Commission's decision of whether to unbundle must take into account competing policy considerations. In particular, they argue that "[t]he impairment analysis also must focus on whether *competition* is possible – not on the interest of individual competitors. . . . The 'goal[] of the Act' is to 'stimulate *competition* – preferably genuine, facilities-based competition.'"[340] But forcing CLECs to rely on special access facilities instead of UNEs will not increase facilities-based competition with respect to loops and transport themselves. Indeed, because of lock-up provisions, special access may actually limit CLECs' ability to deploy loops and transport. Dr. Pelcovits shows that such provisions decrease the ability of the CLEC that is locked in, as well as other CLECs that might want to offer services at wholesale, to rely on their own facilities.[341] This is true not only where the CLEC is already relying on special access, but also on other routes, as the lock in provision gives CLECs an incentive to rely on special access on these routes as well.

Forcing CLECs to rely on special access facilities as inputs into their retail services will *decrease* the competitiveness of the retail market. In arguing that the Commission should find non-impairment so long as individual CLECs can *survive* using special access, the ILECs wrongly focus on the impact on individual competitors, not on overall competition. Even if CLECs are perfectly efficient, the competition they provide will never be able to drive retail prices to anything like those that would prevail in a competitive market because the price of key inputs, obtained at special access prices, will be far above cost.[342]

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340 Verizon Comments at 14 (quoting *USTA II* at 14).

341 Pelcovits Reply Decl. ¶¶ 23-32.

342 *Cf.* Pelcovits Decl. ¶ 8 (key question is whether entry will "result in workably competitive downstream markets").

As Covad demonstrated in its Comments,[343] special access pricing denies customers the benefits of a competitive marketplace. A hypothetical will demonstrate why that is so. Assume it costs CLECs $ X to obtain loops and transport at special access, which is $100 above cost. It costs the CLECs $Y to provide the rest of the components of the service, but costs the ILEC $100 more than $Y because it is inefficient. In this scenario, the CLECs survive, but consumers have gained nothing. The goal of competition will have been effectively thwarted, as the CLECs' efficiency will not have reduced the price of the overall service. Certainly, this is not the "robust competition" the *USTA II* court referenced.[344]

In sum, there is no policy justification for the Commission to tangle with the innumerable administrative and other difficulties in attempting to take special access into account in assessing impairment. Even if CLECs could survive using special access to provide some services to some customers, there would be no significant advantage – and substantial disadvantages – in denying them access to UNEs even to serve these customers. And over the longer run, there is every reason to think that CLECs will not be able to survive. The Commission should find special access either does not obviate – or is irrelevant to – impairment.

5. ILEC Arguments for Ad Hoc Elimination of Unbundling Should be Rejected

Largely relying on the availability of special access, the ILECs argue for a series of *ad hoc* tests eliminating unbundling in particular circumstances even if it is not eliminated altogether. In the end, these seemingly innocuous tests would eliminate the

343 Covad Comments at 90.

344 *USTA II*, 359 F.3d at 293.

availability of UNEs for the vast majority of customers for whom they would have any use. These tests must be rejected for the same reasons as the ILECs' more general arguments must be rejected.

a. Large Enterprise Customers

The ILECs suggest the elimination of unbundled loops and transport used to serve Fortune 1000 companies.[345] The ILECs argue that CLECs should not be able to serve large enterprise customers serving UNEs because most of these customers are served by CLECs today. But this is only because, as Verizon says, "interLATA restriction historically precluded the Bell companies from providing interLATA services, which is a critical component of the package of services that large enterprise customers demand."[346]

Moreover, this *ad hoc* suggestion is completely unnecessary. What is presumably unique about large enterprise companies is that they generate a large amount of traffic, such that a CLEC serving these companies in most locations would do so with loops far above the 2 DS-3 threshold. As a result, under the existing rules, the CLECs who built these networks would not today be able to use UNEs to serve the customer in these locations. And other CLECs that wanted to serve all of the customers' traffic also would not be able to lease the UNEs needed to do so given the capacity thresholds, or would be denied access to UNEs altogether through application of the triggers.

If there are large enterprise customers with locations that generate traffic below the capacity thresholds, however, a CLEC would no more be in a position to deploy loops or transport to these locations than it could anywhere else. Thus, there is no reason to

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345 BOC Report at III-32; Verizon Comments at 68-69.

346 Verizon Comments at 67.

adopt a different loop test for Fortune 1000 companies than for other locations. And there are plenty of reasons not to adopt the ILECs' proposed test. Companies frequently fall in and out of Fortune 1000 status, for example, which would create great difficulty in ordering.[347]

b. Long Distance Services

The ILECs also argue that CLECs should not be permitted to use high capacity UNEs as an input into long distance services.[348] But the arguments respecting long distance service are no different than those relating to any other service. There is no evidence that CLECs can self-deploy facilities below the capacity thresholds to provide such service, and they are already denied access to UNEs above the capacity thresholds.

As for the ability of some CLECs to rely on special access to provide long distance service, this is irrelevant now that the ILECs have obtained section 271 authority, as Verizon's own comments make clear.[349] Thus, with long distance, as with any other service, assessing impairment based on special access would require a geographic specific assessment of price squeeze evidence that would raise all of the administrative difficulties we have previously detailed.

c. EELs

The *USTA* court has rejected the Commission's most recent attempt to create a special regime limiting access to loop-transport combinations even when competitors are

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347 Similar analysis applies to Verizon's suggestion to eliminate unbundling with respect to high-speed packet switched services. *Id.* at 69-70.

348 *Id.* at 74.

349 *See, e.g., id.* at 67 (explaining that ILECs have not been major players in the market for large enterprise customers because of the interLATA restriction).

impaired without access to both constituent parts of the combination – the particular loop and transport facilities that make up the "enhanced extended link" or "EEL." In the Commission's latest effort to preserve the ILECs' special access revenue, in the *Triennial Review Order* it claimed the EELs restriction was necessary to assure that EELs not be used to provide a "non-qualifying service."[350] The court rejected this rationale, holding that there is no such thing as a non-qualifying telecommunications service.[351] The Court stressed, as it has repeatedly, that decisions to unbundle or not to unbundle must be based on impairment, and not on other made-up criteria.[352]

The need for a special rule governing EELs arises only if the Commission properly makes a granular impairment analysis of a particular loop and transmission facility, and determines that competitors are impaired in their ability to offer all telecommunications service without access to each of these facilities. In any other situation, there is no impairment, and the EEL would not be available under the general impairment test. But when competitors *are* impaired without access to these facilities, there is no basis for nevertheless denying competitors access to these facilities in combination.

The ILECs simply ignore this most fundamental point. Instead they launch into analyses of "interconnection trunk ratios" and other "factors," without even considering whether there is any basis for continuing the restriction in the first place.[353]

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350 *Triennial Review Order* ¶ 591.

351 *USTA II,* 359 F.3d at 592.

352 *Id.*

353 SBC Comments at 97. The ILECs' analysis even as to the particulars of the restriction they advance does not withstand analysis. To pick one example of many, the

There is not. The court's observation that the long distance market is competitive does not address EELs at all – EELs are not "long distance" lines, but *local* lines used in part to access long distance networks. If the Commission finds that competitors are impaired in their ability to provide long-distance and other services without access to EELs (the only situation in which a special exception denying access to EELs would have any meaning or effect), then there is no basis for denying competitors access to these facilities. That is the holding of *USTA II.*

Of course the ILECs have argued that competitors are *not* impaired in this situation, because competitors are free to use special access as an input to long-distance services. If the Commission were to accept that argument, it presumably would find no impairment, and competitors would be denied access to the EEL for that reason. There still would be no need for any special rule governing EELs.

But, as we demonstrate in our opening comments and above, the Commission should not consider special access in its impairment analysis. If the Commission agrees and declines to consider special access services in the impairment analysis (as it must), then there is no conceivable reason nevertheless to deny competitors access to loop-transport combinations in situations in which they are impaired in their ability to offer interLATA services without them.

The EELs restriction in this way has always been a restriction without a legitimate justification – an unprincipled device to preserve ILEC special access revenue. It has been justified with a changing series of indefensible rationales that never focus on

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limitation they propose relating to voice services apparently would make it impossible to use EELs to provide VoIP services, even though their use is absolutely essential for facilities-based VoIP providers.

impairment – the need to preserve universal service (even though the Commission has held that special access is not a source of universal service subsidy), the need to avoid "rate shock," the need to protect switched access revenue, and, most recently, the "qualifying service" rationale. The Commission should abandon its effort to preserve through artificial regulation and pretextual justification this wholly unjustified tax on the economy and windfall to the ILECs.

d. Conversions

The ILECs argue that whatever else may be the case, CLECs should not be permitted to convert existing special access facilities to UNEs.[354] This too is wrong for all of the same reasons as the ILECs' general arguments concerning special access are wrong. The fact that CLECs have in the past been able to rely on special access for some purposes in some locations does not mean they will be able to do so in the future given that a fundamental fact about the market has changed: the ILECs now have section 271 authority. If the Commission adopted a blanket rule against conversions, the ILECs could implement price squeezes and CLECs could not even then go to the Commission and argue that they were impaired. CLECs would have to abandon their customers, or their transport of traffic between particular points. At that point, they could then seek to serve the same customers or routes using UNEs. In the meantime, other CLECs that did not have special access facilities at a route or location could seek to use UNEs without going through such a process. Such a policy would make no sense.

The ILECs argue, however, that the Commission cannot find impairment where CLECs are today relying on special access. They point to the statement in *USTA II* that

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354 Qwest Comments at 72.

"competitors cannot generally be said to be impaired by having to purchase special access services from ILECs . . . where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic."[355] As noted above, however, existing competition is not robust given the degree to which critical inputs are above cost. Moreover, in the wireline market, existing competition using special access does not "belie[]" any suggestion of lack of unbundling makes entry uneconomic given the critical change with respect to the ILECs' ability to provide interLATA service. Finally, whatever "generally" may be the case, the administrative difficulties in assessing impairment based on special access make it far more sensible for the Commission not to take special access into account.

e. Packet-Switched Broadband Services

Verizon suggests eliminating use of UNEs to provide packet-switched services.[356] But providing packet switched services to customers on loops and transport is no different than providing any other services. CLECs cannot self-provision facilities below the capacity thresholds to provide such services, and above the capacity thresholds, they have no access to UNEs. Verizon does not even purport to show otherwise. As for wholesalers, where there are wholesalers, application of the wholesale trigger or fiber-based collocator test would result in elimination of unbundling without the need for this additional test.

Verizon argues that CLECs today provide most of the market for Frame Relay and ATM. But where CLECs are using their own OCN-level facilities to do this, they

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355 *USTA II*, 359 F.3d at 593.

356 Verizon Comments at 70.

already have no access to UNEs. As for those CLECs relying on special access, the fact that CLECs have relied on special access in the past does not mean they can do so going forward, as we have shown. Indeed, AT&T shows that CLECs face a price squeeze even today in providing these services.[357] Moreover, Commission reliance on special access to find non-impairment would have all of the difficulties we have elsewhere described.

It is also important to note that if the Commission were to deprive CLECs of the ability to use UNE loops and transport for particular services, this would raise all of the administrative difficulties and risk of ILEC abuse demonstrated by the EELs restrictions over the years.

Finally, the Commission should not be tempted to adopt Verizon's proposal based on its label and its implicit analogy to the Commission's decisions with respect to hybrid loops, fiber-to-the-curb loops and fiber-to-the home loops. In those instances, the Commission refrained from unbundling (or limited unbundling) in an effort to create incentives to deploy of a particular technology (fiber) that the Commission believed would further the ability of mass market customers to access broadband service. But with respect to high capacity loops and transport, there is no new technology involved. Depriving CLECs of use of these facilities to provide packet-switched services would be more like denying them access to copper loops to provide broadband services to mass market customers. It would deny them access to the type of facilities that had been long deployed and will continue to be deployed regardless of unbundling.

There is simply no need to encourage ILEC deployment high capacity loops and transport in order to facilitate greater deployment of packet switched services to business

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[357] AT&T Benway *et. al.* Decl. ¶¶ 78-103.

customers. Verizon does not even purport to argue otherwise. The argument it does make – that CLECs can provide these services economically without UNEs – is no different for packet-based services than for any other services. The ILECs' request for a special rule must therefore be rejected.

f. Newly Constructed Facilities

Finally, the ILECs argue that they should not be required to unbundle any newly deployed facilities because CLECs could have constructed these facilities just as easily as the ILECs.[358] That is absurd. The ILECs have a ubiquitous or near-ubiquitous network. As a result, when they construct new facilities, the distance over which they have to construct them will almost always be less than the distance over which the CLECs would have to construct them. Moreover, the ILECs already have the rights of way for their existing network. Finally, the ILECs have the extensive customer base over which they can spread the cost of these facilities and that will generally permit them to fill up the capacity of the facilities far more quickly than could a CLEC.

In any case, in assessing whether to unbundle newly constructed facilities, the question is not whether CLECs and ILECs are similarly situated ahead of time. The statutory question is whether CLECs would be impaired without access to facilities that have already been constructed. If CLECs could not economically duplicate a facility now, it is irrelevant whether at a previous point in time they could have constructed the facility.

The ILECs assert, however, that the Commission found in the *Triennial Review Order* that CLECs are equally situated in the construction of new facilities and that this

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358 Qwest Comments at 19-20.

provided a justification for not unbundling. But the Commission did so only in the context of fiber to the home loops, where ILECs and CLECs both had to construct wholly new fiber facilities for the entire length of the loop. And there the Commission did so largely based on evidence that CLECs "are currently leading the overall deployment of FTTH loops,"[359] reasoning that simply does not apply to any other types of facilities.

In any case, the *USTA II* court found the CLECs' objections to the Commission's analysis "convincing" even with respect to FTTH loops,[360] and upheld the Commission's decision not to unbundle FTTH loops based only on considerations related to § 706, considerations that do not apply more generally. The fact that even the *USTA II* court found unpersuasive the Commission's attempt to equate the barriers faced by CLECs and ILECs makes clear that the Commission should not extend this analysis beyond FTTH loops.

Conclusion

The ILEC evidence does nothing to undercut the general conclusions the Commission reached in the *Triennial Review Order*, which it should reaffirm. CLECs are impaired without access to loops and transport as UNEs below the capacity thresholds. They cannot build their own facilities at these levels. And CLECs that build facilities above these levels and wholesale them only become relevant once such wholesaling has occurred. Application of a wholesale trigger accounts for this directly, and application of a fiber-based collocation test does so indirectly, while going farther than the Commission need go by taking into account potential wholesalers as well.

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359 *Triennial Review Order* ¶ 275.

360 *USTA II*, 359 F.3d at 583.

As for special access, the fact that CLECs are today using such facilities for some services in some locations is irrelevant. There is no reason to think they will be able to do so to the same extent going forward, and attempting to assess whether they will be able to do so would raise insuperable administrative difficulties.

The Commission should therefore affirm its conclusions in the *Triennial Review Order* that CLECs are impaired below the capacity thresholds. If desirable, it can also apply either the wholesale trigger or a fiber-based collocator test to account for specific deployment.

III. OTHER ISSUES

A. The Commission Should Not Alter the *Triennial Review Order* Procedures for Establishing Preemption

Two BOCs, Verizon and SBC, argue that the Commission should establish preemption rules it declined to establish in the *Triennial Review Order*. SBC asserts that the Commission should establish a rule preempting all state attempts to impose unbundling requirements beyond those authorized by the FCC, subject only to a waiver where a state shows there are compelling circumstances for it.[361] Verizon contends the Commission should "reaffirm that state commissions *cannot* require incumbents to provide UNEs where this Commission has not imposed any such requirement."[362] But Verizon then backs off slightly from this plea for blanket preemption, instead also suggesting that the Commission should establish a procedure to preempt individual state determinations, and should place the burden of proof on states in such proceedings.

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361 SBC Comments at 115.

362 Verizon Comments at 119.

The preemption issue is not one the *USTA II* court remanded to the Commission, and there is no need for the Commission to reconsider it here when faced with such a truncated schedule. If for some reason the Commission were inclined to reconsider that issue in the limited time available to it, it should reject the approaches proposed by SBC and Verizon.

In the *Triennial Review Order*, the Commission already established a procedure to assess preemption. It explained that parties could petition the FCC for a declaratory ruling that a particular state unbundling obligation exceeds the statutory limits on state authority.[363] As the Commission explained in its brief to the D.C. Circuit, the Commission thereby "'expressed its willingness to consider on an individualized basis whether any state rule that might in the future be adopted is inconsistent with national policy.'"[364] The Commission further explained that "[a]ny future proceedings of this sort will likely revolve around specific factual issues."[365] This is true, of course, because there will be many instances in which state unbundling requirements would not even arguably conflict with federal rules. For example, if the Commission decided not to unbundle based on a conclusion that there was extensive deployment of a particular type of facility on a national basis, and a state commission imposed a state law unbundling requirement on the basis that the facility had not been deployed extensively in the particular state, the state law decision would clearly be consistent with federal policy. Similarly, if the Commission decided to unbundle based on a finding of non-impairment

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363 *Triennial Review Order* ¶ 195.

364 Brief for Respondents in No. 00-1012 at 91 (Dec. 31 2003) (quoting *Alascom v. FCC*, 727 F.2d 1212, 1219 (D.C. Cir. 1984)).

365 *Id.* at 92.

without finding any competing policy considerations, a state commission decision to go beyond federal requirements would not conflict with federal policy.

Nor is there any basis for reversing the burden of proof in any future preemption proceedings. When federal law enters into an area previously subject to state police power regulation, there is a strong "presumption" that Congress did not mean to oust state law.[366] Prior to the 1996 Act, states had exclusive jurisdiction over local telephone competition,[367] and some states had already adopted measures to foster local competition. And it is quite clear that the 1996 Act did not "intend to disrupt the procompetitive actions some states already ha[d] taken" or that other states would take.[368] In enacting the 1996 Act, Congress noted with approval ongoing state efforts to "open the local networks of telephone companies,"[369] and endeavored to build on these state efforts—not stop them. To the contrary, the 1996 Act adopts minimum federal requirements that set a "floor below which . . . [a state] may not go" and that do not affect the authority of states to adopt additional procompetitive requirements under state law.[370]

Congress's intent to preserve state-law authority is evinced by four separate anti-preemption "savings" clauses—all of which make it clear that, at a minimum, the Act establishes a strong presumption against preemption. First, the Act provides that

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366 *See Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).

367 *See* 47 U.S.C. § 152(b),

368 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 62 (1996) ("*Local Competition Order*").

369 S. Rep. No. 104-23 at 5 (1995).

370 *Iowa Utilities Bd.* v. *FCC*, 120 F.3d 753, 806-07, 812 (8th Cir. 1997) ("*IUB I*") (subsequent history omitted).

"notwithstanding" the limited federal standards in § 252(e)(2) for rejecting negotiated and arbitrated interconnection agreements, "nothing in this [§ 252] shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement."[371] Section 252(e)(3) represents "an explicit acknowledgment that there is room in the statutory scheme for autonomous state commission action."[372]

Second, section 251 of the Act also makes clear that the FCC does not even have the power to bar state unbundling requirements. Section 251(d)(3), entitled "Preservation of State access regulations," bars the FCC from "prescribing" or "enforcing" regulations under section 251 that "preclude the enforcement of any regulation, order, or policy of a State," so long as those state measures are "consistent with the requirements of this [§ 251]," and do "not substantially prevent implementation of the requirements of this section and the purposes of this part [of the Act]."[373]

Third, section 261(c) provides that "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part."[374] Interpreting section 261, the Sixth Circuit explained that Congress expressly "authorized states to implement additional requirements that would foster local interconnection and competition, stating that the Act does not prohibit state commission regulations 'if such regulations are not

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371 47 U.S.C. § 252(e)(3).

372 *Puerto Rico Tel. Co. v. Tel. Regulatory Bd.*, 189 F.3d 1, 14 (1st Cir. 1999).

373 47 U.S.C. § 251(d)(3)(B) & (C) (emphasis added).

374 *Id.* § 261(c).

inconsistent with the provisions of the [the 1996 Act].'"[375] Under controlling law, state regulations are "consistent" with federal law so long as it is "possible to comply with the state law without triggering federal enforcement action."[376] It is clearly possible for ILECs to comply with state decisions to unbundle without triggering federal enforcement action.

Fourth, section 601(c)(1) of the Act provides that the "Act shall not be construed to modify, impair, or supersede . . . State[] or local law unless expressly so provided."[377] Congress included this clause to "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws."[378] Clearly, nothing in the Act expressly precludes states from adopting unbundling requirements.

Taken together, these savings clauses establish at least that ILECs bear a heavy burden in establishing preemption. As a general matter, they show that state commissions have broad "latitude to exercise their expertise in telecommunications and needs of the local market,"[379] and that state commissions generally retain "independent authority" to impose regulatory measures that they "find[] . . . to be in the public interest and a means of promoting competition."[380] Indeed, as the Commission is well aware

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375 *Michigan Bell Tel. Co.* v. *MCImetro Access Trans. Servs., Inc.,* 323 F.3d 348, 358 (6th Cir. 2003) (*quoting* 47 U.S.C. § 261).

376 *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540 (1977).

377 Act § 601(c)(1), 110 Stat. at 143 (uncodified note to 47 U.S.C. § 152).

378 H.R. Conf. Rep. No. 104-458, at 201 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 215.

379 *Michigan Bell*, 323 F.3d at 358 at 352.

380 *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 391-93 (7th Cir. 2004). *Accord Michigan Bell Tel. Co.* v. *Chappelle*, 222 F. Supp. 2d 905, 918 (E.D. Mich. 2002), *aff'd*

from the briefing of the *Triennial Review Order* appeal, there is a strong argument that these savings clauses *preclude* the Commission from preempting state unbundling regulations. Section 251(d)(3), for example, expressly precludes preemption except if state measures are inconsistent with or substantially prevent implementation of section 251 or the purposes of this part.

In the *Triennial Review Order* appeal, the Commission nonetheless suggested that a state unbundling decision could be preempted. The Commission asserted that such a decision could undermine the requirements of section 251 because an FCC unbundling decision becomes part of the requirements of section 251. But that argument is wrong. A Commission decision not to unbundle is a decision to refrain from imposing a federal requirement to unbundle. It does not establish affirmative requirements on anyone. A state unbundling decision is thus not inconsistent with federal requirements even when the Commission has decided not to require unbundling. And a contrary conclusion would read Section 251(d)(3) out of the Act.

For present purposes, however, there is no need to resolve this question at a general level. The Commission has already established the mechanism by which ILECs can make preemption challenges in the context of specific questions. That is how it should proceed.

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93 F.3d 799 (6th Cir. 2004); *Michigan Bell Tel. Co.* v. *Strand*, 26 F. Supp. 2d 993, 1000-01 (W.D. Mich. 1998).

B. The Commission Has No Authority to Abrogate the Parties' Interconnection Agreements

The ILECs argue that the Commission has authority that it ought to exercise to abrogate change of law provisions in parties' interconnection agreements to eliminate contractual unbundling rights immediately, when the parties expressly negotiated change of law provisions precisely to avoid just such flash-cut changes in their relationships. The argument is deeply cynical, coming from parties that in every other context solemnly insist that contractual undertakings and voluntary agreements, and not regulation, are the preferred method of addressing inter-carrier relationships. But more to the point, the argument is utterly without any legal basis.

The ILECs invoke the *Sierra-Mobile* doctrine[381] to argue that the Commission should - and in fact *must* - override the change-of-law provisions in existing interconnection agreements. Under *Sierra-Mobile*, a federal agency may intervene to override provisions of an agreement under its jurisdiction only if an unforeseen intervening development renders continued application of those provisions contrary to the public interest. The doctrine is thus a specific application of the general rule that contracts that are contrary to public policy are not enforceable.

Here, however, the ILECs demand that the Commission override provisions that are by definition designed to *anticipate* those very intervening developments. Even if it were the case that an intervening change in the law did render the operation of some substantive provision of an interconnection agreement unreasonable, the contractual change-of-law provisions are precisely the kind of measures that render *Sierra-Mobile*

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381 *See FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956).

unnecessary and inapplicable,[382] because they allow for modification of the agreements to accommodate such changes.

Additionally, even if that were not so, the ILECs have fallen far short of demonstrating the kind of public interest imperative that *Sierra-Mobile* requires. The Supreme Court has made clear that the extraordinary step of invading the integrity of a contract requires far more than a showing that an intervening change had rendered a contract unfavorable.[383] Applying *Sierra-Mobile*, the courts of appeals have similarly emphasized that a party seeking to invoke the doctrine bears a "heavy burden" that is much more demanding than an ordinary public interest finding in other contexts.[384] As the Commission itself has explained, "[t]here is a well-established reason why the *Sierra-Mobile* standard for contract reformation is high: preserving the integrity of contracts is vital to the proper functioning of the carrier-to-carrier communications market."[385]

The ILECs do not come close to meeting this standard. Here, the change of law provisions that the ILECs seek to override are unaffected by the substantive change the ILECs hope the Commission will enact in this proceeding. Nothing in the ILEC comments explain how allowing parties to pre-commit to a particular method of

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382 *See Union Pacific Fuels, Inc. v. FERC*, 129 F.3d 157, 161 (D.C. Cir. 1997) (noting that the contracts at issue anticipated changes and that the parties were free either to replicate or contract around *Sierra-Mobile* in their change-of-law provisions).

383 *See Sierra-Mobile*, 350 U.S. at 354-55 (1956) (rejecting the position that a simple finding that a rate is no longer reasonable is sufficient to justify intervention).

384 *See PEPCO v. FERC*, 210 F.3d 403, 407 (D.C. Cir. 2000); *see also Union Pacific Fuels, Inc. v. FERC*, 129 F.3d 157, 168 (D.C. Cir. 1997) (noting that the doctrine only applies "where the public interest *imperatively* demands such action") (internal quotation omitted).

385 *IDB Mobile Communications v. COMSAT Corp.*, 16 FCC Rcd. 11474, 11481 (2001).

accommodating changes in the law in any way affects the public interest. The change-of-law provisions are not, as Verizon contends, "a direct result of the Commission's vacated UNE rules,[386] nor were they "drafted to comply with vacated regulations."[387] Indeed, as Verizon itself points out, the change-of-law provisions that it now seeks to are generally negotiated rather than arbitrated.[388] As such, the terms of the change-of-law provisions are not controlled by the Act and its implementing regulations, nor, necessarily, by any changes to those regulations. Given these fundamental shortcomings, the Commission should reject the ILECs' invocation of *Sierra-Mobile* out of hand.

Even if they were directly targeting substantive unbundling provisions instead of change of law provisions, the ILECs' arguments would be off point. The ILECs assume that the Commission will eliminate an unbundling obligation that the parties had adopted in an interconnection agreement because it had previously been required by the Commission. But the fact that certain unbundling provisions may no longer be required does not mean, as the ILECs suggest, that the continued provision of those elements until the completion of the contractual change-of-law process is *per se* contrary to the public interest.[389]

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386 Verizon Comments at 133.

387 *Id.* at 134.

388 *Id.* at 135.

389 Again, the ILECs fail even to attempt to explain how any temporary disadvantage it suffers until interconnection agreements are amended in accordance with the applicable change of law provisions amounts to the kind of serious public interest concern that *Sierra-Mobile* requires. As noted above, *Sierra-Mobile* itself holds that while a change might render rates disadvantageous to one party, or even unreasonable, that is not necessarily sufficient to justify abrogation. *See Sierra-Mobile*, 350 U.S. at 354-55.

To the contrary, the Act itself contemplates that parties are free voluntarily to agree to unbundling obligations that are not required by section 251. Section 252(a)(1) provides that parties may negotiate interconnection terms and condition without regard for either the unbundling or pricing standards set out in Sections 251(b) and (c).[390] So even if the ILECs were proposing that the Commission abrogate substantive unbundling provisions – rather than change of law provisions – their request would be wholly unjustified.

For all of these reasons, the Commission has previously rejected just these kinds of arguments to abrogate interconnection agreement provisions. Several ILECs, including BellSouth, had asked the FCC to override Section 252 of the Act and relieve ILECs of the obligation to exercise change of law provisions in their interconnection agreements to "avoid any delay associated with renegotiation of contract provisions."[391] But the FCC explicitly rejected this suggestion, declining to take "the extraordinary step of . . . interfering with the contract process."[392] In doing so, the FCC noted that the "practical effect" of leaving implementation of the *Triennial Review Order* to the contract amendment process was the preservation of a much-needed transition period and the avoidance of the disruption that the *Triennial Review Order*'s implementation would otherwise cause.[393]

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390 47 U.S.C. § 252(a)(1).

391 *Triennial Review Order* ¶ 701 & n.2084.

392 *Id.*

393 *Id. See generally Verizon*, 535 U.S. at 505-06; *Pac. Bell v. Pac-West Telecomms., Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003) ("interconnection agreements have the binding force of law") (citing 47 U.S.C. § 252(a)(1)); *GTE South Inc.*, 199 F.3d at 741 (same).

IV. CONCLUSION

For the reasons discussed above, the Commission should adopt the rules and take the other actions recommended by MCI.

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Dated: October 19, 2004

CERTIFICATE OF SERVICE

I, Ruth E. Holder, hereby certify that on this 19th day of October, 2004, I caused true and correct copies of the foregoing MCI Reply Comments to be hand delivered to:

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Ruth E. Holder

Ruth E. Holder

Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY DECLARATION OF MICHAEL STARKEY AND SIDNEY MORRISON
On Behalf of MCI, Inc.

October 19, 2004

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Before the
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REPLY DECLARATION OF
MICHAEL STARKEY AND SIDNEY MORRISON
On Behalf of MCI, Inc.

I. INTRODUCTION AND PURPOSE OF DECLARATION

1. My name is Michael Starkey. I serve as President of QSI Consulting, Inc. ("QSI"). I am submitting this Declaration on behalf of MCI, Inc. ("MCI") in combination with Sidney Morrison, QSI's Chief Engineer. We are the same Michael Starkey and Sidney Morrison who submitted a Declaration on behalf of MCI in this same proceeding on October 4, 2004.

2. We have reviewed the comments submitted by other parties in this proceeding. In this Reply Declaration, we respond to several claims made by the Bell Operating Companies ("BOCs") regarding their loop provisioning processes and procedures. The BOCs would have this Commission believe, among other things, that the Commission erred in its *Triennial Review Order* when it found that the ILECs' loop provisioning processes, including the hot cut, created operational barriers to entry. They further contend that even if that were not the case, they have made vast improvements to

their hot cut processes since the *Triennial Review Order*, and, even if that were not enough, they contend that the hot cut issue is really academic anyway, because more and more CLECs will be entering the market via non-UNE entry mechanisms that do not require a hot cut. But none of these assertions is correct.

3. ***ILEC Process Enhancements Do Not Address Manual Provisioning*:** In the state hot cut proceedings that followed the *Triennial Review Order,* not one ILEC proposed enhancements to address the overarching bottleneck in the loop provisioning process, *i.e.*, the manual work involved in provisioning the loop, known as the "lift & lay." Hence, our primary concerns related to hot cuts remain even if the rosy picture painted by the ILECs with respect to their Operations Support Systems ("OSS") enhancements is accurate (even though much of it is not). The BOCs tout improvements they claim to have made to their hot cut processes, but those improvements are limited exclusively to their OSS. While those improvements could reduce manual work *in pre-order and order* processes, they do not address the manual nature of the hot cut *provisioning* process. We explained in our October 4, 2004 Declaration that the Commission can take steps to minimize the need for manual provisioning of hot cuts, and we outlined steps based on currently available and deployed technology that would accomplish that goal. The BOCs have rejected all such suggestions.

4. ***Categories of Loops Remain Excluded From Hot Cut Processes*:** None of the ILECs will perform a hot cut of a loop served by IDLC (they will instead, at most, move the loop from IDLC to some other technology before provisioning the loop). None of the ILECs will perform a hot cut of a loop that provides both voice and DSL service. And none of the ILECs will perform a hot cut from retail or from UNE-P to an EEL

arrangement in a manner that provides CLECs a meaningful opportunity to compete (some ILECs flat out exclude hot cuts to EELs entirely from their processes). ILEC claims to the contrary, including BellSouth's misleading claim that it provides eight different ways to unbundle an IDLC loop, are nothing more than smoke and mirrors.

5. ***Hot Cut Testing in the 271 Proceedings Was Extremely Limited***: The BOCs' reliance on the tests that were conducted during the 271 process to demonstrate the adequacy of their hot cut processes is substantially misleading. First, the third-party testers did not test the hot cut process end-to-end; rather, the testers observed small volumes of CLEC hot cuts at various points in the process. At no point in the 271 process were the BOCs' hot cut processes tested for their ability to handle volumes that would likely result from the elimination of UNE-P.

II. ILEC Hot Cut Process Enhancements Focus Solely on Ordering and Provisioning Aspects of the Process and Do Not Address Manual Provisioning

6. As a threshold matter, the BOCs' first line of defense of their hot cut processes is that they will be largely irrelevant. The ILECs would have the Commission believe that carriers who today provide service via UNE-P will switch in the absence of unbundled switching to non-UNE based options, such as voice over Internet protocol ("VoIP"). The comments discuss in detail why VoIP is not a current substitute for Plain Old Telephone Service ("POTS"). But the irony of the BOCs' argument cannot be ignored. The Commission found in the *Triennial Review Order* that the ILECs' hot cut processes constitute a barrier to entry. The ILECs had an opportunity to address that barrier in the state hot cut proceedings but uniformly avoided introducing any

mechanization or automation into the provisioning aspect of the process. Because the hot cut process constitutes a barrier to entry, virtually no CLECs have used UNE-L to serve residential customers, and hot cut volumes have been low. And now, the ILECs seek to be rewarded for maintaining their entry barriers, claiming that because CLECs have avoided using the hot cut process, it must be that the CLECs have no interest in hot cuts and are moving to other service delivery methods, and therefore the Commission does not need to worry about hot cuts. This exercise in bootstrapping should not be allowed to stand.

7. The fact remains that UNE-L entry, which is mandated by the Telecommunications Act, requires a working hot cut process that can support volumes in order to be successful. If anything, the ILECs' comments demonstrate our point. If carriers must pursue non-UNE-L entry methods or exit the market rather than pursue hot cuts, something must be wrong with the hot cut process. Absent complete facilities bypass, a hot cut will be required for all facilities-based carriers who wish to compete for mass market customers.

8. Even though they appear to believe improvement is unnecessary (they appear to believe 271 compliant processes are sufficient), in their October 4, 2004 Comments, the BOCs tout system enhancements that are claimed to increase the efficiency of their hot cut processes. For instance, Qwest discusses two new tools that it developed – the Appointment Scheduler and the Batch Status Tool.[1] Qwest explains that these enhancements will enable CLECs to plan and schedule hot cuts on a central office basis

[1] Qwest Comments, Attachment 1, Declaration of Dennis Pappas ("Pappas Declaration"), October 4, 2004 at 7 and 23-24.

and notify CLECs of order completion. Similarly, BellSouth mentions a web-based scheduling tool in its comments.[2] SBC and Verizon also discuss similar enhancements designed to provide CLECs real-time information on the status of requested hot cuts.[3] Each of these enhancements shows promise towards improving the *ordering* and *coordination* phases of the hot cut process. The progress made by the industry in the many state hot cut workshops sprouting from the *Triennial Review Order* was extremely helpful in addressing insufficient hot cut *ordering* and *coordination* processes that were in substantial need of repair. But while the ILECs are right to point to improvements in software-based *ordering* and *pre-ordering* systems, it cannot be ignored that they unilaterally reject, nor will even consider, changing the hot cut *provisioning* processes so that a technician need not be dispatched to perform the "lift and lay" function of physically moving a loop from one network to another. This is the work step that causes the most substantial delay, introduces the largest component of error and incurs the largest component of cost; nonetheless, the ILECs steadfastly refuse even to discuss methods of improving or mechanizing the process in this regard.[4] Hence, the ILECs may talk in great detail about their claimed automation of hot cuts, but that automation is limited solely to ordering and order coordination. No progress related to automation has been introduced where it is needed most, in the *provisioning* aspect of the hot cut.

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2 *See,* Bellsouth Comments, Attachment 2, Affidavit of Ainsworth, Milner and Varner ("Ainsworth/Milner/Varner Affidavit"), October 4, 2004 at 9.

3 *See,* Verizon Comments, Declaration of Thomas Maguire ("Maguire Declaration"), October 4, 2004 at 7, discussing Verizon's Wholesale Provisioning and Tracking System ("WPTS"). *See also,* SBC Comments at 59, describing its "OSS enhancements."

4 See *Triennial Review Order* ¶465.

9. As we demonstrated in our October 4, 2004 Declaration (see, Starkey/Morrison Declaration, Exhibit 2), the preordering/ordering component of the existing hot cut processes comprises only a fraction of the total time and total costs of the hot cut. Rather, it is the manual wiring work involved in both the central office and the outside plant that significantly increases the cost of UNE-L, relative to UNE-P and retail processes. Thus, even if the BOCs' enhancements do increase the efficiency of the preordering and ordering processes, the vast majority of delay and cost that plague the UNE-L process will remain. Indeed, while the BOCs discuss the benefits of these enhancements, they still propose to hire and train thousands of new employees to handle the increase in hot cuts that would occur without UNE-P (with the notable exception of SBC, which amazingly struggles to hold onto the notion that its current staffing is sufficient). The reason for this is simple: these enhancements do not address the manual bottleneck of the loop provisioning process.

10. Furthermore, the BOCs attempt to downplay the fact that most of these enhancements have not yet been implemented. For example, BellSouth's web-based scheduling tool is slated for release on October 29, 2004 (after the submission of this Reply Declaration),[5] Verizon is still working on improvements to its WPTS[6] and Qwest's enhancements are not scheduled to be fully implemented until 2005.[7] These systems cannot be legitimately relied upon until they have been deployed and tested under commercial volumes to ensure that they will work properly. If the 271 certification

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5 Ainsworth/ Milner/Varner Affidavit at 9.

6 Maguire Declaration at 12.

7 Qwest Comments at 50.

process taught us nothing else, it was that OSS systems on paper do not always perform as advertised without substantial debugging and testing. Indeed, the Michigan Public Utilities Commission echoed our concerns with regard to the lack of testing, finding that "there must be appropriate procedures for testing of the SBC modified process to make sure the batch cut migration processes will work as anticipated in a real environment. Without adequate testing, the parties and the Commission cannot evaluate whether SBC is capable of migrating multiple lines in a timely manner."[8]

11. Both Qwest and BellSouth indicate that their newly improved processes have been reviewed by third parties and found to be sufficient. These BOCs tell only part of the story, however. For example, BellSouth suggests that "[PriceWaterhouseCooper's] testing constitutes evidence that BellSouth's batch hot cut process works."[9] Unfortunately, BellSouth fails to mention the many problems PWC identified with the process.

12. BellSouth originally presented the PWC report in the state hot cut proceedings to tout the excellence of its batch hot cut ordering process. But the process that PWC tested is not the same process that will ultimately result from BellSouth's batch hot cut improvements. Hence, the usefulness of the PWC report is suspect from the outset. Likewise, BellSouth has not provided the test plan under which PWC conducted its analysis, nor has it discussed this testing with the CLECs that will ultimately use the

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8 Michigan PSC Order in Docket No. U-13891, *2004 Mich. PSC LEXIS 191*,*37 (June 29, 2004).

9 *Id.* 33.

process or made PWC available to discuss the testing or explain its results.[10] Without the test plan, the parameters of the test (including acceptable ranges of error, important information about how the observations were conducted and a number of other factors) cannot be known. Nonetheless, even assuming the PWC report remains relevant, an independent review of the PWC information leads us to a substantially different conclusion than that reached by BellSouth.

13. From the information provided we can ascertain that PWC followed the cutovers of approximately 750 lines that BellSouth wired to its frames in three central offices. These lines were apparently translated in the BellSouth switches, but did not go to a CLEC collocation cage or switch (hence, any coordination effort required to ready the loop for the CLEC's use were necessarily ignored). When the migration order was worked, the lines were re-terminated on the CLEC portion of the BellSouth Main Distributing Frames and then run back to the BellSouth switches. According to BellSouth, "most" of the orders were issued using the BellSouth bulk ordering process.

14. What can be further gathered from the PWC report (primarily from PWC's "Exceptions to Management Assertions") is that the test identified numerous problems. For example, the PWC exceptions explain that for 22 lines, no dial tone was detected

[10] This is also our primary concern with Qwest's description of its Hitachi test. Very little information has been shared by Qwest about this particular test. Without more detail it is simply impossible for us to review the veracity of any such test and thereby reach conclusions as to whether the results of such an analysis add anything to the primary question facing the FCC - *i.e.*, would these improved hot cut processes operate at substantially increased scale sufficient to support a robust UNE-L entry strategy capable of supporting MCI's mass market offering?

prior to the cut, but the cuts were done anyway.[11] For 3 lines, there was no dial tone for longer than 20-40 minutes, with no explanation given.[12] Two lines were cut on the wrong due date (one early and one late).[13] One line was cut even though the telephone number was wrong.[14] For six lines, CLEC dial tone was not tested prior to the cut[15] and for 49 lines, no cutover notification was given.[16] All told, of the 724 lines actually

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[11] If this problem existed for a live customer, and the trouble was on the loop, the customer would have continued to have problems after the cut. If customer were suspended or had had dial tone removed for some reason, the CLEC would not have wanted the cut to proceed.

[12] The result for a real customer would be the inability to make calls during this period.

[13] In the case of an early cut, the CLEC might not have completed translations, leaving the customer without dial tone. Or the CLEC might not be ready to activate the LNP transaction, leaving the customer unable to receive calls. The customer would call for service, the CLEC would report to it to BellSouth as a UNE-P line, and BellSouth would show no record of the customer existing, which could take considerable time to resolve. A similar problem could occur if the cut were late. The CLEC would assume the order was rejected and would pull its translations from the switch and submit a new order to BellSouth. Indeed, a late cut is potentially more disruptive than an early cut.

[14] In such a case the wrong customer would have been migrated. The losing CLEC would receive a loss notice and stop billing the customer. The gaining CLEC would not bill the new customer since no order was placed for that migration. If the customer reported trouble to the losing CLEC, it would not be able to resolve it, since according to BellSouth, it would no longer own the customer. If trouble were reported to the new CLEC, it would turn the customer away, since the customer would not be in its database. The report provides no explanation of why this problem happened. It simply says it was "resolved" by working with the pseudo CLEC.

[15] If CLEC dial tone had not been present, the customer would have been migrated with no dial tone.

[16] In a non-coordinated cut (which MCI will use for residential customers), BellSouth notifies CLECs of the cut via a fax or email apparently generated by the EnDI system. Testing showed that this system failed on at least one day and presumably more, 49 notifications to be "misplaced" and not sent. CLECs would have assumed that the customer was not cut over and thus would not have activated the LNP transaction. The customer would have been unable to receive calls. The CLEC would not be aware of the problem until the customer called to complain. The CLEC would then have to work with

observed, 81 customer impacting problems were noted in the exceptions, approximately 11% of all observations. While BellSouth concludes from this information that its process works, we disagree. If 11% of all MCI mass market orders were to result in the customer's service being negatively impacted on the very first instance wherein MCI is observed as the new provider (*i.e.*, via the hot cut process), MCI (and likely state commissions and the FCC) would have scores of irate customers to contend with.

15. In sum, the enhancements heralded by the ILECs are in most cases improvements to previous hot cut processes. Unfortunately, they do nothing to address the primary manual bottleneck stemming from the lift and lay process, the primary source of impairment related to hot cuts, and of equal importance, none have been fully implemented and tested for purposes of understanding how they may improve the processes at a load relevant for a marketplace without the benefit of UNE-P. If the hot cut process is to be improved so that it approaches the functionality available to ILEC retail services and to UNE-P CLECs, direction from regulatory agencies, including this Commission, to the ILECs, requiring them to automate the provisioning aspect of the hot cut, will be required. The ILECs have shown that they will not make such meaningful changes without a push from regulators. Further, that direction should not be limited to "batch" hot cut processes. As we discussed in our October 4 Declaration, batch hot cut processes, if implemented, are limited in their functionality, primarily mean to accomplish a customer transition from one service delivery mechanism to another, and are not overly valuable for the daily hot cut volumes that would result from normal

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BellSouth to determine the cause of the problem, a process that would take time and cause customer dissatisfaction.

course customer acquisitions and departures. And the process improvements that the ILECs have implemented since the *Triennial Review Order* generally have little to do with loops being batched together. Said another way, the improvements to hot cut ordering and coordination generally provide equal benefits for loops cut one at a time in the normal course of serving mass market customers, as well as in a batch when transferring loops from UNE-P to UNE-L. As such, any rule the Commission envisions with respect to improving the hot cut process should not limit its effectiveness to only those situations wherein a "batch" makes sense, but should instead improve the entire process for all hot cuts.

III. Exclusions from the Hot Cut Process Remain

A. Hot Cut to EEL

16. In our initial Declaration we discuss in detail the fact that the BOCs' hot cut processes exclude order types that will be important in a marketplace dominated more heavily by a UNE-L entry strategy. One of our primary concerns in this regard relates to EELs. As we stated, QSI consultants participated in every BOC hot cut workshop in the nation, and only BellSouth, to our knowledge, indicated that it would develop a process by which CLECs could use the hot cut process (either the batch process or existing one-at-a-time processes) to transfer UNE-P or ILEC retail customers to an EEL arrangement. This is a major concern. We discussed in detail, in our initial Declaration, the importance of EELs in the absence of UNE-P. Absent the ability to use the hot cut process to convert customers from UNE-P or ILEC retail services to an EEL, CLECs will need to be collocated in every central office in which they serve customers. This is not a viable or

efficient requirement and indeed, is exactly the problem that EELs are meant to solve. However, until workable and efficient processes are available for purposes of "hot cutting" a customer to an EEL, EELs are largely useless in the effort to serve mass market customers (few mass market customers are going to be willing to let their service lapse for some period of time – likely 5 days or potentially much longer – while all new facilities are ordered and readied for service that can be provisioned without a hot cut).

17. Above we mentioned that only BellSouth had agreed to develop a process by which UNE-P or retail loops could be transferred to an EEL for purposes of providing uninterrupted mass market service. Unfortunately, if the process developed by BellSouth serves as a template that other ILECs will follow, little is gained. As an initial matter, BellSouth's EEL process was only released on July 30, 2004 and there is no indication that its process even works, especially in the face of commercial volumes. Further, BellSouth's record of supporting DS0 EELs, even without accommodating those circuits via a hot cut, is underwhelming and does not generate confidence. For example, while BellSouth provided more than 2.4 million UNE-P lines and 377,000 UNE loops to competitors throughout its territory during 2003, it only provided 272 DS0 EELs to competitors over the same time period (representing 0.001% of total loops).[17] None of those were accomplished via a hot cut, and to our knowledge, the vast majority were simply migrated from existing special access or private line arrangements so that no provisioning whatsoever was required.

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[17] *See,* Bellsouth's public response to AT&T Interrogatory No. 59 in GAPSC Docket No. 17749-U, 11/7/03.

18. In addition, BellSouth's hot-cut-to EEL proposal would result in substantial cost, delay and administrative inefficiency for CLECs. For example, BellSouth's recently released process requires the CLEC to purchase SL2 ("designed") loops, which are assessed a higher non-recurring charge when compared to a basic (SL1) loop and involve a higher degree of coordination, thereby further increasing the CLEC's costs. Additional aspects of BellSouth's proposal are likewise problematic. For example, BellSouth's proposal requires company-owned transport to be in place prior to the company accepting any orders for EELs, thereby negating any efficiencies that would result from ordering loop and transport facilities at the same time. Finally, from the scant information available from BellSouth on its proposal, it appears that even if a company had previously established interoffice transport facilities, prior to ordering an unbundled loop, orders would still require a minimum of 15 days to complete (based primarily upon the fact that SL2 loops are required). Each of these conditions will unnecessarily increase delay, costs and administrative burdens for CLECs attempting to use the hot cut to EEL process. The primary culprit is that BellSouth's proposal would require the ILEC and the CLEC to heavily coordinate each individual order, likely taking days to effectively construct the EEL and hot cut arrangement required to cut a single line (days that would be added to the standard 15 day completion interval). This is exactly the type of "hands on" provisioning process that mass market products cannot support (and as we described in our Initial Declaration, these are exactly the types of manually coordinated work steps the ILECs have worked tirelessly to remove from their own retail provisioning processes over a number of years).

19. While BellSouth's process is not effective and will do nothing to reduce impairment (unless substantially modified), at least BellSouth has put forward a "hot-cut-to-EEL" proposal. SBC, Qwest, Verizon and others, to our knowledge, have simply refused to address the issue (at least each did during the state hot cut workshop process).[18]

B. IDLC

20. After reviewing the information provided by all the ILECs, our concerns related to accessing IDLC loops in the absence of UNE-P remain. It is still clear that the BOCs either intend to ignore the issue of accessing IDLC in an unbundled fashion, claim that it is not technically feasible, or, perhaps most frustrating, provide lip service to the idea without any related commitment or plan for making it work.

21. Unlike the other three RBOCs, who make no claim that they will unbundle IDLC loops, BellSouth makes the misleading assertion that it provides nondiscriminatory access to all of its unbundled loops, including those served by IDLC. BellSouth includes with its comments the affidavit of Mr. Milner who claims that BellSouth employs 8 different techniques by which to provide CLECs access to IDLC loops. Four of those methods are consistent with the "IDLC unbundling" options we discussed in our initial Declaration as viable means by which CLECs could gain access to the digital signal of the customer.

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[18] For example, *See* SBC witness Carol A. Chapman's Direct Testimony (Exhibit 1.1) in Illinois Docket No. 03-0593, page 45, filed February 16, 2004.

22. If BellSouth's claims were true and correct, we would happily amend our assertion that none of the ILECs will unbundle IDLC loops. But even though BellSouth apparently no longer takes the position that unbundling IDLC on a digital basis is infeasible, scratching beneath the surface of BellSouth's claims demonstrates that BellSouth, too, has not truly unbundled a single IDLC loop for CLEC use, and they appear to have no plans to do so. BellSouth's misleading statements to the contrary appear to be simple lip service.

23. First, four of the eight unbundling options that BellSouth claims to be available are not options for unbundling IDLC at all, but rather involve moving a customer to alternate facilities. BellSouth, at its own discretion, will choose which option to use, and BellSouth invariably will attempt in the first instance to serve UNE loop requests by moving the customer's circuit from IDLC to either copper or UDLC (Alternatives 1, 3, 7 and 8). We described the ills associated with moving a customer to inferior facilities in detail in our October 4 Declaration.

24. Second, in the state hot cut proceedings, we attempted to determine how many times BellSouth had used any of its 8 options described by Mr. Milner, specifically, how many times had BellSouth used Alternatives 2, 4, 5, and 6, which involve actually unbundling the IDLC facilities. BellSouth was unable (or unwilling) to point to a single instance in which, in the normal course of its business, it had accommodated a UNE request for an unbundled loop by employing one of these methods.[19] BellSouth did, in the state proceedings, describe a technical trial it had undertaken on 2 loops to test the

[19] *See* BellSouth's Supplemental Response to MCI's Second Set of Interrogatories, Florida Public Service Commission Docket No. 030581-TP (filed January 8, 2004).

viability of Alternative 5 ("side door grooming"). However, BellSouth concluded that the trial was a failure. BellSouth testified to a number of purported operational obstacles, and BellSouth ultimately shut the trial down, deciding the option was no longer worth pursuing. BellSouth does not mention this in its Comments or in the Milner Affidavit. We further attempted to determine whether BellSouth had any specified methods and procedures that CLECs could review to determine how they might access options 2, 4, 5, and 6 (because each of these options would require the CLEC to access the requisite loops in a manner different than the other analog options and we were interested in how BellSouth intended to manage that interconnection process). We were unable to find any such documentation. Finally, we have been unable to locate either in testimony, tariffs, interconnection agreements or any other source, the rates, terms and conditions by which CLECs might be able to access these BellSouth options. As we discuss in our October 4 Declaration, accessing UNE loops via one of the digital grooming options described by Mr. Milner will require the CLEC to access the loop in a digital format, and hence, standard CFA assignments cross connected to copper from the main distribution frame will not suffice. Yet, any process description, methods or rates associated with this unique digital interconnection are suspiciously absent from all the documents that should include them if this were a legitimate offering. Frankly, it appears that the totality of BellSouth's process documentation on these methods can be found in the Milner Affidavit. It is abundantly clear to us that BellSouth has no operational methods in place by which to provide these options, has not provided them, and has no plans to do so.

IV. Hot Cut Performance Evaluations Conducted During Section 271 Reviews Provide No Useful Information to the Instant Proceeding

25. The BOCs repeatedly point to evaluations of their hot cut processes performed during their pursuit of Section 271 authority as purportedly showing that their hot cut processes are adequate.[20] However, the Section 271 reviews provide little, if any, relevant information useful in evaluating the matter at-hand. In their attempts to gloss over the untested, unproven nature of their proposed hot cut enhancements, the BOCs ignore two major factors.

26. First, the 271 testing of the BOCs' hot cut processes was extremely limited. When the third-party tested the UNE-P systems, for example, the testers conducted end-to-end testing. They acted as a pseudo-CLEC and submitted pre-order transactions and order transactions for the same line, and then evaluated whether the order made its way through the BOC's system properly, straight through to provisioning. On the UNE-L side, however, no such end-to-end testing was conducted. The testers relied on extremely limited numbers of observations of specific aspects of the hot cut process and never tracking orders through from pre-order through to provisioning. This testing, of course, could not be blind to the BOC, as the BOC knew exactly when it was being observed by the independent tester. And the testers did not test any of the steps leading up to the actual provisioning of the cut, such as checks for dial tone on the "Due Date Minus Two," or facilities checks. In New York, Bearing Point (then KPMG) never even saw a hot cut involving a retail customer served by IDLC.

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[20] *See* Qwest Comments at p. 51; *see also,*Pappas Declaration at 5, 18,23, 43, and 51; Maguire Declaration at 8; Bellsouth Comments at 27.

27. Second, the volumes of hot cuts that were tested during the 271 process were extremely low. Unlike the UNE-P systems, which were subjected to volume and stress tests, the UNE-L process were never tested for their ability to handle mass market volumes. Further, the evaluation of Section 271 requirements was conducted when UNE-P was available and supported the vast majority of competitively acquired mass market access lines. Hence, the hot cut processes and underlying systems examined in the 271 proceedings were not facing the hot cut volumes that would be experienced if UNE-L were used in place of UNE-P to serve the mass market.

28. As a point of reference, during SBC Michigan's 271 test by BearingPoint, the extent to which SBC's UNE-Loop provisioning was tested was addressed at the collaborative workshop on October 17, 2002, in Case No. U-12320. The transcript of this workshop shows that BearingPoint tested a total of only 129 UNE loop orders involving 192 circuits,[21] and did not analyze the average daily volume of loop orders in Michigan. In addition, BearingPoint did not examine the ability of NPAC (the database that handles local number portability) and Neustar (the company that processes the number portability orders) to process orders,[22] nor did BearingPoint look to determine whether 911 data was properly loaded.[23] Proper number porting and 911 loading are critical components of successfully completing the hot cut process and turning up the customer's service, yet, those functions received no review in the 271 process as they relate to hot cuts. In the situation where IDLC is being used to serve a retail customer and the customer is then

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21 Transcript of October 17, 2002 workshop in Case No. U-12320 at 5500.

22 *Id.* at Tr. 5503-5504.

23 *Id.* at Tr. 5504.

targeted to be served via copper, BearingPoint's analysis did not evaluate whether there would be spare copper to accommodate the CLEC's demand.[24] Furthermore, BearingPoint did not perform volume testing on UNE Loop provisioning, or attempt to answer the question of "if on a day a thousand CLEC orders were received to migrate individual residential customers to an unbundled loop, whether or not the due dates could or could not be met?"[25] Further, the fact that the CLECs were able, in the state-specific TRO proceedings, to so easily identify improvements to the very process blessed in the 271 proceedings, indicates that those tests served as a very "low hurdle." More specifically, it is clear that the examination of the loop provisioning processes conducted under Section 271 was designed to answer a much different question than what the Commission must answer in this instance. The same rationale, of course, leads to the inevitable conclusion that the BOCs' current hot cut performance metrics are of little value in evaluating what type of performance might be achieved in a completely different situation, *i.e.*, a situation wherein UNE-P may no longer be available.[26]

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24 *Id.* at 5523-5524.

25 *Id.* at 5524-5525.

26 *See* Bellsouth Comments at 28; *see also* Pappas Declaration at 17.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 15, 2004.

Michael Starkey

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 14, 2004.

Sidney L. Morrison