Once the data has been analyzed, out of the 249 wire centers in the five Texas MSAs for which SBC sought a finding of non-impairment, there is *no* wire center in which residential customers have a real and current choice among three facilities-based local exchange providers leasing loop plant from the incumbent.[161] As with most states, the principal reason for this is that carriers are not using UNE-L to offer service to residential customers. Although, as noted, entry by cable companies is not probative of impairment, even when cable companies are counted as triggering companies, there are *no* wire centers in Texas in which three or more competitive companies that meet the necessary criteria are offering service to mass market customers.[162]

In a situation in which virtually no residential customers have a choice of facilities-based providers, a finding of non-impairment would contravene the purposes of Section 251 of the Act. Failure to require incumbent LECs to provide access to unbundled switching would strand hundreds of thousands of customers in Texas that currently take service from a UNE-P-based carrier – and tens of millions nationwide – with no local service alternative to the incumbent LEC.

(D) MSA Analysis

Although analysis at the MSA level, with its far larger geographic reach, substantially increases the likelihood of finding three or more competitors (not all of which may offer service in the same parts of the MSA) that meet all of the pertinent criteria, none of the MSAs in California, Illinois, Michigan, or Texas for which SBC and Verizon sought non-impairment contain three or more competitors that meet all of MCI's

161 *Id.*, Table 7.

162 *Id.* ¶ 36.

trigger criteria.[163] Thus, even when examined on an MSA basis, neither SBC nor Verizon were able to demonstrate during the state impairment cases in those four states the presence of at least three competitors, each of which shows clear evidence of having surmounted barriers to entry to provide service to mass market customers, particularly residential customers.

(E) Trigger Summaries for Nine Additional States and the District of Columbia

Based on MCI's experience with the state cases, the situation in California, Illinois, Michigan, and Texas is replicated across the vast majority of the wire centers in the United States. In particular, Exhibit 13 to the Murray Reply Declaration includes MCI's trigger analyses for the states of Delaware, Indiana, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, and Wisconsin, as well as the District of Columbia.[164] Based on the analyses for eleven states and the District of Columbia, there are no wire centers that have three or more competitors once the data has been properly screened to identify triggering companies.[165] Moreover, BellSouth, SBC,

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[163] *Id.*, Tables 1-2, 4, 6, 8. These results are especially revealing for Illinois because the Chicago-Naperville-Joliet MSA includes the UNE loop pricing zone that long had the lowest loop prices in the country, reflecting in part the very high density of access lines in that area. The inability of switch-based competitors to make significant inroads in the Chicago area mass market, particularly for residential consumers, confirms that much remains to be accomplished before such competition offers a meaningful alternative to UNE-P-based competition. *Id.* ¶ 21.

[164] Exhibit 13 also includes analyses for the states of Illinois, Michigan, and Texas, discussed above. Because MCI has entered into an agreement to purchase a wholesale platform service from Qwest, the Qwest states are not included in this analysis.

[165] For Pennsylvania, MCI is unable to determine based on the public record whether certain competitors should be counted toward the mass market switching trigger.

and Verizon did not even file switching impairment cases in six states, including Hawaii, Maine, Nevada, New Hampshire, Vermont, or West Virginia.

In sum, actual marketplace evidence demonstrates that economic and operational barriers to entry remain, and that carriers are impaired without unbundled access to mass market switching.

ii. Critique of BOC Data Offered as "Evidence" of Mass Market Competition

In addition to identifying alleged triggering CLECs, as discussed above, in its comments SBC also relied on a variety of data purportedly to demonstrate non-impairment, including the number of CLEC switches serving the MSA; the percentage of SBC retail lines in wire centers with CLEC mass market loops; the percentage of SBC wire centers with CLEC collocations; and the percentage of SBC wire centers with ported numbers.[166] Other BOCs cited to similar data in their comments. For example, Verizon submitted a series of maps that it claims show extensive mass market competition in its service areas.[167] As discussed below, most of this alleged evidence is at best of tenuous relevance to the issue of whether competitors are impaired without access to mass market switching. At worst, based upon MCI's review of virtually identical data during a number of state proceedings, the data in question are highly misleading indicators of the level of switch-based competition for mass market customers.

166 *See, e.g.,* SBC Comments, Attachment A-IL, at 2.

167 *See* Verizon Comments, Attachment O.

(A) Percentage of Retail Lines in Wire Centers with UNE-L Loops

Both SBC's state summaries and the BOC Report provide data purporting to represent the percentage of total ILEC retail lines in the MSAs that lie within wire centers in which switch-based CLECs self-provide switching. During the state proceedings, SBC cited this "coverage" percentage as evidence that competitors enter nearly ubiquitously throughout an MSA. MCI's calculations using SBC's own data, however, showed that was not the case.[168]

For example, SBC claims that switch-based CLECs currently serve mass market customers in wire centers representing a substantial majority of the total retail lines in the five MSAs in Texas for which it sought a finding of non-impairment.[169] Yet, calculations using SBC's data revealed that, in four of the five Texas MSAs for which SBC sought a finding of non-impairment, the UNE-L CLECs relied upon by SBC were providing service to at least some mass market (but not necessarily any residential) customers (using SBC's own flawed definition and data) in barely 40% of the wire centers in each of those MSAs – a far cry from the number touted in SBC's confidential material.[170] In the fifth MSA, Dallas-Fort Worth-Arlington, the figures were not much better: UNE-L CLECs were providing service to at least some mass market customers in only 42% of the wire centers.[171] In both cases, SBC's data shows that more than half of the mass market customers in those five MSAs do not have a single competitive alternative for

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168 Murray Reply Decl. ¶ 44.

169 SBC Comments, Attachment A-TX, p. 2.

170 Murray Reply Decl. ¶ 45.

171 *Id.*

local exchange service. Moreover, the total number of mass market UNE-L-based lines as a percentage of SBC's total retail lines in those five MSAs – a **microscopic 0.3%** – was an even more dismal indicator of the utter lack of UNE-L-based competition for mass market customers.[172]

These results confirm the importance of examining actual deployment on a granular, wire center basis, rather than assuming that competitors could use their switches to serve every wire center in an MSA. Again, based on SBC's own data in Texas, no competitor provided UNE-L-based service in more than 40% of the wire centers in any one of the five MSAs.[173] Three of the CLECs that SBC counted toward the retail trigger provide UNE-L service in 15% or fewer of the wire centers in any of the five MSAs, and three more provided service in less than one-quarter of the wire centers in any MSA.[174] In other state proceedings, the BOCs similarly sought to use MSA-level data to paint a misleading picture of the state of UNE-L-based competition for mass market consumers.[175]

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172 *Id.*

173 *Id.* ¶ 46.

174 *Id.* This information calls into question SBC's claim that competitors would enter on an MSA-wide basis to achieve economies of scale and scope with their switches and demonstrates the danger of eliminating access to UNE switching throughout an MSA or larger geographic area based on data showing limited, targeted entry, primarily to serve business customers. *Id.* ¶ 47.

175 *Id.* ¶¶ 48-50.

(B) Other Data Upon Which the BOCs Relied Are Generally Irrelevant

In its comments, SBC purports to provide data that represent "[t]he key data that SBC produced in support of its geographic market definition and trigger analysis,"[176] including the number of CLEC switches serving an area, the number of CLEC collocations, the percentage of wire centers with ported numbers, and the number of NXX codes in an MSA.[177] During the state proceedings, it became clear that data on CLEC switches, collocations, ported numbers, and NXX codes were not provided in a manner that would enable the Commission to determine whether the CLEC actually was using the resources in question to serve mass market customers, if they were relevant at all. Rather, the data, at best, simply showed that competitors were providing "some kind of service to some kind of customers," if they were relevant at all.[178] SBC, for example, conceded that he could not confirm that all of the switches that SBC had identified were being used to serve mass market customers; rather, he thought it was *likely* that many of them were being used to provide such service.[179] But the data also could have reflected service provided to enterprise customers, as SBC conceded in the Connecticut proceeding.[180] Reliance on NXX data is equally misplaced because it is not clear that the

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176 *See, e.g.,* SBC Comments, Attachment A-IL, at 2.

177 *Id.*

178 Murray Reply Decl. ¶ 51.

179 *Id.* Even to the extent that is the case, the BOCs' data confirms that the "vast majority of these mass-market lines [are] being provided to small business customers," not residential customers. *Id.* ¶ 52.

180 *DPUC Implementation of the Federal Communications Commission's Triennial Review Order – Trigger Analysis*, Docket No. 03-09-01-PH01, Transcript of Public Hearing at 234, Before the Hon. Jack R. Goldberg, Chairperson, State of Connecticut Department of Public Utility Control, (Jan. 20, 2004) ("Connecticut Hearing Transcript").

companies using the codes are providing local exchange service, nor that they are providing service in the relevant geographic market.[181] Moreover, SBC admitted in Connecticut that a carrier with NXX codes assigned to it could be using all of its numbers solely to provide service to enterprise customers.[182]

The quantity of ported numbers also is not a reliable indicator of the level of mass market competition. In the Houston-Baytown-Sugar Land MSA, for example, the total quantity of ported numbers reported by SBC was over *43* times the combined total of SBC's identified mass market loops plus cable telephony lines.[183] In the Dallas-Fort Worth-Arlington MSA, the total quantity of ported numbers was nearly six times the combined total of stand-alone voice-grade loops and cable telephony lines, and more than eight times the combined total of SBC's identified mass market loops plus cable telephony lines.[184] This pattern repeated throughout the state. In addition, there were many wire centers (over 40% of all wire centers with ported numbers) for which SBC reported positive quantities of ported numbers where there were no UNE loops or cable telephony lines.[185] In Connecticut, SBC stated that the data on CLECs' ported numbers could not be used to identify providers of mass market services.[186]

Collocation data also provides little in the way of useful information about actual deployment of mass market switching. As demonstrated in the Huyard Declaration

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181 Murray Reply Decl. ¶ 57.

182 Connecticut Hearing Transcript at 235.

183 Murray Reply Decl. ¶ 55.

184 *Id.*

185 *Id.* ¶ 56.

186 Connecticut Hearing Transcript at 237-238.

attached to MCI's initial comments, many of MCI's – and no doubt many other CLECs' – collocation arrangements are not equipped with the type of voice-grade equipment that is required to support UNE-L provision of mass market service.[187] Moreover, the pattern of collocations suggests that they are not indicative of competition for residential customers: the vast majority of the collocations occur in large, downtown wire centers; in comparison, relatively few are present in the smaller, predominantly residential, wire centers outside the city centers.[188] For example, in the seven Michigan MSAs for which SBC sought a finding of non-impairment, there were two collocations in the 36 wire centers with 5,000 or fewer lines (0.06 collocations per wire center), compared to 50 collocations in the five largest wire centers (10 collocations per wire center).[189]

In short, the BOCs have failed to demonstrate that the vast majority of the data that they have provided is actually probative of the level of mass market competition in the marketplace today, especially for residential customers.

(C) Verizon's Maps Do Not Demonstrate Actual Deployment of Mass Market Switching

Although MCI was unable to examine the data underlying the various maps provided by Verizon because of the compressed time frames and Verizon's refusal to provide MCI access to the underlying data,[190] MCI was able to compare Map A for the Riverside-San Bernardino-Ontario MSA in California to the data Verizon submitted in

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187 Huyard Decl. ¶¶ 7-8.

188 Murray Reply Decl. ¶ 59-61.

189 *Id.* ¶ 60 & Table 9.

190 Specifically, Verizon segregated its data by competitor, and refused to provide MCI any data other than its own. This process apparently contributed to significant delays in obtaining Verizon's confidential filing, which MCI finally received on Thursday, October 7, three days after it had been filed.

the California trigger case.[191] Based on that assessment, much of the competitive activity that Verizon depicts relies on speculation regarding areas that competitors "could serve" – *if* they found extension of service to be in their economic interest.

In order to illustrate the disparity between Verizon's depiction of potential competitive alternatives and actual competitive deployment, Exhibit 12 to the Murray Reply Declaration provides a side-by-side portrayal of the map Verizon submitted with its comments for the Riverside-San Bernardino-Ontario MSA, and that portion of the "Verizon Base Case" map – which reflects the data presented by Verizon during the state trigger analysis.[192] As that comparison reveals, Verizon's own depiction of mass market competition in the two maps varies dramatically.

Indeed, a casual observer looking at the more recent Verizon map for this MSA would conclude that the Riverside, California area is a hotbed of switch-based competition for mass market customers. Yet, in the California state impairment proceeding, Verizon itself admitted that is far from being true. During the rebuttal round of the California proceeding, Verizon's revised data showed that *no more than two switch-based competitors (including cable carriers)* provided mass market service in any part of the Verizon portion of the Riverside-San Bernardino-Ontario MSA.[193]

The reason for this discrepancy becomes obvious upon a closer examination of the other maps provided by Verizon,[194] which make clear that Verizon is depicting what

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191 Murray Reply Decl. ¶ 62.

192 *Id.*, Exhibit 12.

193 *Id.* ¶ 63; *see also* Verizon Comments, Attachment O, Map D (showing only two wireline competitors in the Riverside-San Bernardino-Ontario, CA MSA).

194 *See* Verizon Comments, Attachment O.

it believes to be the "switch reach" for the various categories of competitors represented in its series of maps.[195] For example, Verizon's Map A purports to show "total competitor coverage," but in fact only shows that Verizon believes that these areas are physically close enough to a competitor's switch so that there is the potential for them to be served by that switch.[196] The map provides no information about the location of customers actually served by those switches today. Moreover, the competitive switches identified by Verizon include switches owned by wireless providers and cable companies as well as by UNE-L-based providers. The Verizon maps reveal that when Verizon claims there are five or more competitors serving part of the MSA, the most likely explanation is that customers in that area have a choice of multiple wireless providers.[197] In particular, if one compares Map C (wireless coverage by number of carriers) to Map A (total coverage by competitors), one sees that the two maps are strikingly similar, and that wireless carrier coverage must account for most of the total competitor coverage. As MCI has previously shown (and the Commission has previously concluded), wireless service is not comparable to traditional local exchange service, and therefore the presence of wireless carriers is not probative of whether competitive carriers are impaired in their ability to offer local exchange service in the absence of unbundled switching.

Analysis of Verizon's maps for the remaining MSAs likely would reveal that they provide equally little information about the extent of actual deployment of mass market switching. For example, Verizon attached maps identifying three or more competitors in

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195 Murray Reply Decl. ¶ 65.

196 *Id.*

197 *Id.* ¶ 66.

several MSAs for which it did not seek a finding of no impairment during the state proceedings. Verizon did not file non-impairment cases in the Oxnard and Santa Barbara MSAs in California, the Dallas, Houston and College Station MSAs in Texas, and the Chicago MSA in Illinois.[198] Presumably, Verizon declined to file non-impairment cases for these MSAs because it did not have sufficient evidence to make even a *prima facie* showing that three or more switch-based competitors were serving mass market customers in its territories within those MSAs.[199]

b. The Alternate Proposals by the New York PSC, ALTS, and PACE Are Inferior to MCI's Proposal

The New York Public Service Commission ("NY PSC"), ALTS, and PACE each submitted proposals regarding the Commission's impairment analysis for local switching.[200] As explained below, the NY PSC and PACE proposals are problematic, and are inferior to MCI's analytical framework for assessing impairment. The ALTS proposal is similarly problematic, and is limited in its application because it purports to address impairment only for carriers that serve business customers.

i. NY PSC

In its comments, the NY PSC summarizes the results of the "trigger" analysis that it conducted, following the guidance of the *Triennial Review Order*, for each of Verizon's 520 wire centers within the state of New York. The NY PSC counted cable

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198 *Id.* ¶ 66 & n.68.

199 *Id.* ¶ 66.

200 Comments of the New York Department of Public Service ("NY PSC Comments"); Comments of the Association of Local Telecommunications Services ("ALTS Comments"); Comments of the PACE Coalition, *et al.* ("PACE Comments").

providers as triggering companies, but excluded wireless and VoIP providers. The NY PSC found that, if the product market were defined to include both residential customers (purchasing no more than 4 lines) and small business customers (purchasing no more than 18 lines), and there is no requirement that triggering companies must offer service to all or nearly all mass market customers, a finding of no impairment would be warranted in 162 of the 520 wire centers.[201] By contrast, if the mass market were defined to include only residential customers, a finding of no impairment would be warranted in only 19 of the 520 wire centers.[202]

At the outset, it must be noted that the NY PSC's impairment proceeding barely got off the ground. Parties were not permitted to conduct traditional party-to-party discovery,[203] no testimony was filed, no hearings were held, and no briefs were filed. The NY PSC based its analysis on an initial, unsworn submission by Verizon, and responses to a limited set of Staff interrogatories. The parties therefore never had any opportunity to present formal evidence or to test the veracity of Verizon's submission or the limited discovery responses provided to Staff.

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201 NY PSC Comments at 3, 17.

202 *Id.* Both results overstate the number of markets in which competitors are not impaired because they rely on competitive LEC entry that occurred under the NY PSC's interim hot cut rate of $35 for two- and four-wire individual hot cuts. As discussed below, on August 25, 2004, this interim rate was replaced by significantly higher rates of $42.36 and $69.60, respectively. NY PSC Hot Cut Order at 3. These higher rates make examination of prior entry by competitive LECs less relevant to the question of whether additional competitive LECs can and will enter, since it will now be more difficult for UNE-L competitive LECs profitably to serve residential customers.

203 Verizon did respond to 16 interrogatories that were propounded jointly by the CLEC industry after negotiation. Verizon maintained that its responses were voluntary in nature.

Nevertheless, the large disparity in the NY PSC's alternate applications of the *Triennial Review Order* triggers illustrates the extent to which the results of a trigger analysis are affected by the inclusion of companies that are providing service only to business customers. As MCI explained in its comments, a rational trigger analysis would require triggering companies to be providing facilities-based service not just to business customers, but also to residential customers within a given market.[204] Alternatively, the Commission could assess impairment separately for small business and residential customers.[205] If the Commission chooses not to adopt either of these approaches, it risks foreclosing entry via UNE-P in a large number of markets, where the vast majority of residential customers have no opportunity to purchase a facilities-based alternative to the incumbent LEC's offering.[206] Such a result cannot be squared with the pro-competitive and pro-consumer goals of the Act.

Despite submitting its analysis conducted under the rubric of the *Triennial Review Order*, the NY PSC urged the FCC in this proceeding to adopt an arbitrary analysis that is different from the analysis required by the *Triennial Review Order*. Under the NY PSC's proposal, each wire center would receive a "score" based on whether one or more alternative platforms were deployed in that wire center. In an attempt to reflect characteristics that render each of these alternatives "less than perfect substitutes for

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204 MCI Comments at 109-112.

205 *Id.* at 112.

206 This will be the case even if cable companies are counted as triggering companies, as they were under the NY PSC's analysis. MCI, of course, has explained why cable companies should not be counted as triggering companies. *See* MCI Comments at 113-114.

traditional wireline telephone service,"[207] the NY PSC assigned the following numerical weightings to each alternative:

- A weight of 1.0 for a wire center where a UNE-L CLEC serves residential customers, or a weight of 0.5 for wire centers where a UNE-L CLEC serves only business customers.[208]
- A weight of 1.0 to PacketCable providers.[209]
- A weight of 0.5 to wireless if there are at least two wireless providers serving the wire center.[210]
- A weight of 0.75 to VoIP providers.[211]

The NY PSC concluded that an overall score of 2.75 or above in a particular wire center (out of a maximum score of 3.25 if all four alternatives were present) would justify a finding of no impairment for that wire center.[212]

The NY PSC's proposal is flawed in a number of respects. First and foremost, the proposed weights for wireless and VoIP are completely arbitrary and present no rational basis on which this Commission can base an impairment decision. Although it may be true, as the PSC suggests, that wireless is becoming a substitute for wireline voice in some market segments for some consumers,[213] the NY PSC does not explain how it arrived at a 0.5 weighting for wireless. If this weighting is meant to imply that 50% of consumers in a wire center would perceive wireless as a viable substitute for wireline, the

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207 NY PSC Comments at 6.

208 *Id.* at 9.

209 *Id.*

210 *Id.* at 10.

211 *Id.*

212 *Id.* at 11.

213 *Id.*

NY PSC does not provide any studies or data supporting such a conclusion. In fact, such an assumption would be unwarranted, given that even the BOCs have asserted that – at most – only 14% of customers consider wireless a substitute.[214]

Likewise, the NY PSC provides no evidence that 75 percent of consumers consider VoIP to be a substitute for traditional wireline voice service. The NY PSC also fails to mention a number of critical points suggesting that the true weighting should be far less than 0.75. For instance, although the NY PSC claims that "95% of New Yorkers have access to broadband capability,"[215] it fails to acknowledge that only 21% of U.S. homes currently purchase a broadband connection.[216]

The NY PSC's finding that there is no impairment for wire centers whose overall score is greater than or equal to 2.75 is equally arbitrary. Instead of providing any objective evidence to support a numerical cutoff of 2.75, the NY PSC merely describes its "judgment" and "belie[f]" that 2.75 is appropriate.[217] Such subjective grounds are not an adequate basis for the Commission to adopt the NY PSC proposal. Rather than rely on such speculative judgments, the Commission should focus its impairment analysis on what competitive alternatives are actually available in the marketplace, as well as on the remaining economic and operational barriers to UNE-L-based entry.

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214 BOC Report at II-30. The PSC's assignment of a 0.50 weighting for UNE-L competitive LECs serving business customers is similarly suspect.

215 NY PSC Comments at 10.

216 *See* discussion *supra* Section II.A.1; *see also* MCI Comments at 94 (discussing requirements that consumers purchase cable telephony as part of a bundle that includes either cable modem or cable TV).

217 NY PSC Comments at 11.

Finally, the NY PSC's approach to the transition period for UNE-P is based on faulty reasoning. Specifically, the NY PSC argues that the transitional period should continue for six months past the twelve-month period adopted by the FCC in its order adopting interim rules,[218] and that the increase in price for UNE-P should be greater than the one dollar adopted by the FCC.[219] The NY PSC reasons that "[a] larger initial price increase would provide a more meaningful price signal to carriers in the market and encourage prompt implementation of migration plans."[220] The NY PSC further reasons that a longer transition would permit intermodal technologies "to become even more prevalent" and would "allow more time for carriers and consumers to adapt to the new circumstances."[221]

Although MCI agrees that the FCC's interim schedule should be adjusted to allow additional time for carriers to transition to a UNE-L environment,[222] such additional time should not be linked to a price increase for UNE-P, nor is the transition period proposed by the NY PSC sufficient. The NY PSC recently *increased* the non-recurring charges for hot cuts to more than $42 per hot cut, exacerbating rather than easing the economic barriers to entry associated with the hot cut process.[223] If the NY PSC wants to encourage effective migration to a UNE-L environment, the better approach would be to

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218 *Interim Order* ¶ 29.

219 NY PSC Comments at 12.

220 *Id.*

221 *Id.* at 12-13.

222 MCI Comments at 122.

223 NY PSC Hot Cut Order at 3.

lower the costs of migration – specifically, by reducing the hot cut NRC and requiring incumbent LECs to mechanize their hot cut procedures.[224]

ii. PACE

In their comments, the PACE Coalition, Broadview Networks, Grande Communications, and Talk America, Inc. ("PACE Coalition") propose a complex test for the availability of unbundled local switching. Specifically, competitive LECs with 1500 lines or more in a specific central office would not be able to obtain unbundled local switching at all unless: (1) the competitive LEC has a "ubiquity" strategy; (2) there is no collocation space in the central office; (3) concentrated DS0 EELs are unavailable as UNEs; (4) hot cut non-recurring charges are more than $5; (5) hot cuts are not provisioned in the same interval as UNE-P; and (6) rates, terms and conditions for the BOCs' switching services offered pursuant to section 271 have not been found to be just and reasonable.[225]

PACE distinguishes between carriers that pursue a "density" strategy, and those that pursue "ubiquity," and notes that the availability of unbundled local switching is essential to the ability of a carrier to serve a broad geographic area.[226] The PACE proposal uses "ETC" status – the designation of a carrier as an eligible telecommunications carrier ("ETC") for purposes of receiving federal universal service support – as a surrogate for identifying carriers that seek to serve the mass market in a large geographic area.

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224 *See* Starkey/Morrison Decl. ¶¶ 52-57; Huyard Decl. ¶ 18.

225 PACE Comments at 82-96.

226 *Id.* at 85.

MCI agrees that carriers pursuing a strategy of serving mass market customers ubiquitously would be impaired without access to unbundled local switching, and that even if economic and operational barriers were eased, the reality of the market economics dictates that UNE-P would still be the only economically feasible way to serve mass market customers in many ILEC wire centers. ETC status, however, is not a suitable proxy for determining which carriers are pursuing a strategy of serving a large area. The designation of carriers as ETCs was developed for an entirely different purpose – identifying carriers that should be eligible for federal universal service support – and there is no reason to think that there is a meaningful correlation between carriers with ETC status and carriers that require access to unbundled switching over a large geographic area. MCI's own experience, moreover, shows that the use of ETC status would be extremely problematic. MCI, which is the premier provider of local mass market services in the country, and which offers service in large geographic areas in 48 states plus the District of Columbia, has ETC status in only five states.

In its comments, MCI has described in detail the barriers to entry that must be overcome before the Commission can find that there is no impairment without access to unbundled switching in a given wire center.[227] The PACE 1500-line proposal addresses none of those barriers to entry, nor does the ability of a carrier to serve 1500 lines via UNE-P indicate that it has overcome barriers to using its own switch. Consequently, the Commission should not adopt the PACE Coalition proposal as currently formulated.

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[227] MCI Comments at 43-81 (describing both operational and economic barriers).

iii. ALTS

ALTS proposes to assess impairment with respect to carriers seeking to use unbundled switching to serve business customers. ALTS is silent with respect to the assessment of impairment for carriers seeking to serve residential customers.[228]

The ALTS proposal suffers from many of the same flaws as the PACE proposal in that it fails to address operational and economic barriers. A company that serves 1,344 lines in a central office via UNE-P may have enough traffic for two DS3s worth of transport, but has not demonstrated that it would be able to serve those customers profitably via UNE-L, which requires collocation (with its attendant costs) as well as imposing other costs on the carrier.[229]

Moreover, for the reasons given in MCI's comments, the analysis of impairment with respect to residential customers must include an evaluation of actual deployment to residential customers, as well as an analysis of the operational and economic barriers to serving those customers.[230] ALTS' comments underscore the fact that business customers and residential customers are quite different, and that these differences are relevant to the ability of a competitive LEC to provide service to residential customers,

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228 *See, e.g.*, ALTS Comments at 94 ("Although the absolute number of *business* lines that a CLEC must serve in a wire center in order to justify the cost of establishing a new collocation in that wire center may vary from CLEC to CLEC, the same basic premise holds true for all CLECs: a certain minimum number of business lines served off of a given wire center must be able to be captured before the CLEC will undertake to collocate there.") (emphasis added).

229 *See* MCI Comments, Attachment A, Pelcovits Decl. ¶¶ 59-82.

230 *See* MCI Comments at 82-125 (actual deployment), 43-73 (operational barriers), & 74-81 (economic barriers).

even if the competitive LEC is already serving business customers.[231] For example, the ALTS comments state that its members primarily seek to use unbundled switching to serve multi-location customers.[232] Eschelon Telecom, Inc. ("Eschelon") states that "[t]he typical Eschelon end user customer takes between five and ten lines of service from us."[233] In both cases (multi-location customers, and customers with 5-10 lines), the revenues generated by the customer would be substantially greater than the expected revenues generated by a residential customer, so that a carrier might reasonably expect to make a profit by serving a business customer in a given wire center, even if the carrier could not profitably serve residential customers in the same wire center.

4. Qwest's Wholesale Platform ("QPP") Agreement

As Qwest explains in its comments, MCI and five other competitive LECs have entered into interconnection agreements to purchase Qwest's wholesale platform product, known as "QPP."[234] One key aspect of MCI's agreement with Qwest is that the agreement ties future increases in the price of QPP to satisfactory removal of barriers to UNE-L-based entry. First and foremost, the agreement expressly conditions higher monthly recurring charges for QPP on the successful implementation of a hot cut process that permits MCI to use its own switches to provide service to mass market customers.[235]

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231 *See id.* at 109-112 (explaining, *inter alia*, that the economics of serving residential customers tend to be quite different from the economics of serving business customers, and that many of the lines identified as mass market lines in the state proceedings were in fact DS0 loops used to provide service to larger business customers).

232 ALTS Comments at 94-95.

233 *Id.*, Appendix F, Pickens Decl. ¶ 5.

234 Qwest Comments at 56.

235 *See, e.g.*, Master Agmt., Service Exhibit 1, § 3.3, attached to Qwest Comments, Declaration of William M. Campbell, Attachment 3, Exhibit WC-2.

In so doing, the agreement creates incentives for Qwest to implement a workable hot cut process as quickly as possible. Second, the rates MCI pays for both existing and new customers are the same under the agreement. Thus, MCI may continue to offer a competitive alternative to new residential and small business customers at the same time that it may migrate existing customers to UNE-L-based services. Given industry churn rates, continued growth of a carrier's customer base is critical to its ability to maintain and expand its local service area. Third, the agreement provides MCI financial incentives to decrease its reliance on UNE-P and increase UNE-L-based service to mass market customers. Specifically, to the extent that MCI reduces substantially its use of UNE-P by converting those customers to UNE-L-based service, MCI will be entitled to pay lower non-recurring charges for batch hot cuts, as well as reduced monthly recurring charges for QPP.[236]

Obviously, MCI believes that this agreement satisfies its particular business objectives in the Qwest territory. That said, MCI disagrees with Qwest's suggestion that the Commission make a *per se* finding of non-impairment in any market where such a contract is available upon request to similarly situated carriers.[237] As a matter of statutory construction, there is no sound reading of section 251(d)(2) – and Qwest has not even attempted to provide one – that would allow the Commission to consider the existence of private contracts as *per se* establishing a lack of impairment. It certainly does not establish conclusively that the MCI-Qwest arrangement would eliminate impairment for any other carrier.

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236 *Id.*; ICA Amendment § 3.3.

237 Qwest Comments at 58; *see also id.* at 27-28.

5. Transition Mechanism

a. Pricing of 271 Elements

In the event that the Commission were to find (erroneously, in MCI's view) that the BOCs are not required to provide unbundled switching pursuant to section 251 in certain wire centers, the BOCs would still be required by section 271 to provide access to a switching service. Before initiating the transition timetable described in MCI's comments,[238] the Commission must ensure that the BOCs have published rates, terms and conditions for a switching service pursuant to section 271, and that those rates, terms and conditions are just and reasonable, and not unreasonably discriminatory, in compliance with sections 201 and 202 of the Communications Act.[239]

If the Commission were to determine that the BOCs are not required to provide access to unbundled switching pursuant to section 251 in certain wire centers, it should order the BOCs if they wish to continue to offer in-region, interLATA services to file tariffs for switching services that satisfy their obligations under section 271, accompanied by cost support for the proposed rates. The rates for these elements cannot be developed arbitrarily, but rather they must have some cost basis in order to satisfy the statutory requirements. The Commission should state that a rate that is at or below the level of the section 251 unbundled switching rate that was in place at the time the BOC's 271 application for the relevant state will be considered just and reasonable, and need not be accompanied by cost support.[240]

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238 MCI Comments at 121-124.

239 47 U.S.C. §§ 201-202.

240 Any subsequent tariffs that would increase the rate above the level at the time of approval of the 271 application must be accompanied by cost support, and should be

In order to permit interested parties an opportunity to file petitions regarding the proposed rates, terms and conditions, the Commission should request that the BOCs file their tariffs on 90 days' notice. In the event that a BOC files with less than 90 days' notice, the Commission should direct the Bureau to suspend and investigate the tariff if: (1) any party files a petition to reject or suspend and investigate; or (2) the Bureau independently concludes that suspension and investigation is required.

b. Combinations of 271 Elements and Commingling of 271 Elements with UNEs and Incumbent LEC Services

Verizon argues that the Commission should find that the BOCs have no obligation to combine 271 elements with each other, or with elements required to be provided under section 251.[241] The Commission should deny this request. Instead, the FCC should clarify that the BOCs are required to permit combinations of elements unbundled under checklist items 4, 5, 6, and 10 (*i.e.,* loops, transport, switching, and databases and associated signaling), along with commingling of those elements with UNEs and incumbent LEC services.

In the *Triennial Review Order* the Commission also held that when section 271 checklist items are not required to be unbundled under section 251 and 252, the "combination" requirement of section 251 does not apply to those "section 271 elements."[242] CLECs challenged this conclusion because they were concerned that when

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suspended and investigated if parties file petitions or the Bureau independently concludes that suspension and investigation is warranted.

[241] Verizon Comments at 159; *see also* BellSouth Comments at 77 (FCC should find that there is no obligation to make available checklist items four, five, six and ten in combination).

[242] *Triennial Review Order* ¶ 655 n.1989.

faced with a request to honor their section 271 obligations, the ILECs would purposefully misconstrue the Commission's statement as a sanction to engage in the kind of rank unreasonable practices and discrimination that they had engaged in under section 251 and 252, until the FCC put a stop to it. In other words, they were concerned that the ILECs would needlessly tear apart their own network facilities before they leased them to the CLECs, for the sole purpose of raising their rivals' costs.

On appeal, both the FCC and the Court made clear that that is *not* what Commission intended. Thus, in oral argument, Judge Williams made clear "as I understand the CLEC position, it's that you have what seems to be completely arbitrary raising of rivals' costs by disallowing combination. [But] it doesn't seem to me you need specific statutory language [in section 251] to respond to that."[243] FCC counsel agreed, stating that "all the Commission was saying here [in *Triennial Review Order* ¶ 655 n.1989] was under Section 251(c)(3), there's specific language referring to combination" and that language does not apply directly to section 271.[244] And when the ILEC counsel made the irrational assertion that *any* non-discrimination requirement in the section 271 context "would essentially reintroduce the 251 regime,"[245] the Court firmly rejected the claim: "No, that wouldn't be true with a simple, generic mandate of non-discrimination."[246]

The Court's decision then reiterated the same point. While "none of the requirements of § 251(c)(3) [including the "combination" requirement] applies to"

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243 Transcript of Oral Argument at 96, ll. 21-24.

244 *Id.* at 97, ll. 5-8.

245 *Id.* at 102, l. 1.

246 *Id.* at 102, ll. 3-4.

section 271, "[o]f course, the independent unbundling under § 271 is presumably governed by the *general* nondiscrimination requirement of § 202. But as the only challenge the CLECs have presented . . . is grounded in an erroneous claim of a cross-application of § 251, we do not pass on whether the § 271 combination rules satisfy the § 202 nondiscrimination requirement."[247] In sum, the CLECs had prevailed in making clear the limited nature of the Commission's conclusion in the *Triennial Review Order* that the section 251 "combination" rule did not apply to "section 271 elements." That ruling was *not* meant to suggest that the ILECs were free to disable section 271 by needlessly raising rivals costs by tearing apart facilities before they handed them over to the CLECs. Such a practice plainly would violate Section 201(b)'s prohibition against unreasonable practices, and would also run afoul of Section 202's prohibition against unreasonable discrimination if the incumbent LEC permitted another customer to combine 271 elements.

The Commission has previously found that network elements required pursuant to section 271 must be offered in a manner that is just, reasonable, and not unreasonably discriminatory, in compliance with sections 201 and 202 of the Act.[248] The Commission should now clarify that a flat refusal by a BOC to combine 271 elements, or to commingle elements unbundled pursuant to section 271 with UNEs or services, would be an unreasonable practice in violation of section 201(b). The Commission should also clarify that if a BOC permits a customer to combine 271 elements, or to commingle 271

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247 *USTA II,* 359 F.3d at 590.

248 *Triennial Review Order* ¶ 662; *see also id.* ¶¶ 656-664; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 470 (1999) ("*UNE Remand Order*"); 47 U.S.C. §§ 201(b) and 202.

elements with UNEs or services, it would be unreasonably discriminatory in violation of section 202 for the BOC to refuse to permit other customers the same combination and commingling options.

Denying carriers the ability to combine 271 elements or commingle section 271 elements with section 251 UNEs or incumbent LEC services would be an unjust and unreasonable practice prohibited by section 201(b) of the Act. Loops, transport, switching, and signaling are already combined within the BOCs' networks, as they must be for the BOCs to provide services to their own customers.[249] It would be unjust and unreasonable for the BOCs to break apart these elements when they provide them to requesting carriers. Indeed, the sole reason for the BOCs to go through the effort of breaking apart these already-connected elements would be to put competitive carriers at a disadvantage.

A BOC might also attempt to permit some, but not all, customers to combine 271 elements, or to commingle 271 elements with UNEs or services. In order to avoid further litigation on this point, the Commission should now make it quite clear that failure to offer the same options of combination and commingling to one customer when another customer has those options, would be unreasonable discrimination in violation of section 202.

If the Commission were to relieve the BOCs of the duty to combine 271 elements, or to commingle section 271 elements with UNEs or incumbent LEC services, it would

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[249] As the U.S. Supreme Court has explained, unbundling obligations are not about physically breaking network components apart into their smallest possible units. Rather, unbundling is "about lease pricing." *Verizon v. FCC*, 535 U.S. 467, 531 (2002) ("To provide a network element 'on an unbundled basis' is to lease the element, however described, to a requesting carrier at a stated price specific to that element.").

render the section 271 access requirements meaningless. In many cases, a section 271 element would be useless if it could not be combined or commingled with other elements or services provided by the incumbent LEC. For example, access to unbundled switching pursuant to section 271(c)(2)(B)(vi) serves no purpose unless the switch is connected to an incumbent LEC-provided loop. Similarly, in the vast majority of cases, a fiber loop provided pursuant to section 271(c)(2)(B)(iv) would be useless without incumbent LEC-provided transport or special access services. It would be passing strange if the FCC were to impose an "independent and ongoing obligation" on the BOCs to provide access to loops, transport, switching, and signaling under section 271, but render those elements useless by declining to require the BOCs to combine them, or commingle them with section 251 UNEs or incumbent LEC services.

The Commission *eliminated* the commingling ban in the *Triennial Review Order*, precisely because it effectively disabled the right to use unbundled elements that were subject to the "no commingling" rule.[250] A rule that sanctioned "no commingling" in the section 271 context but in no other context would be a rule that functioned simply to disable the use of section 271 elements. Indeed, Verizon actually defends its "no commingling" proposal on just this ground: that it would discourage competitors from insisting on taking advantage of the benefits set out in the section 271 competitive checklist, and so encourage them instead to "provide service over competitively deployed facilities."[251]

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250 *Triennial Review Order* ¶ 596.

251 Verizon Comments at 162.

Congress imposed the section 271 obligations on the Bell Companies as a condition for them to obtain and retain interLATA authority. Disabling these provisions based on Bell policy arguments that they are unwise would disserve the statute. The Commission should for these reasons reject the ILECs' various efforts to disable the requirements of the section 271 competitive checklist.

B. The Commission Should Continue to Unbundle High Capacity Facilities

The ILECs urge this Commission to eliminate unbundling of high capacity loop and transport facilities – either everywhere, or everywhere that CLECs make significant use of these facilities. In doing so, they point to evidence that CLECs have deployed their own loop and transport facilities, but they ignore that these are fiber facilities that the Commission has already determined should not be unbundled. They also point to CLECs' ostensible ability to rely on special access facilities, while ignoring the arguments as to why such ability is limited and will be more limited still in the future.

1. CLECs Have Not and Cannot Deploy High Capacity Facilities Below the Capacity Thresholds

The evidence the ILECs submit showing extensive CLEC deployment of transport facilities is largely a rehash of similar evidence presented in the last go round. The ILECs assert there are a significant number of route miles where the CLECs have deployed transport facilities and buildings to which they have deployed loops.[252] They also assert there are a number of CLEC networks in the largest MSAs and that these networks reach many of the largest wire centers.[253]

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252 BOC Report at III-3, III-4.

253 BOC Report at III-8; BellSouth Comments at 36. Much of the other evidence the ILECs present concerns CLEC use of special access facilities or mixes evidence

a. CLECs Have Deployed OCn Fiber Facilities, Not DS-1 and DS-3 Facilities

Even taken at face value,[254] the ILECs' evidence shows deployment of facilities for which the Commission has already eliminated unbundling – OCn level facilities or other facilities above the capacity thresholds. It does not show that there are any significant instances in which CLECs have deployed facilities with traffic levels below the capacity thresholds. Indeed, the QSI report from the state cases shows there are virtually no cases in which CLECs have deployed facilities below the capacity thresholds.

The ILECs do not argue to the contrary. They acknowledge that "transport is typically provisioned at OCn capacity levels."[255] SBC is the only ILEC to discuss evidence from the state cases in any detail, and the evidence it cites shows that even according to SBC itself, the triggers were met on relatively few routes, and almost never as a result of deployment of DS-1 or DS-3 facilities. SBC says, for example, that "[i]n Texas. . .competing carriers nonetheless expressly admitted that at least two of them had collocated and deployed fiber transport facilities at the end of 231 routes; 104 such routes showed at least three competing providers."[256] Thus, SBC claimed non-impairment on relatively few routes in Texas (and other states) under the trigger test. And this claim

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concerning special access facilities with evidence on self-deployment. *See, e.g.*, Verizon Comments at 38. Because reliance on special access is inappropriate for the reasons detailed in MCI's initial comments and explained further here, the only relevant evidence concerns self-deployment.

254 *But see infra* Point C.

255 Qwest Comments at 88; *see also* SBC Comments at 86 (wholesalers "are fully capable of extending their networks *where the traffic demands it*") (emphasis added).

256 SBC Comments at 72.

was *not* generally based on instances where CLECs had deployed facilities below the capacity thresholds. Instead, it was based on instances where CLECs had collocations and had deployed fiber from that collocation to some other point – almost certainly primarily OCn level fiber.[257] The most this evidence shows is that in a limited number of instances, CLECs have deployed loops and transport *above* the capacity thresholds, not that they have done so below the capacity thresholds.

b. Competitors Cannot Potentially Deploy DS-1 or DS-3 Facilities Below the Capacity Thresholds

The ILECs' argument about *potential* deployment also does not show possible deployment below the capacity thresholds. The ILECs improperly rely on evidence of where deployment has already occurred to assert that deployment would be economic in other areas where no deployment has yet occurred. They assert, for example, that there will be some instances in which it will be economic for CLECs to extend fiber from their fiber rings.[258] But they provide absolutely no basis to conclude a CLEC could economically deploy DS-1 or DS-3 facilities below the capacity thresholds. Indeed, their submissions are remarkable for the absence of virtually any economic arguments about loop or transport deployment. The Commission previously concluded that even efficient CLECs could not do so, and that is surely correct.

So even if the ILECs are right that some CLECs that have not deployed their own facilities potentially could do so, these would be only OCn fiber facilities – facilities that exceed the capacity thresholds. And CLECs already are precluded from obtaining UNEs

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257 SBC Comments at 72 n.241 (dispute in states was largely over whether OCn deployment counted towards the triggers).

258 BOC Report at III-16.