whatsoever. It is difficult to believe that CLECs are impaired without access to UNEs when they can and do use special access in lieu of UNEs to carry or deliver local exchange traffic and do so without any evidence of economic loss.[171]

Second, the astonishing claim that ILECs are earning very high (and, by implication, undeserved) rates of return on special access services is essentially meaningless from an economic standpoint. This claim relies on measures of fully allocated book costs of services that are produced using substantial shared and common assets, thus entailing a very high proportion of fixed and common costs and significant economies of scope. It makes no economic sense at all to equate ARMIS regulated rates of return for special access with economic profits. In fact, the tendency of Dr. Selwyn, in particular, to use regulated rates of return repeatedly like a cudgel has been noted and criticized before. For example, Alfred Kahn and William Taylor stated two years ago:

> High or increasing rates of return calculated using regulatory cost assignments for interstate special access services do not in themselves indicate excessive economic earnings reflecting the exercise of market power. Indeed, regulatory rates of return for geographic subsets of single services in multi-product, multi-geographic firms bear no relationship with economic profits and thus can serve no useful purpose in determining whether pricing flexibility has or has not been excessively permissive. ILECs are integrated multi-regional firms and rely on an integrated regional management structure employing the regional physical and human resources to provide a multiplicity of services. The cost allocations required render such a calculation meaningless.[172]

Professor Kahn and Dr. Taylor went on to note that noted economists for AT&T (the same company represented here by Dr. Selwyn and in part by Mayo et al.) decried the use of rates of

[171] Banerjee Reply Declaration ¶ 64.

[172] *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Declaration of Alfred E. Kahn and William E. Taylor on Behalf of BellSouth Corporation, Qwest Corporation, SBC Communications, Inc., and Verizon, at 7 (filed Dec. 2, 2002).

return based on accounting allocated costs as "economically irrational" when they appeared before Massachusetts regulators in 1992 to request relief from rate of return regulation for AT&T's intrastate services. Those economists noted, as did Professor Kahn and Dr. Taylor, that allocations of non-incremental costs among services (or categories like regulated and unregulated, interstate and intrastate) may be an expedient for calculating accounting rates of return but, not being cost-causative, those allocations do not lead to any measure of economic profits.[173]

VII. ENTRANCE FACILITIES AND ENHANCED EXTENDED LOOPS

A. The Commission Should Not Require Unbundled Access to Entrance Facilities.

There is no merit to the CLECs' claim that the Commission held "that entrance facilities are not facilities or that they are not used to provide a telecommunications service."[174] The footnote in the *Triennial Review Order* cited by the D.C. Circuit does not announce that no impairment analysis was being conducted for entrance facilities because they are not section 153(29)-network elements ineligible for section 251(c)(3) unbundling. Rather, the footnote elaborates on the discussion in the *Triennial Review Order* concerning the economic distinctions between inter-network transmission facilities used for backhaul (entrance facilities) and intra-incumbent LEC transmission facilities used for transport.[175]

The Commission squarely determined that a "more reasonable approach" that was "most consistent with the goals of § 251" includes "only those transmission facilities *within* an ILEC's

[173] Banarjee Reply Affidavit ¶ 65.

[174] ATX/Blackfoot, *et al.* Comments at 47. *See* AT&T Comments at 51 (arguing that entrance facilities are "network elements" under § 153(29)).

[175] *Triennial Review Order,* 18 FCC Rcd at 17009, n. 119, *cited in USTA II, id.*

network."[176] This conclusion was based, not on the definition of a "network element" in section 153(29), but rather on the eminently reasonable conclusion that Congress, in section 251(c)(3), intended to make only those section 153(29) "network elements" that resided within an ILEC's own telecommunications network available for access on an unbundled basis, although ILECs remain obligated to provide any such network elements needed for interconnection under section 251(c)(2).[177]

In addition to the economic distinctions between "entrance facility" network elements and "inter-network backhaul transmission facility "networks"[178] there is the critical distinction of "inherency" – loop network elements connect to end-users, and without them, an ILEC network would serve no purpose. In contrast, entrance facility network elements are not an inherent part of an ILEC network because they connect to competitors, rather than end-users.[179] Because entrance facilities may be required for interconnection purposes, and Congress explicitly enacted provisions that govern carrier obligations to provide interconnection in § 251(c)(2), it was altogether reasonable for the Commission to exclude these network elements from a definition of ILEC dedicated transport intended for unbundled access under § 251(c)(3).

The D.C. Circuit itself acknowledged that entrance facilities were unsuited for compelled unbundling by openly questioning why ILECs, and not CLECs, tend to construct entrance facilities, by noting that entrance facilities exist exclusively for a CLEC's convenience and observing that it is anomalous that CLECs do not provide entrance facilities when they could do

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[176] *Triennial Review Order*, 18 FCC Rcd at 17203, ¶ 366; *USTA II*, 359 F.3d at 585.

[177] *Id.*

[178] BellSouth Comments at 51, 53-55; *see also* SBC Comments at 70; *and* Verizon Comments at 66, 80-81.

[179] Brief for Respondents, No. 00-1012, *USTA, et al. v. FCC* at 81, n.35. (Dec. 31, 2003).

so, presumably, at costs associated with "the most efficient telecommunications technology currently available, . . . i.e., the TELRIC standard."[180] No commenter advocating the compelled unbundling of entrance facilities has overcome these concerns with a persuasive case for impairment for entrance facilities.

In the first place, the Commission should reject attempts to redefine its definition of entrance facilities as loops, or in such an open-ended fashion so as to make entrance facilities available as UNEs on an unrestricted basis to decidedly unimpaired broadband, wireless, and long distance interconnecting carriers without restriction.[181] There is no evidence in the record to support such a definitional change, or such unrestricted use, on remand. The D.C. Circuit upheld the Commission's decisions not to compel unbundled access to broadband elements as reasonable, "even in the face of some CLEC impairment" in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition ensures the persistence of substantial competition in broadband.[182] The D.C. Circuit explicitly found that existing rates outside the compulsion of section 251(c)(3) do not impede wireless competition or pose a barrier to wireless carriers that makes entry uneconomic,[183] and, in the context of long distance service, made clear that the same facts and rationale apply.[184] To expand the current

[180] *USTA II,* 359 F.3d at 586.

[181] ATX/Blackfoot, *et al.* Comments at 49 (redefining entrance facilities without any limitations on interconnection carrier's end in order to accommodate packetized data carriers), T-Mobile Comments at 9-10 (redefining element as part of loop or sub-loop definition), AT&T Comments at 52 (not advocating change to definition, but advocating unbundled access to entrance facilities "free of use restrictions"), Sprint Comments at 56-59 (not advocating change to definition, but arguing "reversal" of exclusion of entrance facilities so that they can be made available to wireless carriers).

[182] *USTA II*, 359 F.3d at 585.

[183] *Id.* at 575-76.

[184] *Id.* at 592-93 (on the issue of impairment, the Commission "may well find none with reference to long distance service").

definition of entrance facilities, or to "reverse the exclusion" of entrance facilities from the definition of dedicated transport and in turn allow unrestricted unbundled access to these facilities under section 251(c)(3) to broadband, wireless and long distance providers alike would flout these rulings.

In any event, commenters advocating entrance facility impairment are wrong. CLECs concede that new entrants have the "stronger desire" to connect to the ILEC network and that the "principle of network effects" provides ILECs with "an incentive to permit such connections."[185] These market conditions destroy any case for compelled unbundling – CLECs and ILECs alike, though competitors, have market incentives to interconnect their respective networks through arms-length commercial transactions. Moreover, as explained by the Commission, all LECs have the duty to interconnect with each other on a just and reasonable, nondiscriminatory basis regardless of the status of unbundled access to ILEC entrance facilities.[186]

Wireline commenters argue that the impairment analysis with respect to entrance facilities should be the same as that for high capacity loop and transport facilities.[187] These arguments fail in two critical ways. First, they do not refute in any substantive way the unique economic characteristics that distinguish entrance facilities from dedicated transport that the Commission identified in the *Triennial Review Order*, which were acknowledged by the D.C. Circuit and which are confirmed in the record.[188] Neither CLEC nor ILEC has first-mover or

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[185] ATX/Blackfoot, *et al.* Comments at 48.

[186] *See Triennial Review Order*, 18 FCC Rcd at 17203-04, ¶ 366.

[187] ATX, *et al.* Comments at 49-50, AT&T Comments at 52 ("the impairment analysis is exactly the same as that for dedicated transport").

[188] *See Triennial Review Order*, 18 FCC Rcd at 17203-04, ¶ 367 (discussion of different economics of dedicated facilities used for backhaul between networks and transport within an incumbent network, concluding that analysis of role of entrance facilities within definition of dedicated transport must reflect this distinction); *USTA II*, 359 F.3d at 586; BellSouth Comments

sunk-cost advantage.[189] Indeed, AT&T appears to agree that entrance facilities are "the most competitive type of transport" and that their competitive deployment is "pervasive,"[190] stating for AT&T "almost all competitively deployed transport links *are* entrance facilities." [191]

This admission of AT&T's ability to deploy entrance facilities in competition with other carriers demonstrates the second reason why wireline commenters cannot demonstrate impairment. The record, as shown above, reflects a significant lack of impairment with respect to high-capacity loop and transport facilities. For commenters contending that the same impairment analysis should apply, they cannot be impaired for the *most* competitive form of ILEC transport elements, when they are not impaired without unbundled access to the (allegedly) *least* competitive forms. And where, as here, AT&T concedes that all of the competitive transport that it deploys are entrance facilities, it can simply make no argument that it is impaired in its ability to access ILEC entrance facilities. Moreover, AT&T's 12 DS3 economic "threshold" for self-deployment cannot stand in the light of the availability of ILEC special access services and other competitive alternatives outlined in the record of this proceeding. [192] Using these competitive alternatives, AT&T can "bridge" the interval until it believes, in its own business judgment, that self-provisioning entrance facilities is more economical than leasing them from third parties.

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at 53-55, Padgett Affidavit, ¶¶ 37-39 (BellSouth designs, engineers, constructs and deploys the facility to order of requesting carrier; newly constructed facility is dedicated to the use of the ordering carrier and is not used by BellSouth to serve its own end users; connecting carriers are migrating to self provisioned entranced facilities). *See also* Verizon Comments at 80-81, *esp.* Patil Declaration, ¶¶ 6, 9, 16 (similar trends documented in other ILEC serving territories).

[189] Padgett Reply Affidavit, ¶85.

[190] *UNE Fact Report 2004* at Section III, E, 1, a.

[191] AT&T Comments at 52.

[192] BellSouth Comments at 55-57.

Wireless carriers such as Sprint and T-Mobile have not provided any evidence to overcome the strong presumption of wireless non-impairment that permeates *USTA II.* Vaguely complaining of unspecified levels of expenditures, the wireless carriers continue to complain, not about "uneconomic entry," but rather about their ability to make more profits. All of these arguments have been thoroughly refuted.[193]

Wireless commenters do not overcome the compelling record evidence, or the judgment of the D.C. Circuit, that with respect to the wireless market, "evidence already demonstrates that existing rates outside the compulsion of § 251(c)(3) don't impede competition."[194] Sprint simply asserts, without support or context, "the single largest network operating cost of Sprint's mobile wireless division is the purchase of dedicated transport facilities."[195] This assertion alone is not enough to establish impairment, especially in light of Sprint's most recent annual report, in which it asserts, "[t]he market for wireless services is highly competitive."[196]

In describing its PCS Division's costs of services and products, Sprint states that theses costs "mainly include handset and accessory costs, switch and cell site expenses, customer

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[193] Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, *Public Notice*, Report No. 2635 (Oct. 9, 2003); 68 F.R. 60391 (Oct. 22, 2003). BellSouth Comments at 63-66, BellSouth App. Tab 32 (Reply Declaration by National Economic Research Associates, Inc., "Claim: CMRS Providers are Impaired Without the Availability of Dedicated Transport on a UNE Basis" (July 17, 2002) ("NERA 2002 CMRS Impairment Analysis")); SBC Comments at 22-24 ("As the D.C. Circuit has recognized, the overwhelming evidence of remarkable growth and robust competition in the wireless industry without access to UNEs demonstrates that there is no lawful basis to find impairment or impose unbundling in that market); Verizon Comments at 71-74. *UNE Fact Report 2004* § II.B.1.

[194] *USTA II*, 359 F.3d at 576. AT&T grudgingly acknowledges, "CMRS competition might be flourishing even though CMRS carriers typically use special access as an input to their *wireless* service" AT&T Comments at 124 (emphasis in original).

[195] Sprint Comments at 55.

[196] Sprint Corporation Form 10-K, "Sprint PCS Group, General Overview of the Sprint PCS Group, Competition" at 6 (Dec. 31, 2003) available online at <www.sprint.com/sprint/ir/annual>

service costs and other network-related costs."[197] Sprint goes on to single out "handset and equipment costs" as comprising 39 percent of total costs of services and products, but nowhere in its comments does Sprint provide any information about its "dedicated transport costs" in relation to its overall $ 6.15 billion worth of service and product cost operating expenses, or its ability to afford $ 2.15 billion in capital expenditures for 2003.[198] The Commission is in no position to find that Sprint is impaired without access to ILEC entrance facilities, or any other kind of UNE, on the record presented.[199]

T-Mobile fares no better. As the Reply Declaration of Dr. Banerjee demonstrates, T-Mobile has not properly characterized the market and ignores substantial and convincing evidence of meaningful product substitution, which has occurred without wireless carrier's access to UNEs.[200] Nor are T-Mobile's attempts to characterize "wireless only" UNEs convincing.[201] BellSouth has thoroughly refuted these arguments.[202] T-Mobile has added

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[197] *Id.* at 39.

[198] *Id.* at 37. It is telling that in the Sprint 10K discussions on "Legislative and Regulatory Developments," Sprint is silent as to this proceeding, *USTA II*, or any specific impairments with respect to its access to ILEC dedicated transport UNEs as it relates for its wireless operations. *Id.* at 9. *See also* NERA 2002 CMRS Impairment Analysis, BellSouth Comments, and Tab 32 at 126-28 for a discussion on how important the overall financial context is to assessing claims of impairment with respect to even quantified dedicated transport expenses.

[199] *See* NERA 2002 CMRS Impairment Analysis, BellSouth Comments, Tab 32 at 126-28 for a discussion on how important the overall financial context is to assessing claims of impairment with respect to even quantified dedicated transport expenses.

[200] Banerjee Reply Declaration, ¶¶ 98-104.

[201] T-Mobile wrongly characterizes transport elements as loops for the reasons set forth in the record incorporated into this proceeding through the wireless petition. Base stations are simply not end-user customer premises. If they were, then there would be no further telecommunications services provided beyond that point, and CMRS providers would not be eligible for UNEs because they would not be providing telecommunications services. Further, in BellSouth's region, many multiple PCS providers attach to a single cell tower, and in turn serve multiple end users; T-Mobile's characterization of these facilities as a kind of lonely lighthouse is simply wrong. Moreover, especially for roof-top facilities, facilities based competitive providers, such as cable companies, can just as easily serve CMRS providers through competitive fiber-optics alongside ILEC facilities.

nothing new in its evidentiary case, and as Dr. Banerjee demonstrates, they have utterly failed to prove impairment.[203]

B. The Commission Should Strictly Limit Access to EELS.

The record in this proceeding demonstrates that carriers are not universally impaired without unbundled access to high-capacity loops, transport, or dark fiber. In markets where there is no impairment, ILECs no longer have an obligation to make available unbundled EELs.

However, even when made available, EELs are especially susceptible to gaming and arbitrage. Under the *Triennial Review Order*, EELs obtained at TELRIC rates ostensibly to provide local wireline service could be used to provide service in markets where competition thrives and where there is no impairment, such as the wireless and long distance markets.[204] As the D.C. Circuit observed in *USTA II*, "IXC providers have traditionally purchased these services from ILECs for long distance purposes as a special access service, i.e., under the ILEC's tariff rather than at TELRIC rates."[205]

The record bears this out.[206] In BellSouth's region, nearly 87 percent of all DS1 loop/transport combinations are purchased as special access, while over 99 percent of all DS3 loop/transport combinations are purchased as special access.[207] Special access circuits are being

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[202] BellSouth Nov. 6, 2003 Opposition and Comments at 16-17, n.53; BellSouth Nov. 17, 2003 Response to Comments Supporting Wireless Petitions for Reconsideration at n.7 and accompanying text.

[203] Banerjee Reply Declaration, § IV.

[204] *Id.* (EELS can also be used to "originate and terminate long distance calls.").

[205] *Id.*

[206] Verizon Comments at 75-76; SBC Comments at 93-94.

[207] Padgett Reply Affidavit, ¶ 87. When BellSouth's three largest IXC customers are taken out of the count, the percentages change to 68% of all DS1 loop/transport combinations and 98% of

purchased at wholesale and are being used successfully to provide local service even when UNE alternatives are available at lower cost. [208]

Thus, the record demonstrates that carriers have been using special access circuits to successfully provide service in both local and long distance markets, belying any claim that they are impaired in general in any market without access to EELs. Given a choice at the outset of purchasing UNEs or special access, many carriers choose special access over UNEs for their own business reasons, and many have decided not to convert their special access circuits to UNEs, further undermining any case for impairment.[209]

To comply with *USTA II,* the Commission must therefore ensure that high capacity loop and transport UNE combinations are confined to markets where impairment exists. SBC correctly states that the D.C. Circuit, in exercising its deference to the Commission's decision with respect to its newly enacted eligibility criteria, "in no way foreclosed the Commission from revisiting those criteria and, if necessary, improving upon them."[210] In fact, the Court stressed that the new "safeguards" are "imperfect."[211] As the record reflects, under the Commission's new criteria, a facility can be used predominantly if not exclusively to provide long-distance service.[212] The Commission must at a minimum ensure that UNEs in general, and EELs in

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all DS3 loop/transport combinations. BellSouth's three largest IXC customers purchase 99% of their DS1 loop and transport combinations and 99% of their DS3 loop and transport combinations as special access circuits. *Id.*

[208] Padgett Affidavit, ¶ 39 (filed with BellSouth's Initial Comments).

[210] SBC Comments at 95.

[211] *Id.*

[212] *Id.* at 96-97 (demonstrating how only one of the several criteria adopted purports to actually address how a CLEC actually uses EELs, and this requirement, that each DS1 EEL be associated with a single interconnection trunk, is twice flawed, permitting both a majority of the traffic over the facility to be non-local, or Internet access or data traffic).

particular, are not used to provide long distance, wireless or other services for which there is no impairment. In order to do this, especially under the timeframes under which the Commission is operating, the Commission must re-establish the usage criteria, safe harbors and commingling restrictions it previously adopted in its *Supplemental Order Clarification.* [213]

BellSouth stresses that there is no need to depart from the rules established by the Commission prior to the *Triennial Review Order*. Even as the D.C. Circuit has continued to find fault with the Commission's fundamental unbundling analysis following the Supreme Court's original vacatur, it has continued to endorse the central principles affirmed by the *CompTel* court. Although a number of parties propose various modifications to the Commission's newest EELs eligibility criteria, there is no question that, as a matter of law, the prior restrictions are lawful and are far less susceptible to gaming or arbitrage than the new criteria or to any alternative proposed by commenting parties.[214] In BellSouth's experience, concerns about ILEC abuse of the auditing requirements were far overstated; individual complaints have always been subject to complaint resolution procedures and CLEC objections to audits are not always well taken. It would be best to restore the former eligibility criteria and rely on existing enforcement mechanisms to ensure carrier compliance.[215]

Finally, it is important that the pre-existing criteria, which were designed to address traditional, narrowband networks, be supplemented in order to address the issues posed by non-traditional networks. In order for next generation integrated packet services to be provisioned over UNEs, the requesting carrier must demonstrate that at least 50% of the circuit's bandwidth

[213] Padgett Reply Affidavit, ¶¶ 86-91.

[214] Padgett Reply Affidavit, ¶¶ 92-93.

[215] *Id.*, ¶ 93.

is used and continuously available for dialing and conducting simultaneous local voice telephone calls. In order to demonstrate eligibility there must be a sufficient number of working local telephone numbers assigned to the circuit in order to allow this, with porting capability, 911 capacity, and the circuit must connect to a class 5 switch or its equivalent. Only non-channelized DS-1 circuits ordered after the effective date of any rules adopted in this proceeding should be eligible for provisioning over UNEs in this way. Loops must terminate into a collocation arrangement or be connected to a UNE transport facility, while UNE interoffice transport facilities being used in a packet network must have both ends terminating into a collocation arrangement in order to be a part of a valid UNE combination.

VIII. INTERPLAY BETWEEN SECTION 251 AND SECTION 271

A. Where the Commission Makes a Determination of No Impairment Under Section 251, State Commissions Cannot Impose an Unbundling Obligation Under Section 271 or Under State Law.

A number of commenters continue to argue that, even if the Commission determines that carriers are no longer impaired without access to ILEC unbundled network element under section 251, states can nevertheless require the ILECs to unbundle these same (or similar) elements under state law or under section 271 of the Act. As the Commission itself as stated, its unbundling decisions "reflect[] a 'balance' struck by the agency between the costs and benefits of unbundling an [an] element. *Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption.*[216] Thus, no legal basis exists for a state to impose unbundling obligations under color of any state or federal law once the Commission has determined that unbundling is not required.

[216] Brief for Respondents at 93, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.* (D.C.Cir. filed Jan. 16, 2004) (FCC *USTA II* Br."), quoted in SBC Comments at 114 (emphasis added).

Thus, the interplay between section 251 and section 271 is relatively straightforward. As long as the Commission lawfully determines that there is impairment with respect to ILEC network elements, the ILEC is required to provide unbundled access to those elements consistent with the Commission's unbundling rules. The availability of these section 251 elements may in turn, as the Commission has found, satisfy any independent obligation to provide elements separately identified in section 271.[217] To the extent that an independent basis in state law exists that purports to authorize state commissions to regulate the rates, terms and conditions of unbundled access to ILEC network elements, this state authority is both concurrent and coextensive with valid Commission unbundling requirements for elements for which the Commission has made an affirmative finding of impairment under section 251. But in no event do the states have authority under state or federal law to mandate unbundling when the Commission has found no impairment.

Some commenting parties attempt to bootstrap section 271 to section 252 in a way that would attempt to establish derivative state authority to compel unbundling under section 271 even where the Commission has found no impairment. Such attempts are misguided.[218] Moreover, the cases cited by AT&T for state's general rulemaking authority for section 271 elements all dealt with "checklist item two" UNEs that are in fact 251 UNEs incorporated by

[217] With respect to forbearance from the imposition of unbundling under section 271 for facilities as to which the Commission has not found impairment, including broadband facilities, BellSouth agrees with SBC's analysis, SBC Comments at 109-118, and the analysis contained in the various BOC petitions on this issue. SBC Comments at n. 322.

[218] *Cf.* AT&T Comments at 175-82, Momentum Comments at 15-18, *with* BellSouth Comments at 70-81, SBC Comments at 113-18, Verizon Comments at 120-28. Qwest does not address the legal arguments demonstrating this, but makes clear that only the Commission has authority under § 271 to regulate the rates, terms and conditions of elements that may be independently required under § 271. Qwest Comments at 92-101.

reference into 271, and do not apply to "independent" checklist items 4-6 and 10.[219] AT&T's reliance on *Coserve* is equally misplaced, and its statement that the Fifth Circuit "reversed a state commission's reasoning" is intentionally misleading.[220] *Coserve* holds that: (1) a state commission's section 252 jurisdiction is limited by the actions of the parties in conducting voluntary negotiations; (2) a state commission may only arbitrate issues that were the subject of voluntary negotiations, and (3) its holding neither eliminated an ILECs section 252 duty to negotiate nor "create[s] any new obligations under the Telecom Act."[221] Far from reversing any holding or reasoning, the Court of Appeals *affirmed* the district's court's decision *not to reverse* a state commission because the commission's "ultimate refusal to arbitrate… was correct," since the issue in dispute "was not a mutually agreed upon subject of voluntary negotiation" between the CLEC and ILEC in the first place.[222]

AT&T states that under section 271, "[t]he Commission's federal interest is to ensure that state commission-set rates for checklist items are not too high, but there is absolutely no § 271 basis for a federal concern that these rates are too low." [223] AT&T's new view of the 1996 Act is plainly incorrect and at odds with its own earlier positions. The 1996 Act is not analogous to

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[219] AT&T Comments at 175-77, *citing WorldCom v. FCC, AT&T v. FCC and Sprint v. FCC.*

[220] AT&T Comments at 179.

[221] Verizon Comments at 488.

[222] *Id. Coserv* does not hold that jurisdiction is established under section 271 for states to maintain unbundling requirements that have been eliminated by this Commission, or that this Commission has refused to promulgate under section 251, or that state commissions have independent jurisdiction over the prices and terms of non-checklist item two elements and services. *Coserve* stands for the unremarkable proposition that any party may, at the outset, voluntarily consent to negotiate over issues, and by doing so consent to subsequent compulsory arbitration in the event no agreement is reached on the issues on which they agreed to negotiate. But a parties' potential ability to consent to jurisdiction to a state regulatory over a wide range of topics does not confer independent legal jurisdiction upon a state regulatory commission to set prices, terms and conditions generally for matters that Congress has given exclusive jurisdiction to this Commission.

[223] AT&T Comments at 175.

federal health and welfare regulation, like the Clean Air or Clean Water Acts, where Congress establishes minimum requirements for national health and safety, such as permissible levels of air emissions or water pollutants, which states may be permitted to exceed by establishing more rigorous requirements.

The role of state commissions is "carefully delineate[d]" and does not, as the D.C. Circuit has found, include imposing unbundling obligations when the Commission has found that CLECs are not impaired without such unbundled access.[224] Furthermore, the Commission's rules have been vacated as overbroad three times because of the social costs of maximum, unprincipled network unbundling. Allowing states to adopt unbundling policies that are more rigorous than a "minimum" federal floor is precisely backwards; it would undo the "'balance' struck" by this Commission "between the costs and benefits of unbundling an [an] element."[225]

Therefore, whatever the Commission may establish under section 251 is the maximum amount of unbundling permitted by law, not the minimum. State unbundling policies that are inimical to those established by this Commission in conformance with the guidelines articulated by the federal courts are like the standard-less sub-delegation federal responsibilities with respect to section 251 impairment determinations that the D.C. Circuit found unlawful.[226] They would clearly strike a "different balance" than that struck by this Commission, would "conflict with federal law" and "thereby warrant[] preemption."[227]

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[224] Verizon Comments at 116, *quoting USTA II*, 359 F.3d at 568 and citing to *Triennial Review Order*, 18 FCC Rcd at 17101, ¶ 195.

[225] Brief for Respondents at 93, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.* (D.C.Cir. filed Jan. 16, 2004) ("FCC *USTA II* Br."), quoted in SBC Comments at 114.

[226] *USTA II,* 359 F.3d at 568. Neither the FCC nor the U.S. sought certiorari on this or any point.

[227] Brief for Respondents at 93, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.* (D.C.Cir. filed Jan. 16, 2004) (FCC *USTA II* Br."), quoted in SBC Comments at 114. The Commission should therefore grant BellSouth's pending Petition for Declaratory Ruling

Indeed, AT&T has advocated precisely this position, which ultimately was adopted by the Supreme Court. As AT&T wrote in its initial comments in the antecedent docket:

> The 1996 Act was enacted against the background of the settled rule that federal agency regulations will preempt any inconsistent state policies unless the federal statute provides otherwise.
>
> Accordingly, any Commission regulation that reasonably implements the standards of Section 251 (and that is not waived by the Commission, see infra), will itself preclude the operation of inconsistent state regulations. . . .
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> . . .
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> More fundamentally, if the determinations of the minimum requirements of section 251 were initially to be made in 50 different states and the District of Columbia, it would recreate the balkanization, delays, and incessant litigation that the Act was intended to end . . . .[228]

AT&T was even more emphatic in its Reply Comments:

> The express terms of §§ 251, 252, and 253 render irrelevant statements about preemption of state law being "disfavored" and eliminate any need to consider whether preemption should be "implied." Congress has exercised its authority under the Commerce Clause of the Constitution in the most direct and unequivocal terms by imposing explicit federal duties on ILECs and by mandating that states enforce those federal requirements.[229]

On appeal, the Supreme Court agreed with AT&T:

> But the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the states. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal agency regulations. If there is

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(Tennessee preemption petition). BellSouth also agrees with Verizon that the Commission should establish a procedure that ensures the prompt preemption of any state commission order, whenever issue, that purports to impose such inconsistent obligations. Verizon Comments at 119 (advocating that complaints be decided within same 90-day period that applies to complaints that a BOC is not in compliance with § 271, and imposing burden of proof in such proceeding on the parties advocating such state requirements)

[228] Comments of AT&T Corp., CC Docket No. 96-98, at 4-6, 8 (filed May 16, 1996) (§ 2(b) of the Act has no relevance to the Commission's authority to promulgate the rules that would best implement the Act's local competition provisions, and that the subsequently enacted § 251 impliedly repeals § 2(b)).

[229] Reply Comments of AT&T Corp., CC Docket No. 96-98, at 2-3 (filed May 30, 1996).

> any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.[230]

The arguments that AT&T espoused eight years ago apply with the same force of law and logic. After three vacaturs, it is clear that this Commission must determine which network elements should be unbundled, not a state commission. As AT&T argued in 1996, all of the provisions of the 1996 Act that preserve state commission authority make clear that state commissions have no retained authority to take actions that conflict with the requirements of the 1996 Act or the Commission's regulations, or that substantially prevent the implementation of the Act and those rules.[231] When the Commission has either found no impairment "or otherwise declined to require unbundling on a national basis" with respect to a particular network element, states are barred from directing that the network element be unbundled because to do so would "conflict with … implementation of the federal regime."[232]

B. Section 251 Requirements Do Not Apply to Section 271 Elements.

Neither states, nor the Commission, should allow commingling of section 271 elements with any other elements, nor apply the pricing standards of section 251 to section 271. As Qwest notes, *USTA II* upholds the Commission's conclusion that BOCs are not obligated to combine elements provided pursuant to section 271 with other elements unbundled under section 271 or section 251.[233] As Qwest notes, carriers operating under the less regulatory obligations of

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[230] *Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

[231] *Id.* at 117, citing *Triennial Review Order*, 18 FCC Rcd at 17099, 17100-01, ¶¶ 192, 194.

[232] *Triennial Review Order*, 18 FCC Rcd at 17101, ¶ 195. *See Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004), and various state commission findings that "no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under §251(d)(2). Verizon Comments at 117-18, n.124.

[233] Qwest Comments at 98.

section 271 are able to structure offerings, including platform offerings through contract tariffs. Unreasonable discrimination in the provision of these market-based offerings is afforded both through market forces themselves, as well as the general nondiscrimination standard set forth in section 202 of the Act.[234]

Nor are commercial agreements that do not relate to unbundling obligations under section 251 subject to the filing, arbitration, review and approval and opt-in requirements of section 251.[235] Because any obligation to provide the specific items identified in checklist items 4-6 and 10 arises out of section 271 and not section 251, it is an independent obligation "divorced" from section 251 and the Commission has sole jurisdiction over contracts for these elements. And where an ILEC elects, for business reasons, to negotiate over or agree to provide network elements that are not mandated by either section 251 or section 271, agreements covering these elements are not subject to state filing, arbitration or approval.[236] Accordingly, the Commission should grant BellSouth's Emergency Petition for Declaratory Ruling and its accompanying Petition for Forbearance for the reasons stated herein and in those petitions.[237]

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[234] *Id.* at 98-99

[235] Qwest Comments at 92-97; SBC Comments at 123-29; Verizon Comments at 138-41.

[236] Qwest Comments at 93-94.

[237] BellSouth Emergency Petition for Declaratory Ruling (filed May 27, 2004) (requesting the Commission to declare that separate agreements for the provision of services not required under § 251 are not subject to section 252; that such agreements are federal agreements that require compliance with section 211 of the Act and § 43.51(c) of the Commission's rules; and that inconsistent state actions are preempted); BellSouth Petition for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Section 252 with Respect to Non-251 Agreements (filed May 27, 2004) (providing an additional basis for the Commission to exempt Non-251 Agreements from the requirements of § 252, in the event that the Commission grants the Emergency Petition for Declaratory Ruling but that decision is vacated upon review or the Commission does not agree with the legal analysis in the Emergency Petition but concurs with BellSouth that the underlying relief sought is vitally important).

VIII. TRANSITION ISSUES

BellSouth agrees with those commenters that insist that after eight years of unlawful unbundling it is important to adopt procedures that will facilitate a rapid and rational transition away from the maximum unbundling regime that has been repudiated by the courts. BellSouth does not oppose the transition proposal advocated by Qwest.[238] However, as a practical matter, and given the Commission's commitment to establish permanent rules prior to the end of December 2004, BellSouth also does not oppose the time-table established in the *Interim Order* as the outer limits for any transition to a new lawful unbundling regime adopted by this Commission. The Commission should reject any attempts to extend this transition by "slow-rolling" the implementation of the new rules.[239]

AT&T's argument that the Commission cannot order the elimination of access to particular UNEs by a particular date without overriding valid change of law provisions is groundless. The basis of AT&T's argument is that states "retain the authority to determine whether access to network elements should be required under state law (or other provisions of federal law)," which, as demonstrated above, is false.[240]

Because the agency's unbundling rules never complied with the law in the first instance, the Commission is following the law as it already and always existed when it adopts lawful unbundling rules; in doing so, the Commission can certainly correct its prior unlawful findings without necessitating a lengthy renegotiation process.[241] Thus, CLECs may not use "change of

[238] Qwest Comments at 89-92.

[239] SBC Comments at 118-20.

[240] AT&T Comments at 200.

[241] Verizon Comments at 133.

law" provisions in their existing interconnection agreements to delay the implementation of the new rules.

In the course of its arguments for a prolonged transition period AT&T asserts that BellSouth's EELs waiver request is no longer necessary and seeks the immediate right to convert special access circuits to EELs. BellSouth's petition, of course, was designed precisely to prevent the premature conversion of special access circuits to EELs; the danger that existed at the time of the petition was that carriers would convert special access circuits to EELs before a state commission's determination of whether impairment existed for the component loop and transport elements comprising the EEL. This "unbundle first, find impairment later" approach was then, and remains now, unlawful.

With the finality of *USTA II*, and the record so clear on lack of impairment, particularly with carriers' use of special access, the Commission can and should prohibit special access conversions to EELs. When impairment has been found to the extent that EELs are made available as UNEs in the Commission's final unbundling rules, carriers may elect between EELs or special access alternatives (or other alternatives) for new circuits only, and subject to meaningful use restrictions. In no event should EELs be made available to carriers, or to carrier's customers for the use in the long distance, wireless, or competitive access markets.

In sum, for the reasons set forth in the comments, the Commission should reject AT&T and other attempts to create multi-year transitions, to invoke change-of-law provisions to slow down implementation of the Commission's new rules, and to permit any special access to UNE conversions.[242] The Commission should instead adopt rules requiring parties to move quickly to new arrangements incorporating new rules established in this proceeding on a time-table no later

[242] SBC Comments at 118-23, Verizon Comments at 128-38.

than that established in the Interim Order. CLECs have already benefited from a prolonged (exceeding five years) transition period dating from the first vacature of the Commission's unbundling rules in 1999. It is time to stop the market-distorting effects of maximum unbundling.

IX. OTHER ISSUES

A. There is No Basis for Re-implementing Line Sharing.

1. CLECs Are Not Impaired Without Access To Line Sharing.

Not only is there absolutely no justifiable policy reason for reinstating line sharing as a UNE, the Commission is legally barred from doing so. As BellSouth pointed out in its comments, line sharing was vacated by the D.C. Circuit in *USTA I*, a holding that the court reiterated in *USTA II*, and was repudiated by the Commission in the *Triennial Review Order*.[243] Thus, the Commission could not lawfully reinstate line sharing, even if it were so inclined.[244]

However, several commenters distort the facts and market realities in an attempt to revisit the line sharing issue.[245] Accordingly, BellSouth is providing the Reply Affidavit of Mr. Eric Fogle to correct the record.

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[243] *See* BellSouth Comments at 78.

[244] *See* BellSouth Reply App. at 4. The Commission should, however, make clear that there is no independent Section 271 line sharing obligation and reject Covad's attempts to improperly claim a continued basis to line sharing other than as specified in the transition plan of the *Triennial Review Order.* Covad has refused to modify its interconnection agreement and in state proceedings over this issue state commissions are reaching divergent results. If any action is needed on this issue, it is simply to clarify unequivocally that national policy concerning line sharing is the transition plan only which must be included in interconnection agreements and that no independent line sharing obligation exists under section 271. *See* BellSouth Reply App. at 7-9 (excerpts of state commission agenda sessions concerning the dispute between BellSouth and Covad; the Georgia and Florida commissions have not required Covad to modify its interconnection agreement; the Tennessee Regulatory Authority appears to have properly ordered the transition plan).

[245] *See e.g.* Earthlink's Comments; Covad's Comments.

There are few issues involved in this proceeding that have been as soundly rejected as line sharing. One would reasonably assume the matter to be closed. Unfortunately, several commenters are back, trying once again to have the Commission put back in place a regulatory regime that disincents investment and relies on synthetic competition in a subsection of the market. The issue these commenters refuse to recognize is that competition for communications services is no longer between incumbent and competitive LECs but between entities that can provide a wide array of services to meet consumers' communications needs. Cable modem providers, wireless providers, satellite providers, and even power companies[246] all provide a link to the end user. Through these links, these entities are providing bundles of services that include voice, data, and in some cases video. This intermodal competition is precisely what the D.C. Circuit had it mind when it vacated the Commission's original line sharing decision.[247] Consistent with this decision, and the Commission's decision in the *Triennial Review Order*, it makes no economic sense, nor does it advance any competitive policy position to force one competitor – ILECs – to unbundle spectrum on a copper loop in order to allow a subset of entities to provide a limited set of services to consumers. The commenters attempt to carve out a niche market for the provision of Internet access through an unbundled high frequency portion of a copper loop is simply an outdated business model.

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[246] "FCC Adopts Rules for Broadband Over Power Lines to Increase Competition and Promote Broadband Service to All Americans," FCC News Release (Oct. 14, 2004).

[247] *USTA I*, 290 F.3d at 428 ("the Commission, in ordering the unbundling of the high frequency spectrum of copper loop so as to enable CLECs to provide DSL services, completely failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite").

B. Commenters Distort the Facts Supporting the Commission's Basis for Phasing Out Line Sharing in the *Triennial Review Order.*

Commenters supporting the reinstatement of line sharing contend that the bases for the Commission's decision to eliminate line sharing in the *Triennial Review Order* are invalid, even though that decision was rendered last year and was affirmed by the D.C. Circuit seven months ago. The Commission's bases for eliminating line sharing in the *Triennial Review Order* are even more compelling today.

1. Line Splitting Is a Viable Option for CLECs.

Despite their claims to the contrary, if a CLEC desires to continue to be only a broadband Internet access provider, it can do so through line splitting. BellSouth has been and continues to be a leader in developing and supporting line splitting processes.[248] Moreover, the fact that AT&T has claimed it has curtailed its residential service is no reason to re-instate line sharing.[249] Although Covad asserts that AT&T's decision limits the number of voice CLECs that it can partner with in order to provide dual services to customers, this claim lacks merit for two reasons.

First, Covad markets mainly to business customers, thus AT&T's pull out of the residential market has little impact on Covad. Second, AT&T has made clear its plans to offer VoIP services to the residential market. Covad is uniquely positioned, as a stand-alone broadband service provider with significant experience in ordering UNE-loops, to benefit from AT&T's strategies. Specifically, AT&T's VoIP service requires an existing broadband service, and broadband services that do not require an underlying voice service (which is exactly what

[248] *See* Fogle Reply Affidavit, ¶ 11.

[249] As BellSouth pointed out in its Initial Comments, these AT&T's claims are suspect.

Covad has been ordering for years to support its SDSL based broadband services) to provide the transmission facility are the most likely candidates to be bundled with AT&T's VoIP offering.[250]

2. CLECs Can Use the Entire Loop to Provide a Variety of Services.

CLECs can obtain the entire loop (UNE-L) to provide a bundle of services to the end user. In fact, this is precisely what other providers (ILECs, cable modem, wireless, satellite) are doing – they are using the resources of access facility to provide as many services to the end user as are possible. Covad baldly argues that UNE-L is not viable because "intractable hot cut problems have not been resolved." This, of course, is completely false, and any problems in the hot cut process are of Covad's own making.[251]

3. Carriers Can and Should Provision Multiple Services to Consumers in Order to Recoup the Cost of Facilities.

The alleged lack of the ability to provision video is a smoke screen. Covad claims the Commission relied on the ability of providers to offer video over DSL as a means to recoup costs of the loop, which Covad claims is not a current option. While the Commission did make this finding, it did not view video in a vacuum but as one of many possible services that could be offered as a bundle or package to the end user. As BellSouth has pointed out on many occasions, CLECs, just as ILECs, can use the loop to offer multiple services. The Commission should not, therefore, perpetuate a business case based on a single service, especially when end users express a desire for bundled services from one provider. Moreover, video is a very viable option over DSL.

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[250] See Fogle Reply Affidavit, ¶ 4.

[251] *Id.*, ¶ 17.

4. Commercial Agreements for Line Sharing Will Occur if There Is an Adequate Demand.

Some commenters argue that the lack of commercial agreements for line sharing indicates that ILECs are not willing to enter into such agreements. However, this argument makes little sense given Covad's success in negotiating such agreements.

5. CLECs Using Line Sharing have an Unfair Cost Advantage Over LECs that Use the Entire Loop.

Covad contends the final reason the Commission found for eliminating line sharing was "cost allocation problems." In support of its decision to eliminate line sharing, however, the Commission's concern regarding the difficulty of cost allocation was the competitive disadvantage line sharing LECs had over full service LECs. The Commission recognized that with no accurate basis to allocate costs, most states simply required ILECs to charge zero for the high frequency portion of the loop ("HFPL"). The Commission stated, "The result is that competitive LECs purchasing only the HFPL have an irrational cost advantage over competitive LECs purchasing the whole loop and over incumbent LECs." The Commission went on to find that this cost advantage goes away by eliminating line sharing and allowing CLECs to line split or to purchase and use the entire loop. Absolutely nothing has changed since the Commission made that finding in the *Triennial Review Order*; the same analysis applies today. Moreover, Covad's proposal of the HFPL costs from the Qwest agreement as a national floor for such costs is unreasonable considering arbitrary nature in assigning such costs and the different cost structures between the different companies.

C. The Commission Should Reject Requests for Alleged Clarification of Its Hybrid Loop Unbundling and Network Modification Rules.

The CLEC Coalition's request for "clarification" of network modification rules should be denied as vague and factually unsupported.[252] In any event, the Commission just issued an Order germane to this point, which should resolve the concerns expressed.[253] Parties aggrieved by the Commission's actions in relation to hybrid loop unbundling or network modification polices can take appropriate action in the context of that proceeding.[254]

X. CONCLUSION

The Commission cannot adopt permanent rules that disregard the explicit directives of the D.C. Circuit and the Supreme Court, as many carriers would have it do. Nor can the Commission fail to provide the clarity and direction that is vital to the telecommunications industry. This clarity and direction can occur through the adoption and application of a narrow and rational impairment standard which eliminates access to unbundled local circuit switching and eliminates unbundled access to high capacity transport, loops, and dark fiber in those central offices with 5,000 or more business lines.

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[252] Loop and Transport Coalition Comments at 122-25.

[253] "FCC Removes More Roadblocks to Broadband Deployment in Residential Neighborhoods," FCC New Release (Oct. 14, 2004).

[254] In any event, the attached Milner affidavit demonstrates that to the extent BellSouth's costs for providing routine network modifications have already been included in the UNE rates established by the state commissions, BellSouth does not seek to recover those same costs against from CLECs through a separate network modification charge. The Milner affidavit further demonstrates that it is inappropriate to make the comparisons between wholesale and retail provisioning that the CLEC Coalition advocates. ILECs incur costs in providing network modifications, and when those costs have not been accounted for in UNE rates established by state commissions, ILEC should be able to recover those costs from its customers. Milner Reply Affidavit, ¶¶ 18-20.

Respectfully submitted,

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Date: October 19, 2004

REDACTED INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WC DOCKET NO. 04-313 AND CC DOCKET NO. 01-338

CERTIFICATE OF SERVICE

I do hereby certify that I have this 19th day of October 2004 served the following parties to this action with a copy of the foregoing **BELLSOUTH REPLY COMMENTS** by electronic filing and/or by placing a CD of the same in the United States Mail, addressed to the parties listed on the attached service list:

/s/ Lynn Barclay
Lynn Barclay

WC Docket No. 04-313
CC Docket No. 01-338

Tipton Reply Affidavit

Exhibit PAT – 1

REDACTED

MSA	ACTUAL SW ID	SWITCH Node/POI	UNE-P Units By CLEC
Abbeville, LA Micropolitan Statistical Area			
Alexandria, LA Metropolitan Statistical Area			
Americus, GA Micropolitan Statistical Area			
Anderson, SC Metropolitan Statistical Area			
Asheville, NC Metropolitan Statistical Area			
Athens, TN Micropolitan Statistical Area			
Baton Rouge, LA Metropolitan Statistical Area			
Bogalusa, LA Micropolitan Statistical Area			
Boone, NC Micropolitan Statistical Area			
Bowling Green, KY Metropolitan Statistical Area			
Brownsville, TN Micropolitan Statistical Area			
Brunswick, GA Metropolitan Statistical Area			
Burlington, NC Metropolitan Statistical Area			
Calhoun, GA Micropolitan Statistical Area			
Central City, KY Micropolitan Statistical Area			
Cleveland, TN Metropolitan Statistical Area			
Columbia, SC Metropolitan Statistical Area			
Columbia, TN Micropolitan Statistical Area			
Columbus, MS Micropolitan Statistical Area			
Corbin, KYMicropolitan Statistical Area			
Cordele, GA Micropolitan Statistical Area			
Corinth, MS Micropolitan Statistical Area			