprise customer premises in one area of its serving territory (New York City for example) and the customers' satellite offices or locations in another part of its serving territory (Baltimore, for example), Verizon could not provide the majority

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326 ALTS Comments at 29; Time Warner Telecom Comments at 8, 15-17.

327 AT&T Comments at 92; *see also id.* at 115 (noting recent price squeeze by SBC with respect to long distance service).

> of the high capacity services, such as end-to-end high capacity private line, ATM, or Frame Relay services, that large enterprise customers require.[328]

Verizon here explains precisely why CLECs have in the past been able to use special access facilities to serve some large enterprise customers but will likely not be able to do so to the same extent in the future. Until Verizon achieved section 271 authority, it was not competing for large enterprise customers and thus had no incentive to price squeeze CLECs.

Verizon asserts that little has changed since the ILECs obtained section 271 authority – that CLECs are still able to rely on special access. But by Verizon's own account, there can be little empirical evidence for assessing this proposition, because "Verizon could not compete seriously for such [enterprise] business until it had received authority to provide long distance service in *all* of its service territories, which occurred just last year."[329] A single year provides very little evidence to assess empirically whether CLECs will continue to be able to rely on special access – especially because most contracts with business customers are long-term contracts that have not come up for renewal in the last year.

Verizon also points to the relatively few contracts that have come up for bid in the last year. But this is too slim a reed upon which to base a finding of non-impairment.

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328 Bruno Decl. ¶ 14.

329 *Id.* ¶ 16. SBC's claim that "[s]ince SBC received 271 approval in all of its in-region states, it has only won approximately $200M of incremental business," Casto Decl. ¶ 13, is even less relevant. SBC does not show the percentage of contracts that it won when competing against CLECs relying on SBC special access facilities, nor even say that it has now geared up its business to compete in the enterprise market and begun strongly doing so. It thus provides no basis to project future developments. Indeed, SBC's $200 million incremental gain, if examined carefully, could well demonstrate a future ability to make huge inroads in the market.

Given the very limited and contradictory empirical evidence, the Commission must rely primarily on economic evidence that shows that over time, the ILECs will drive competitors out of the market using price squeezes.[330] And this economic evidence is *supported* even by the limited empirical evidence Verizon provides. Thus Verizon say that of the 203 RFPs on which Verizon bid in 2003 and for which selections have been made, Verizon won an astonishing 68 of the RFPs, which is *one-third* of the total.[331] As the new entrant into the large enterprise market, competing against CLECs that had built up customer loyalty, one would expect Verizon to be far less successful than other competitors. Verizon was also competing in a market where it had little experience and where it cannot yet offer the full suite of services that competitors can offer.[332] And Verizon was competing in a market where CLECs' short term incentive is to match whatever rates Verizon offers in order to offset their sunk costs, even though they would not be able to compete beyond the short run through such a strategy.[333] Verizon's success in capturing substantial market share so quickly suggests that the effects of price squeeze are already being felt.

Equally important, Verizon is not looking at the proper universe of data. Verizon evaluates all of the RFPS on which it bid, not just those on which CLECs were using special access facilities. In a significant subset of the contracts Verizon examined, it is likely the case that CLECs were offering to serve the customers using their own

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330 AT&T Selwyn Decl. ¶¶ 59-79. *Cf.* ALTS Comments at 18-33.

331 Bruno Decl. ¶ 20.

332 AT&T Benway *et al.* Decl. ¶ 65; Pelcovits Reply Decl. ¶ 47.

333 Pelcovits Reply Decl. ¶ 46.

facilities.[334] In these cases, no price squeeze is possible and it is not surprising that CLECs won the contracts. But this means that Verizon likely won far more than one-third of the contracts against CLECs who were relying on special access facilities to serve customers. This is strong evidence that CLECs will not long be able to rely on special access facilities.

Moreover, Verizon's evidence shows that that it has now figured out how to win even more of the bids against CLECs on a going forward basis. Verizon first says that large CLECs are today able to compete because Verizon gives them 34-50% discounts off of the tariffed rates based on volume and term commitments. Thus, Verizon says, CLECs can compete by offering customers service anywhere between the price they pay Verizon for the services and the price Verizon would charge the customer at retail – the tariffed special access rate without the discount.[335] But this theory is based on the remarkable assumption that Verizon will continue to charge the tariffed special access rate to customers from whom it is seeking retail business, while giving CLECs a 35-40% discount to serve these same customers. Yet Verizon has every incentive either to raise the special access rates or lower the retail rate (on the portion of the service that consists of the special access facilities) to diminish or eliminate the margins of its competitors and obtain all of the retail business.

That is precisely what Verizon is now doing, as it acknowledges. Verizon says that it has begun to offer large enterprise customers product-specific discounts in

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[334] MCI has never denied that in many instances CLECs *are* serving large enterprise customers with their own facilities and have built facilities to serve such customers above the capacity thresholds. That is why the Commission eliminated unbundling of such facilities above the capacity thresholds.

[335] Bruno Decl. ¶¶ 24-25.

response to "competition for these services."[336] Verizon provided one customer "an effective discount for these services of 24 percent off the 5-year term plan rates for DS-3s and 16 percent for DS-1s, resulting in as much as 59 percent off the monthly rates for DS-3s and 54 percent for DS-1s."[337] Verizon offered a second customer "discounts of 20 percent off of the SONET rings . . . and . . . discounts of up to 13 percent off 5-year term rates for DS-1 services, as much as 50 percent off the month-to-month rates."[338] Not surprisingly, Verizon won these contracts. As Verizon explains, "While Verizon's Enterprise Solutions Group has only begun to make strides into the larger enterprise market, pricing flexibility has allowed Verizon to compete more effectively with the larger carriers who have dominated this market."[339] Indeed, using just such a strategy, Verizon will be able to reverse the prior domination of CLECs (stemming from Verizon's preclusion from the interLATA market) and quickly come to dominate the market itself. Thus, whatever may have been the case in the past, on a going-forward basis, the availability of special access will not obviate CLECs' impairment in the provision of any services.

c. *Reliance on Special Access Does Not Further the Purposes of the Act*

Moreover, even if the ILECs were correct that some CLECs could continue to provide some services using special access, that scenario would not serve the goals of the Telecommunications Act. The ILECs have long argued, and continue to argue, that the

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336 *Id.* ¶ 28; *see also* Nogay Decl. ¶¶ 35-36 (describing contract tariffs offered beginning in 2003 with additional discounts for retail customers).

337 Bruno Decl. ¶ 26.

338 *Id.* ¶ 27.

339 *Id.* ¶ 28.