(Easterbrook, J.). Because, as Verizon has demonstrated, VoIP and wireless are actually taking significant amounts of wireline customers and revenue-generating minutes from the incumbents — and have the potential to take many more customers in the near future — they necessarily belong in the same market. *See* Crandall/Singer Reply Decl. ¶¶ 5-32.

PACE has the same goal as MCI, but takes a different approach. It proposes to define two markets — a "non-POTS" market, made up of customers that would consider switching to an intermodal alternative, and an "analog POTS" market, made up of customers that want to retain wireline service notwithstanding the availability of intermodal alternatives. PACE *et al.* at 8, 11-22; *see* CompTel/ASCENT at 12 (same). Thus, like MCI, they propose a product market that excludes intermodal alternatives by definition. Even aside from the fact that so-called "POTS competition" is nothing more than PACE's new euphemism for synthetic "UNE-P competition," PACE's attempt to define separate markets based on different customer preferences fails as a matter of law. Indeed, PACE's "emphasis on consumer preference is economically irrelevant," because "[a]ttributes of [consumers] do not identify markets." *Menasha*, 354 F.3d at 665. Instead, the price competition provided by intermodal alternatives constrains retail prices for incumbents' wireline offerings to all customers. *See id.* And because incumbents "typically set fairly uniform prices designed to attract a large number of buyers, not simply a handful of buyers who have some unusual and special preference," the competition provided by intermodal alternatives benefits *all* consumers, even those uninterested in competitive telephone service. *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 796-97 (1st Cir. 1988) (Breyer, J.).

CLECs also rely on the Commission's reasons in the *Triennial Review Order* for discounting intermodal competition, such as that "a hot cut [is not] necessary to provision wireless or cable" so such competition "does not provide any evidence about whether it is possible to enter using UNE-L." MCI at 87, 93; *see Triennial Review Order* ¶ 440. They also repeat the Commission's claim that cable companies have advantages not available to CLECs and do not have wholesale obligations. *See* PACE *et al.* at 64-65; *Triennial Review Order* ¶¶ 98, 443, 446. As Verizon has explained, these reasons are all unlawful. Discounting intermodal competition on such grounds is equivalent to defining away intermodal competition, because the only entrants that would count are those that depend on the ILECs' networks. The 1996 Act, however, is not designed to protect particular competitors or technologies, but instead to open markets to competition, in whatever form. Nor is there any merit to claims that the D.C. Circuit approved of the Commission's treatment of intermodal competition in the *Triennial Review Order*. *See* Sprint at 19; CompTel/ASCENT at 11. In fact, the court expressly stated that, because it was vacating the Commission's UNE rules for numerous reasons, it "need not decide" whether "the weight the FCC assign[ed] to this factor is reasonable in a given context." *USTA II*, 359 F.3d at 572.

b. In *USTA II*, the D.C. Circuit held, in no uncertain terms, that the Commission erred in refusing to consider competition using ILECs' tariffed special access offerings. The Commission, the court held, "*must consider* the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired." *USTA II*, 359 F.3d at 577 (emphasis added). And, in case its meaning were not clear, the court reiterated two sentences later that, "[w]hat the Commission *may not do* is compare unbundling only to self-provisioning

or third-party provisioning, arbitrarily excluding alternatives offered by the ILECs." *Id.* (emphasis added). For these reasons, the D.C. Circuit "vacate[d] the Commission's decision not to take into account availability of tariffed special access services when conducting the impairment analysis." *Id.* at 594.

Because, as the court recognized and the CLECs acknowledge, the primary difference between special access and UNEs "is how that facility is priced," Integra at 21-22, the fundamental question in the impairment analysis is whether competitors *need* the price break that comes with UNE pricing. *See also Iowa Utils. Bd.*, 525 U.S. at 389-90 (holding that the Commission cannot regard "*any* increase in cost (or decrease in quality) imposed by denial of a network element" as a UNE as a source of impairment). Verizon has demonstrated that, wherever there is demand for high-capacity services, competitors are successfully serving business customers of all shapes and sizes using special access services purchased from Verizon, either exclusively or to supplement their own facilities or facilities leased from alternative carriers. As the D.C. Circuit explained, where, as here, "competitors have access to necessary inputs [through special access] at rates that allow competition not only to survive but to flourish," "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs" and there is no "need for the Commission to impose the costs of mandatory unbundling." *USTA II*, 359 F.3d at 576, 592. In this regard, the D.C. Circuit was merely applying the Supreme Court's determination in *Iowa Utilities Board* that impairment does not exist merely because UNEs are cheaper than other methods of competing. *See* 525 U.S. at 389-90.

Again implicitly recognizing that this evidence is dispositive, every CLEC commenter to address the issue argues that the Commission should find that the availability of special access is irrelevant.[21] A number of commenters contend that the 1996 Act precludes consideration of special access. *See* MCI at 151-54; Covad at 80-81; McLeod at 35-36. Even aside from the fact that this claim is squarely in conflict with the D.C. Circuit's determination that the Commission "must consider" special access, *USTA II*, 359 F.3d at 577,[22] it is based on an erroneous interpretation of § 251(d)(2). That section provides that, in "determining what network elements should be made available for purposes of subsection (c)(3)," "the Commission shall consider" whether "the failure to provide access to *such* network elements" — that is, "network elements [that] should be made available for purposes of subsection (c)(3)" or *UNEs* — would result in impairment. 47 U.S.C. § 251(d)(2) (emphasis added). The statute thus makes clear that impairment exists only where competition is not possible without *UNEs*. This is what the

[21] This section addresses commenters claims that consideration of special access is prohibited by the 1996 Act; responses to the remainder of their claims can be found at pages 81-100, *infra*.

[22] There is no merit to AT&T's claim that the D.C. Circuit's holding with respect to special access can be limited to wireless carriers. *See* AT&T at 81-82. Although AT&T is correct that wireless providers' successful use of special access precludes an impairment finding as to them, the requirement to consider special access cannot be limited to that single group of providers. The D.C. Circuit "vacate[d] ¶¶ 102-03 of the Order" — containing the Commission's explanation for refusing to consider special access as part of the impairment analysis *generally* — as well as the Commission's specific "decision that wireless carriers are impaired without unbundled access to ILEC dedicated transport." *USTA II*, 359 F.3d at 577, 594. Because the Commission applied the rule set out in paragraphs 102 and 103 to its impairment analysis for *all* elements — including for high-capacity loops and dedicated transport — the D.C. Circuit's vacatur of those paragraphs calls into question *all* of the Commission's impairment findings. *See Triennial Review Order* ¶¶ 300 n.872, 333 (refusing to consider CLECs use of high-capacity loops purchased as special access); *id.* ¶ 407 n.1262 (refusing to consider CLECs' use of high-capacity transport purchased as special access). The D.C. Circuit itself made this clear by stating repeatedly that the Commission must consider special access as part of its impairment inquiry and by applying that conclusion to high-capacity EELs. *See USTA II*, 359 F.3d at 577, 593.

Supreme Court recognized when it explained that, in the impairment context, "the proper analogy . . . is not the absence of a ladder" — *i.e.*, the absence of any access to the ILECs' facilities — "but the presence of a ladder tall enough to enable one to do the job, but not without stretching one's arm to its full extension." *Iowa Utils. Bd.*, 525 U.S. at 390 n.11.

The CLECs, in contrast, argue that § 251(d)(2) requires the Commission to ignore special access in assessing whether impairment exists, because that section purportedly limits the Commission to considering whether CLECs need ILECs facilities *at all* in order to compete, not whether they need those facilities as UNEs. *See, e.g.*, MCI at 153. But these CLECs ignore that § 251(d)(2) plainly instructs the Commission to consider whether competition is possible without *UNEs* — not whether competition is possible without the use of any ILEC facilities at all, such as by purchasing special access. Indeed, in quoting § 251(d)(2), MCI purposefully omits the word "such" and replaces it with "[ILEC]," in a misleading attempt to leave the impression that it is where competition is not possible without ILEC facilities — as opposed to without *UNEs* — that constitutes impairment. *Id.* at 152.[23]

5. The Commission must consider whether an *efficient* competitor can compete — the analysis cannot turn on the particular business plans or capabilities of individual competitors. *See* Verizon Comments at 22.

[23] Other commenters rely not on the text of the 1996 Act, but on the statutory structure, through which they claim "Congress signaled that UNEs would be the means by which CLECs would compete in the previously closed local market." ALTS at 12; *see id.* at 9-13; McLeod at 36-37; CompTel at 24. But the fact, for example, that the § 271 checklist includes UNEs (item 2) but not special access, *see* ALTS at 12, simply means that Congress intended for BOCs to provide UNEs where there is impairment. The statutory structure provides no basis for ignoring the plain language of § 251(d)(2), under which CLECs are not impaired — and the Commission may not impose UNE requirements — if CLECs can compete without UNEs.

In *USTA II*, the D.C. Circuit held that the Commission's impairment standard was "vague almost to the point of being empty" because the Commission had not answered the question, "Uneconomic by whom?" 359 F.3d at 572. The CLECs largely agree that the only permissible answer is that there is no impairment if entry is possible by an efficient CLEC. *See* AT&T at iii, 10-11; ALTS *et al.* at 7; PACE *et al.* at 33-35; Loop & Transport at 27-28; Sprint at 14; McLeod at 4; Alpheus at 80; CompTel/ASCENT at 7.[24] Therefore, where an efficient carrier can enter a market and compete without certain UNEs, competition is *possible* without those UNEs, and the Commission cannot require incumbents to provide those elements as UNEs to other, less efficient carriers, or to carriers that have adopted less efficient business plans.

Nonetheless, most CLECs ultimately, though implicitly, take the position that Integra states explicitly: an efficient CLEC is impaired without UNEs because "the business plan for Integra Telecom and all companies similarly situated *was based on TELRIC pricing for unbundled network elements.*" Integra at 22 (emphasis added); *accord id.* at 34. That competitors have built business plans around the continued availability of UNEs at "subsidized and below cost[]" TELRIC rates[25] — unreasonably relying on rules that incumbents have

[24] Except for AT&T, these CLECs qualify their support for this answer by arguing that the Commission should consider a "reasonably efficient competitor." Before the D.C. Circuit, however, they imposed no such qualifier, arguing that "inherent" in the Commission's impairment analysis is consideration of a competitor "utilizing the *most efficient* network architecture available to an entrant." Letter from David W. Carpenter, Sidley & Austin, to Hon. Mark J. Langer, Clerk, United States Court of Appeals for the District of Columbia Circuit, Nos. 00-1012, *et al.* (D.C. Cir. filed Jan. 29, 2004) (emphasis added).

[25] *See* J. Pelofsky, *Michael Powell on Monday Moved To Dampen Speculation He Plans To Leave*, Reuters (Aug. 19, 2003).

repeatedly and successfully challenged[26] — is irrelevant to the unbundling inquiry. CLECs cannot bootstrap their way to impairment by designing UNE-based business plans. As the Supreme Court recognized in *Iowa Utilities Board*, if impairment could be demonstrated through such machinations, "entrants, rather than the Commission, [would] determine whether . . . the failure to obtain access to nonproprietary elements [as UNEs] would impair the ability to provide services." 525 U.S. at 389. Instead, impairment exists only where an efficient CLEC, pursuing an efficient, non-UNE-based business plan, cannot compete successfully.[27]

6. Evidence of actual competition — while not necessary to preclude a finding of impairment — is dispositive evidence that competition is possible without UNEs, both in that market and in all similarly situated markets. *See* Verizon Comments at 22-24.

a. If an *actual* carrier is competing successfully without UNEs, then it is necessarily the case that an *efficient* carrier could do so and that competition is *possible*. CLECs, however, claim that the statute requires the presence of at least two — and in some cases as many as four or five — competitors in a particular market before the Commission must conclude that competition is, in fact, possible without UNEs. *See, e.g.*, ALTS *et al.* at 37; Loop & Transport at 82-86. These CLECs are wrong. As explained above and in Verizon's comments, the

[26] *See Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1110 (D.C. Cir. 2001) (holding that, where the agency's rules "had never been judicially confirmed, but were under unceasing challenge before progressively higher legal authorities," "reliance is typically not reasonable").

[27] For both of these reasons, PACE's claim that the Commission should adopt special UNE rules for a so-called "universal competitor" — that provides service "over the same service territory as the BOC in a state" in both "urban and rural markets" — must be rejected. PACE *et al.* at 85-91 (footnote omitted). Not only can a CLEC that gives up a significant advantage over an ILEC not be deemed an "efficient" competitor because binding D.C. Circuit precedent requires the Commission to consider CLECs' countervailing advantages, *see supra* note 19, but also PACE makes clear that the "universal competitor" strategy is impermissibly premised on the continued (likely perpetual) availability of UNEs, *see* PACE *et al.* at 88-90.

impairment standard is not a backward-looking actual competition test, let alone one that requires the existence of fully competitive markets before unbundling is eliminated. *See supra* pp. 17-19. Evidence of actual competition without UNEs, however, precludes a finding that an efficient competitor would be impaired without UNEs. Such an actual competitor is, at best, an efficient competitor. Nor is it relevant that such a competitor might have advantages unavailable to competitors generally, because the goal of the 1996 Act is to promote competition, not the interests of particular competitors or particular business plans. *See supra* pp. 19-21.

These CLECs, however, assert that, in *USTA II*, the D.C. Circuit affirmed the Commission's use of multi-competitor, actual-competition triggers. *See* ALTS *et al.* at 75; Sprint at 30; Alpheus at 27. Alpheus, for example, asserts that those triggers "were not attacked on appeal and were implicitly approved by the court." Alpheus at 27. Again, these CLECs are wrong. The incumbents expressly challenged the Commission's triggers,[28] and the D.C. Circuit's decision not to rule directly on those challenges cannot be equated with approval of the triggers, implicit or otherwise. The court had neither the obligation nor the need to identify *every* respect in which the Commission's high-capacity facility and mass-market switching rules were unlawful. It had *multiple* reasons for vacating those rules, which was more than sufficient. And, as demonstrated in Verizon's comments and above, triggers that require the presence of multiple competitors before the Commission cannot find impairment are flatly inconsistent with the D.C. Circuit's repeated holdings that there is no impairment if "competition is *possible*" without

[28] *See* Brief for ILEC Petitioners and Supporting Intervenor at 26-27, *USTA II*, Nos. 00-1012, *et al.* (D.C. Cir. filed Jan. 16, 2004); Reply Brief for ILEC Petitioners and Supporting Intervenor at 13, 17, *USTA II*, Nos. 00-1012, *et al.* (D.C. Cir. filed Jan. 16, 2004).

UNEs. *USTA II*, 359 F.3d at 575 (emphasis added); *see* Verizon Comments at 12-14; *supra* pp. 18-20.[29]

Nor can approval of the Commission's triggers be teased from the D.C. Circuit's statements that "the statutory structure suggests that 'impair' must reach a bit beyond natural monopoly." *USTA II*, 359 F.3d at 572; *see* ALTS *et al.* at 37. Contrary to ALTS's claim, the D.C. Circuit was addressing the "features" — that is, the economic characteristics — of a market that may be considered as part of the impairment analysis, 359 F.3d at 572, not the absolute number of competitors that "must be able to serve [a] market" where the Commission does not find impairment, ALTS *et al.* at 37. In any event, a market is not characterized by natural monopoly if two *companies* — not, as ALTS contends, "two competitors" plus the incumbent, *id.* — can economically serve a market.[30] Indeed, the D.C. Circuit held that the existence of a single intermodal competitor was sufficient to ensure "robust . . . competition" in the broadband market. *USTA II*, 359 F.3d at 582.

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[29] Indeed, a multiple competitor trigger is especially inappropriate in the context of high-capacity loops, because it bears no relation to the manner in which customers purchase high-capacity services. Such customers normally use a single supplier to meet all or virtually all of their needs. *See* Bruno Decl. ¶ 8. Although they might rely on a second supplier for redundancy purposes, individual customers rarely (if ever) purchase from three or more suppliers at the same location. Routes will fail a multiple competitor trigger, therefore, not because competition is impossible without UNEs, but because of the manner in which high-capacity services are purchased, which has nothing to do with natural monopoly and is not a permissible factor to consider in the impairment analysis.

[30] *See, e.g.*, *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1122 n.4 (D.C. Cir. 1996) ("A natural monopoly occurs when, because of the high ratio of fixed costs to variable costs, a single firm has declining average costs at the level of demand in the industry, such that the single firm can supply the service more cheaply than *two firms* could.") (emphasis added); *see Triennial Review Order* ¶ 76 n.259 (same).

b. *USTA II* makes clear that evidence of actual, non-UNE competition is dispositive evidence that competitors are not impaired both in the market in which the competition is occurring and in all similarly situated markets.

In *USTA II*, the D.C. Circuit rejected the Commission's assumption that each geographic market — there, each specific point-to-point loop and transport route in the nation — is unique, such that "competition [i]n one [market] [i]s *irrelevant* to the existence of impairment [i]n the other" markets in the country. 359 F.3d at 575. The Commission, the court explained further, "cannot ignore the . . . facilities deployment [in one market] when deciding whether CLECs are impaired with respect to [another market] without a good reason." *Id.* Any conclusion that "good reason" exists to distinguish between markets must be supported by substantial evidence — not assertions — that the "structural impediments to competition" in those markets "vary decisively." *Id.* at 570, 572, 575. Where there is no substantial evidence that such differences exist, evidence that precludes a finding of impairment in one market is dispositive in all similar markets as well. A number of CLECs recognize that *USTA II* requires the Commission to alter its prior approach to assessing impairment. *See, e.g.*, Loop & Transport at 81 (recommending that the Commission "group [markets] wh[e]re the barriers to entry are similar").[31]

7. The Commission's impairment analysis must be based on appropriate geographic market and market segment definitions. *See* Verizon Comments at 24-28.

[31] Although the so-called Loop and Transport CLEC Coalition has correctly internalized this aspect of *USTA II*, the remainder of their proposed test — which, among other things, requires the presence of multiple actual competitors and insists on a route-by-route inquiry — cannot be squared with *USTA II*. *See supra* pp. 18-20; *infra* pp. 35-38, 46-51.

a. The Commission must identify the relevant geographic markets for purposes of assessing impairment.

In *USTA II*, the D.C. Circuit held that "[a]ny process of inferring impairment (or its absence) from levels of deployment depends on a sensible definition of the markets in which deployment" occurs. 359 F.3d at 574. The geographic market definitions the Commission uses for its impairment analysis must therefore reflect the manner in which carriers actually compete. CLECs do not dispute this, but, as discussed below, argue for geographic market definitions that bear no relation to the manner in which competitive deployment occurs.

i. For high-capacity facilities, the evidence Verizon has presented demonstrates that competitors do not enter discrete route-by-route markets. Instead, competing carriers are providing service throughout the MSAs they have entered. Indeed, as discussed in further detail below, competitors enter markets by deploying fiber *rings,* which they design based on their projections of all the traffic that will ultimately be carried over those rings. Based on such projections, competitors decide which ILEC central offices and other points of aggregation, as well as which individual buildings, their rings should pass. If designed efficiently — and there is no lawful basis for presuming otherwise or for giving UNEs to inefficient CLECs — these rings will make it economic for competitors to transport traffic and serve specific customers throughout the broad area covered by the fiber ring (or rings) without UNEs. Whether a competitor can economically compete on a particular route, therefore, depends primarily on how it designed its fiber ring. The relevant geographic market for purposes of determining impairment, therefore, must be the broad markets competitors enter when they deploy their fiber rings. *See infra* pp. 46-51. Indeed, in an analogous context, the Commission has recognized and

the D.C. Circuit has affirmed that, for high-capacity loops and dedicated transport, "MSAs *best reflect* the scope of competitive entry" and, therefore, are a "logical basis for measuring the extent of competition." *Pricing Flexibility Order*[32] ¶ 72 (emphasis added).[33]

AT&T and MCI claim that defining route-specific geographic markets is consistent with Commission precedent and prior BOC arguments. *See* AT&T at 16-17; MCI at 133-34. But the opposite is true. In the *MCI-WorldCom Merger Order*[34] and the *LEC Classification Order*,[35] for example, when the Commission referred to "point-to-point markets," the "points" it had in mind were broad geographic areas, such as "St. Louis," "Manhattan," "Miami," and "Los Angeles," not specific routes. *MCI-WorldCom Merger Order* ¶ 166; *LEC Classification Order* ¶ 65. Moreover, in those orders, the Commission ultimately chose to consider a *national* market. *See MCI-WorldCom Merger Order* ¶ 168; *LEC Classification Order* ¶ 66. In the *Bell Atlantic-*

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[32] Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*"), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

[33] AT&T repeats the Commission's reasons in the *Triennial Review Order* for refusing to follow the *Pricing Flexibility Order* in defining the geographic market for assessing impairment for high-capacity facilities. *See* AT&T at 20-21. But, as Verizon has shown, the Commission's reasons cannot be squared with binding judicial decisions interpreting the 1996 Act. Competitors cannot be impaired within the meaning of § 251(d)(2) where there is enough facilities-based competition to "constrain prices" — the trigger for pricing flexibility, *Triennial Review Order* ¶ 104 — because in such circumstances there is "no reason to think doing so would bring on a significant enhancement of competition." *USTA I*, 290 F.3d at 429.

[34] Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 18025 (1998) ("*MCI-WorldCom Merger Order*").

[35] Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756 (1997) ("*LEC Classification Order*").

NYNEX Merger Order,[36] the Commission "conclude[d] that LATA 132 . . . constitutes a relevant geographic market," as does "the New York metropolitan area, including northern New Jersey." *Id.* ¶¶ 55-56. Indeed, in the past, MCI and WorldCom have argued "that the properly defined area on which to base geographic market definition is the *metropolitan area*." *MCI-WorldCom Merger Order* ¶ 167 (emphasis added). As MCI and WorldCom correctly argued then, the "product market should be defined by metropolitan area, *reflecting the pattern of investment that new entrants into local markets make*."[37] They explained, as Verizon demonstrates here, that "metropolitan area fiber rings . . . are the first step in establishing a local network for new entrants."[38]

CompTel/ASCENT claims that the Commission should retain its route-by-route market definition because that "will allow the Commission to avail itself of the massive evidence already created" in the state proceedings. CompTel/ASCENT at 13-14. Even aside from the fact that the state commissions' records are, in fact, *incomplete and irrelevant* — as a result of CLECs' refusal there, as here, to turn over relevant data, as detailed in the Reply Declaration of Lynn Walker, *see also infra* pp. 61-63 — this is much like the proverbial drunk looking for his

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[36] Memorandum Opinion and Order, *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985 (1997) ("*Bell Atlantic-NYNEX Merger Order*").

[37] Second Joint Reply of WorldCom, Inc. and MCI Communications Corp. at 6, CC Docket No. 97-211 (FCC filed Mar. 20, 1998) (emphasis added).

[38] *Id.* AT&T cites two declarations submitted by economists on behalf of Verizon, but those, too, argue in favor of broad geographic markets for high-capacity facilities. *See* Kahn/Taylor Decl. at 5, attached to Opposition of Verizon, RM No. 10593 (FCC filed Dec. 2, 2002) (arguing that the Commission's pricing flexibility rules properly used the MSA as the relevant geographic market); McDermott/Taylor Decl. ¶ 12, attached to Petition of Bell Atlantic for Forbearance, CC Docket No. 99-24 (FCC filed Jan. 20, 1999) ("examining market power on a statewide basis is appropriate").

keys under the lamppost because the light is better there. Indeed, given that the data were tailored to the specific, unlawful triggers established in the *Triennial Review Order*, it would be arbitrary and capricious to re-adopt the route-specific geographic market definition simply to make it easier to use that flawed data.[39]

ii. For mass-market switching, the evidence Verizon presents demonstrates that competitors offer services such as VoIP and wireless on a nationwide basis. The few CLECs that address this issue argue that the wire center is the appropriate market, but that is because these same CLECs attempt to define the product market to exclude the very nationwide intermodal competition that shows there is no impairment without UNE access to circuit switching to serve mass-market customers. *See* MCI at 35; PACE *et al.* at 82-91; Supra at 10-21.[40] Once intermodal competition is considered — as it must be — then the only appropriate

[39] The Commission also could not re-adopt its route-specific market definition for high-capacity loops based on CLECs' claims that the D.C. Circuit did not vacate the Commission's high-capacity loop UNE rules in *USTA II*. *See, e.g.*, AT&T at 2 n.1; McLeod at 12-15; CompTel at 25-27; MCI at 126; ALTS at 35. Verizon has already demonstrated that those claims are erroneous. *See* Verizon Comments at 34-35; Ex Parte Letter from Dee May, Vice President — Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, *et al.*, at 3-5 (July 29, 2004). The only new claim the CLECs raise here is to assert that, in the context of hybrid loops, the court presumed that CLECs would continue to have access to UNE high-capacity loops. *See* AT&T at 2 n.1 (citing *USTA II*, 359 F.3d at 582); McLeod at 13. But the D.C. Circuit, in fact, held that "robust intermodal competition from cable providers" that justified the Commission in refusing to order unbundling of the broadband capabilities of hybrid loops notwithstanding any impairment CLECs might face without UNE access to such loops. *USTA II*, 359 F.3d at 582. In any case, now that the Commission has sought (and received) new evidence on the lack of impairment with respect to UNE high-capacity loops, the Commission is prohibited from simply declaring its 18-month-old unbundling rule valid and ignoring today's evidence. *See, e.g.*, *Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 323 (D.C. Cir. 1992) (agency that initiates rulemaking must provide "a reasoned explanation" if it then declines to make findings based on evidence received); *see Williams Nat'l Gas Co. v. FERC*, 872 F.2d 438, 443 (D.C. Cir. 1989).

[40] In any event, the claim that the ILEC's wire center is the proper geographic market is inconsistent with CLECs' own claims about how they compete. CLECs such as MCI have

geographic market is a national one, because that is how these intermodal competitors are entering the market. *See* Verizon Comments at 90-109; *infra* pp. 113-28. Indeed, as noted above, the Commission adopted a national market definition for long-distance service based on similar evidence about the manner in which competition occurs. *See LEC Classification Order* ¶ 66 (determining to "treat, in general, interstate, long distance calling as a single national market"); *Competitive Carrier Order*[41] ¶ 30 ("there is a single national relevant geographic market . . . for interstate, domestic, interexchange telecommunications services with no relevant submarkets").

b. The Commission also must make "impairment findings [on a] service-by-service" basis. *CompTel*, 309 F.3d at 12, 14. There is little or no disagreement among the commenters that, "without an impairment finding as to [particular] services, to require that ILECs provide [UNEs] for such services on an unbundled basis." *Id.* at 14. And any claim that the Commission could permit the use of UNEs for one service, such as wireless, based on an impairment finding for a different service cannot be squared with *USTA I*, *CompTel*, or *USTA II*. *See id.*; *USTA I*, 290 F.3d at 428-29 (no impairment in the provision of broadband service); *USTA II*, 359 F.3d at 576-77, 592-93 (no impairment for provision of wireless and long-distance service).

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repeatedly argued that their "fiber-intensive network architecture allows a single switch to access *a much larger geographic area* than that served by the numerous switches of Verizon's copper-based, hierarchical network." Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039, ¶ 307 (2002) (emphasis added). Based on these CLECs' own claims, therefore, the Commission cannot adopt the wire center as the relevant geographic market.

[41] Fourth Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 95 F.C.C.2d 554 (1983) ("*Competitive Carrier Order*").

8. There are numerous factors that *cannot* be relied on as a basis for finding impairment, including issues created by regulators (such as below-cost retail rates), factors unrelated to natural monopoly characteristics of the market, and factors that could be addressed directly or through means other than mandating unbundling. *See* Verizon Comments at 28-30.

a. The Commission cannot rely on low basic-service rates as a source of impairment.

As the D.C. Circuit has twice held, low basic-service rates are not related to "structural features that would make competitive supply wasteful" and, therefore, cannot constitute a source of impairment. *USTA II*, 359 F.3d at 573; *USTA I*, 290 F.3d at 422 (where regulators have kept retail rates low, there is no sense in which the absence of "unbundling can be said to impair competition in such markets, where, given the ILECs' regulatory hobbling, any competition will be wholly artificial"). AT&T, for one, agrees that it would be futile for the Commission to point yet again to such regulated rates as a basis for finding impairment. *See* AT&T at 11-13.

Other competitors, however, argue that the Commission is obligated to find that "consideration of [below-cost] rate levels as a barrier to entry is proper." Loop & Transport at 30; *see* PACE *et al.* at 36-37; CompTel/ASCENT at 10-11. They assert that, "if the presence of [below-cost] rates is not a factor the Commission can consider, . . . then the central goal of the 1996 Act will be frustrated." Loop & Transport at 30; *accord* PACE *et al.* at 36 n.100. But, beyond this assertion, these commenters make "no attempt to connect" low retail rates "with any . . . purposes of the Act (other than, implicitly, the purpose of generating 'competition,' no matter how synthetic)." *USTA II*, 359 F.3d at 573. Nor could they. Below-cost retail rates have

nothing to do with natural monopoly or whether competitors can reasonably duplicate the facilities at issue.

b. The Commission may consider "only costs related to *structural* impediments to competition" that are "linked (in some degree) to natural monopoly." *Id.* at 572 (emphasis added); *USTA I*, 290 F.3d at 427.

CLECs, however, continue to assert that the Commission should consider factors that, like low retail rates, have no relationship at all to natural monopoly. Sprint, for example, contends that the Commission should consider the "normal start-up costs" that "competitors incur when first entering the market." Sprint at 15. The D.C. Circuit rejected the identical claim in *USTA I*, holding that "rel[iance] on cost disparities that are universal as between new entrants and incumbents in *any* industry is to invoke a concept too broad . . . to be reasonably linked to the purpose of the Act's unbundling provisions." 290 F.3d at 427.

Others claim that the costs of wholesaling spare capacity to other competitors are prohibitive and must be considered in the impairment context. *See* AT&T at 46; ALTS *et al.* at 76; NuVox at 17-18; KMC's Duke Decl. ¶¶ 17-18. Even aside from the fact that dozens of CLECs offer wholesale services, from the DS1 to the OCn level, *infra* pp. 48-49, 72-73, such costs cannot count as part of the impairment analysis. They are not related in any way to either natural monopoly or to incumbents' legacy position, but instead are costs faced by "new entrants . . . in *any* industry." *USTA I*, 290 F.3d at 427. Moreover, incumbents also had to incur the costs of designing wholesale systems and processes and, moreover, had to retrofit these wholesale operations to legacy networks designed for a single-carrier environment. CLECs, by contrast, could have built wholesale capabilities into the new networks they deployed. To the extent that

CLECs claim wholesaling is expensive because of choices they made in deploying their networks, *see, e.g.*, KMC's Duke Decl. ¶ 17, consideration of such costs is doubly prohibited, because it would reward CLECs for inefficient business plans.

c. Finally, where the Commission can address an alleged source of impairment directly, or through narrower alternatives, the Commission is prohibited from mandating unbundling. Indeed, the D.C. Circuit explained that it would be "irrational" — and, therefore, unlawful — to mandate unbundling when a "narrower alternative," with "fewer disadvantages," could address the specific bases for a finding of impairment. *USTA II*, 359 F.3d at 571. To the extent that CLECs continue to argue, for example, that alleged difficulties in obtaining access to buildings constitutes impairment, *see, e.g.*, AT&T at 19, their arguments cannot be squared with the D.C. Circuit's holdings. The appropriate response to this claim — aside from the facts that competitors are successfully gaining access to such buildings and that any such difficulties are not related in any way to natural monopoly — would be to address the issue directly, by requiring building owners to provide competitors with access.

II. HIGH-CAPACITY UNES

Verizon demonstrated in its opening comments that, wherever there is demand for high-capacity services, competing providers are competing successfully using a combination of their own or other alternative facilities and special access services purchased from incumbent LECs; that competing providers of all varieties are using these alternatives to UNEs to provide high-capacity services to customers of all shapes and sizes, in both large and small markets across the country; and that competing providers have been so successful that they lead in the head-to-head

competition at the retail level for a number of the most significant categories of high-capacity services and customers. The comments do not disprove any of these showings.

Indeed, not a single competing carrier has supplied the Commission with the kind of detailed data it needs to make an impairment finding. *None* of the competing carriers provides maps of their fiber networks, a list of the streets served by those networks, or the locations (such as wire centers) connected to those networks. *None* details the routes on which they lease other competitive providers' networks, or provides the capacity they are obtaining on those routes. *None* provides the specific locations or addresses where they are serving end-user customers using their own networks, the locations or addresses where they are using other competitive facilities to serve customers, or what level of capacity they are providing to end-users at all of these various locations. And *none* provides any detailed data regarding their use of special access.

Because competing carriers have failed to provide any of these data, there is no basis on which the Commission can find impairment. As described above and in Verizon's opening comments, before the Commission may impose an unbundling requirement, it first must make a finding of impairment based on substantial record evidence — not the conclusory assertions, anecdotal claims, and speculation on which the competing carriers rely here. Thus, while the Commission must judge the full evidentiary record to make the impairment determination, where competing carriers fail to provide the detailed information necessary to create that record, the Commission has no basis for finding impairment. In fact, under well-settled precedent, the

Commission must infer that the data that competing carriers obviously maintain but have purposely withheld are unfavorable to them.[42]

A. A Lawful Impairment Analysis Must Take Into Account How Competition in the Provision of High-Capacity Facilities and Services Actually Works

In order to formulate "a sensible definition" of the high-capacity market, it is necessary to begin with an understanding of how competition in this market actually works. Although competing carriers argue that the Commission should simply readopt the conclusions it reached in the *Triennial Review Order*, including its route-, capacity-, and carrier-specific framework, *USTA II* precludes that approach. And while these carriers strain to characterize the court's holding with respect to high-capacity UNEs as narrow, their arguments to that effect are wide of the mark. The Commission must accordingly adopt a new analytical framework that is consistent with the D.C. Circuit's prior holdings and with the new record of evidence regarding how carriers compete in the provision of high-capacity services.

1. A lawful impairment analysis must take into account the characteristics of the high-capacity market

The Commission first must take into account the fact the high-capacity market is distinct from other telecommunications markets given the nature of demand for high-capacity services.

First, the demand for high-capacity services is highly concentrated geographically, which as the Commission has recognized provides greater opportunities for competitors. *See Triennial Review Order* ¶¶ 205, 375. As Verizon demonstrated in its opening comments, nearly *80 percent* of the demand for high-capacity special access services (as measured by revenues) is

[42] *See, e.g.*, *International Union*, 459 F.2d at 1336 ("[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.").

concentrated in a little over *8 percent* of the wire centers where special access is provided (or roughly 532 out of nearly 7,000 total), and more than *86 percent* of those 532 wire centers are located in the 40 MSAs in Verizon's serving area with the largest amount of high-capacity demand (referred to here as the "top-40 MSAs").[43]

None of the commenters disputes the fact that overall demand for high-capacity services is highly concentrated.[44] AT&T nonetheless claims (at 66-67) that the demand for DS1s and DS3s is less concentrated than demand for high-capacity services and facilities as a whole. But the facts show that 80 percent of the demand for DS1 special access is concentrated in approximately 12 percent of Verizon's wire centers (or 844 out of roughly 7,000), and that more than 80 percent of these 844 wire centers are located in Verizon's top-40 MSAs. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 6 & Exh. 1. In addition, 80 percent of the demand for DS3 special access service is concentrated in just 253 wire centers— less than 4 percent of Verizon's

[43] *See* Verizon Comments at 36; Verses/Lataille/Jordan/Reney Decl. ¶ 8 & Exhs. 1B, 2B; Lataille/Jordan/Slattery Reply Decl. ¶ 6; *see also UNE Fact Report 2004* at III-8 & Table 5 (reporting similar data for other Bell companies).

[44] NuVox claims (at 38-39) that its *own* demand for DS1 loops and EELs is "highly diffuse," but its own data show that, in each of the MSAs where NuVox serves customers, total demand for high-capacity services is so heavily concentrated that pricing flexibility was granted based on a showing that only a few wire centers (as little as one or two) contained at least 65 percent of that MSA's special access revenue, and that those wire centers had attracted competitive fiber. *See* NuVox at 38-39 & Coker Decl. Attach. 1. Although NuVox may also serve some customers outside of the most concentrated wire centers in those MSAs, NuVox has not provided the information necessary to show that total demand in those MSAs is diffuse, or that NuVox's own demand is diffuse. Specifically, NuVox fails to provide a breakdown of its aggregate demand in the small number of wire centers with fiber (and where demand is concentrated) and those without.

total wire centers where special access is provided— and nearly 90 percent of these 253 wire centers are located in Verizon's top-40 MSAs. *See id.* ¶ 6 & Exh. 2.[45]

Second, demand for high-capacity services also is concentrated among those customers that generate the highest volumes of traffic (and therefore warrant use of dedicated, high-capacity facilities) and correspondingly high revenues. *See* Verizon Comments at 37-38; *Triennial Review Order* ¶ 303. This is why the number of competitive networks in an MSA is strongly correlated with the size (in population terms) of an MSA (which, in turn, is highly correlated with business activity). *See 2004 Fact Report* at III-8 & Fig. 1. It also is why, within those MSAs, competitors target even more precisely the specific wire centers, buildings, and other locations where that demand is concentrated. *See id.* at III-8 to III-9 & Table 6; Verses/Lataille/Jordan/Reney Decl. ¶ 44 & Exh. 6; Lataille/Jordan/Slattery Reply Decl. ¶¶ 7-10.

2. A lawful impairment analysis must take into account the way in which carriers deploy networks and provide high-capacity services

The Commission next must take into account the way in which competing carriers deploy networks and provide high-capacity services. There are three facts that are of particular relevance here.

First, when competing carriers decide to enter a new market, they typically deploy metropolitan fiber rings that connect to all major traffic aggregation points within that metropolitan area (such as ILEC central offices, carrier POPs, carrier hotels, and data centers), as well as the largest office buildings, with built-in break points to add additional "lateral"

[45] AT&T's own data show that approximately *two-thirds* of the DS1s and DS3s that AT&T purchases from Verizon are within the 20 MSAs in Verizon's serving area with the largest amount of high-capacity demand (referred to here as the "top-20 MSAs"). *See* AT&T at 67 & Stith Decl. ¶ 23.

extensions to new buildings and other locations in the future. *See 2004 Fact Report* at III-9 & Table 6; Pilgrim Reply Decl. ¶¶ 4-5.[46] As a result, the decision whether to deploy one of these rings in the first place is based on the revenues the CLEC expects to be able to earn from the a broad area over the *long-term* — and *not*, as the CLECs assert, on whether any individual route in that area would, standing alone, generate enough revenues to justify the costs of deployment.[47] Moreover, the size of the market available to the CLECs is even larger because competing providers are able to use special access to connect to virtually any location that is not immediately reached by their fiber networks. The impairment framework needs to reflect these facts, and therefore must not adopt a route-by-route analysis but instead must use a broader geographic market (such as an MSA) that reflects the actual scope of CLEC entry. *See* Kahn/Tardiff Reply Decl. ¶¶ 22-23.

Second, the fiber networks that competing carriers deploy can be used to provide any kind of service, to any kind of customer, at any level of capacity, simply by adding or modifying the electronics at the ends of the cable. As the Reply Declaration of Robert Pilgrim explains, it is straightforward as a technical matter to deploy electronics — such as multiplexers and digital cross-connects available from a variety of vendors — that enable fiber to be "channelized" so

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[46] *See also* AT&T's Fea/Giovannucci Decl. ¶ 23 ("When AT&T enters a new market, it first builds a consolidated metro fiber network that connects network points of aggregation where demand has already proven substantial, including interexchange POPs, the strategically located (to minimize transport) collocations in incumbent LSOs, and switch/private line service nodes."); XO's Tirado Decl. ¶ 14 (When XO "constructs a Metro Fiber (MF) Ring, it does so in a manner that identifies geographically proximate commercial buildings that house as many potential customers as possible" and "we attempt to design and build the metro ring to pass directly by as many of those buildings as possible.").

[47] *See, e.g.*, AT&T at 18-19; Loop & Transport at 32-35; ALTS *et al.* at 70, 83-84; Covad at 78; MCI at 148-149; Supra at 21-22.

that it can be used to provide services at different levels of capacity, including at the DS1 and DS3 level. *See* Pilgrim Reply Decl. ¶¶ 9-10; *2004 Fact Report* at III-10 to III-11. As the Commission has already found, competing carriers are not impaired in their ability to deploy the electronics that are attached to fiber facilities. *See Triennial Review Order* ¶ 381. Thus, wherever competitive fiber networks have been deployed, they are capable of serving any type of customer — from small businesses that use only a single DS1 of capacity, to larger businesses that use multiple DS3s and above — which further increases the size of the market available to CLECs.

Competing providers themselves acknowledge that they channelize their fiber networks to provide services at different levels of capacity from DS1 on up. *See 2004 Fact Report* at III-10 to III-11 & Table 7. For the convenience of the Commission, this filing collects materials for more than 20 competitive fiber providers where they make clear they provide service at all levels of capacity. *See* Attachment J. To cite a few key examples, AT&T states that its "Local Private Line Services are delivered over the AT&T Local SONET backbone infrastructure . . . and can be provisioned at the following speeds: DS-1/DS-3, OC-3c, OC-12c."[48] MCI "offers local service over its own network facilities" at "DS-0 . . . DS-1 (1.544 Mbps), and DS-3 (44.736 Mbps) . . . OC-3c" on up.[49] XO provides private line services over its "extensive intercity and

[48] AT&T, *AT&T Local Private Line Service, at* http://www.business.att.com/products/productdetails.jsp?productId=lpls (Reproduced in Attachment J).

[49] MCI, *Enterprise: Metro Private Line Services, at* http://global.mci.com/us/enterprise/data/privatelines/metro/ (Reproduced in Attachment J).

metropolitan network" at speeds ranging from "DS-1 to OC-n."[50] Time Warner Telecom uses its "expansive local footprint" to offer "end-to-end network connectivity" at "transmission speeds from 1.5 Mbps to 10 Gbps."[51]

Several commenters nonetheless claim that all of the fiber routes they have deployed were justified, in the first instance, by very high levels of capacity along those routes, and that the Commission should therefore assume that all fiber is being operated only at those higher levels of capacity. But this argument confuses the economics of deploying fiber in the first instance, with the economics of channelizing that fiber once it has been deployed. In markets where fiber already has been deployed, as well as in any markets with similar characteristics, it is obvious that fiber can be deployed. The question being addressed here is the different one of whether that fiber also can be channelized to provide service at various different speeds. And the facts prove that it can be, and that fiber already is being channelized by any number of carriers.

Third, wherever competing carriers have deployed fiber, they can offer that fiber to other carriers on a wholesale basis, at any unit of capacity, lit or dark. As explained in the Pilgrim Reply Declaration, a single fiber cable can be divided and shared among multiple carriers using standardized electronics such as multiplexers and digital cross-connect systems. *See* Pilgrim Reply Decl. ¶ 9. A carrier can lease lit bandwidth to other carriers at a range of different speeds from DS1 up to OCN, or it can provide dark fiber, and different strands of the same fiber can be used interchangeably to provide lit and dark services. *See id.*

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[50] XO, *XO Carrier Private Line*, *at* http://www.xo.com/products/carrier/privateline/ (Reproduced in Attachment J).

[51] Time Warner Telecom, *Dedicated High Capacity Services*, *at* http://www.twtelecom.com/Default.aspx?navId=222&configArgs=src=dctm;doc=0900bb3f801414a7 (Reproduced in Attachment J).

A large number of competing fiber providers — including CLECs, wholesale fiber suppliers, and utilities — advertise on their websites the fact that that they provide wholesale services at all levels of capacity, including — contrary to the claims of some CLECs — DS1 and DS3.[52] For the convenience of the Commission, this filing collects materials for more than 20 competitive fiber providers where they make clear they provide wholesale service at all levels of capacity. *See* Attachment J. To cite a few examples, AT&T states that its "Wholesale Services offers . . . an array of Local . . . Dedicated Private Line & SONET services *from Single Channel* to OC192 (Wavelength) services."[53] Time Warner Telecom's "services for carriers include: . . . Dedicated High Capacity Services" at "DS1/DS3." XO states that its "*Carrier* Private Line Services provide high-speed, dedicated point-to-point connectivity for voice, data, and video applications" "from DS-1 to OC-n."[54] McLeod's "Private Line *Carrier* Services feature: Dedicated circuits in a range of bandwidth levels including DS0, DS1, DS3 and OCX."[55] A number of CLECs here also acknowledge that they lease local fiber from competitive providers.[56]

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[52] *See, e.g.*, AT&T at 46; ALTS *et al.* at 76; NuVox at 11-12; Lightship's Gawlick Decl. ¶¶ 6-11.

[53] AT&T, *AT&T Data Services. For You. For Your Customers.* (emphasis added), *at* http://www.business.att.com/content/datasrvswhlsale_ltr.pdf (Reproduced in Attachment J); *see 2004 Fact Report* at III-14 & Table 9.

[54] XO, *XO Carrier Private Line, at* http://www.xo.com/products/carrier/privateline/ (Reproduced in Attachment J).

[55] McLeodUSA, *Wholesale Services: Private Line Carrier Services, at* http://www.mcleodusa.com/ProductDetail.do;jsessionid=0000bWkImm78gx028K4naTRyeCg:uquv7396?com.mcleodusa.req.PRODUCT_ID=410970 (Reproduced in Attachment J).

[56] *See, e.g.*, Loop & Transport at 75 (coalition members "are able to purchase interoffice transport from other CLECs on between [seven] and [35] percent of their routes") (brackets in original); Advanced Telcom's Wigger Decl. ¶¶ 33, 48 (Advanced TelCom has self-deployed

As explained in its opening comments, Verizon's own experience when it enters markets outside of its franchise territory provides further evidence that competing carriers are providing access to their fiber networks on a wholesale basis. When Verizon enters out-of-franchise market, it routinely relies on other competing carriers, rather than the ILEC, as its principal supplier. *See* Verizon Comments at 40-41 & Cuddy Decl. ¶¶ 4-19. All of the competing carriers on which Verizon relies operate their own networks and use their networks in whole or in part to provide service to Verizon. *See* Cuddy Reply Decl. ¶¶ 3-6.

3. *A lawful impairment analysis must take into account the way in which carriers extend and fill in the reach of their networks*

The Commission must further take into account the fact that competing carriers have a variety of ways to extend and "fill in" their own networks to reach customers throughout the areas in which they seek to compete.

As an initial matter, competing carriers can lease capacity from other competitive providers and use that fiber to connect to their rings. As noted above, a number of competing providers confirm that they are using competitive suppliers in precisely this manner, and a number of commenters state that they try to do the same wherever such competitive alternatives are available.[57]

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nearly "65%" of the "interoffice routes in our system" and purchases another "7% of our total system routes" from competitive carriers"); Broadview's Sommi Decl. ¶ 8 (Broadview "has established relationships with over thirty (30) different carriers" for transport, and uses these "alternate vendors 25% of the time") (emphasis omitted); Talk America's Brasselle Decl. ¶ 10 (Talk America has "been able to purchase interoffice transport from other CLECs on . . . 35% of our system routes") (emphasis omitted); *see also 2004 Fact Report* at III-19 & Table 12 (providing examples of similar CLEC statements made in the past).

[57] *See, e.g.*, AT&T's Fea/Giovannucci Decl. ¶ 77 ("[W]henever AT&T cannot justify building its own facilities, we try to use CLEC alternatives as often as possible"); Loop &

In addition, competing carriers can use special access from the ILEC to connect additional locations to their rings. And, while none of the competing carriers filing comments has provided detailed data regarding how or where they are using special access and in what quantities,[58] Verizon has provided extensive data demonstrating that competing carriers are using special access in this manner. For example, Verizon's data show that, within its top-40 MSAs, competing carriers are using special access in the same wire centers within those MSAs where these competitive providers have deployed fiber facilities, or where other competitive providers have deployed fiber. *See* Verizon Comments at 38-39 & Attach. H (Maps D & E); Lataille/Jordan/Slattery Reply Decl. ¶¶ 30-31 & Exh. 12. Verizon also has demonstrated that competing carriers are using special access services to serve not only large enterprises, but also small and medium-size businesses such as antique dealers, book stores, dry cleaners, florists, gas stations, and hair dressers, to name a few. *See* Verizon Comments at 58 & Verses/Lataille/Jordan/Reney Decl. Exhs. 8A-8E.

B. Competitors Are Capable of and Are Using Alternative High-Capacity Transport Facilities

1. Verizon demonstrated in its opening comments that competing providers have deployed extensive fiber facilities throughout the areas where demand for high-capacity services is concentrated, and that these providers are capable of and are using those facilities to provide transport services. *See* Verizon Comments at 42-47 & Nogay Decl. ¶¶ 7-15. On a national basis, for example, Verizon demonstrated that competing providers have now deployed at least one

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Transport at 33, 75, Broadview's Sommi Decl. ¶¶ 6, 8; ATX *et al.* at 16; Covad at 74-75; PaeTec at 7; Time Warner Telecom at 1.

[58] *See, e.g.*, PaeTec at 5-6; AT&T at 98; Loop & Transport at 55-60; XO's Tirado Decl. ¶ 36; MCI at 167; Time Warner Telecom at 2.

network in at least 140 of the 150 largest MSAs nationally; an average of nearly 20 networks in each of the top 50 MSAs nationally; and that these networks consist of approximately 324,000 route miles of fiber nationally. *See* Verizon Comments at 42; *2004 Fact Report* at III-3 to III-4 & Table 1. In addition, Verizon demonstrated that competing providers also have deployed extensive fiber facilities in each of the MSAs served by Verizon where high-capacity demand is concentrated. In fact, more than 80 different fiber providers have deployed facilities in Verizon's top-40 MSAs, and those companies collectively have deployed fiber in *two-thirds* of the individual wire center locations in those MSAs where demand is concentrated.[59] Verizon's data also show that in wire centers with 5,000 or more business lines there is an average of more than four alternative providers with their own fiber facilities. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 32.

The comments do not seriously dispute any part of this factual showing. Only a small fraction of competitive fiber suppliers have even filed comments in this proceeding.[60] Those that did have provided only high-level details about their networks — such as the number of local fiber route miles they operate nationwide, and these totals are consistent with what Verizon has already reported.[61] But not a single carrier supplies detailed information regarding their fiber

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[59] The list of competing providers that have deployed fiber includes, among others, **[BEGIN VENDOR PROPRIETARY]**

[END VENDOR PROPRIETARY]. *See* Verses/Lataille/Reney/Jordan Decl. Exh. 4A.

[60] Of the 80 competing fiber suppliers in Verizon's top-40 MSAs, *see* Verses/Lataille/Reney/Jordan Decl. Exh. 4A, only 12 have filed comments here.

[61] The 12 competing carriers that operate fiber networks and that have filed comments report serving a total of 24,300 local fiber route miles. *See* Loop & Transport at 6; MCI at 32. In addition, AT&T publicly reports that it serves at least 21,000 local fiber route miles. *See 2004*

routes — *not one* fiber map and *not one* list of locations, streets, cities, or even markets where these carriers operate fiber or obtain fiber from alternative providers.[62] The high-level data that the commenters do provide nonetheless confirm that competing carriers have deployed fiber networks in large and small markets throughout the country, wherever demand exists. As MCI explains (at 147), CLECs have deployed high-capacity transport facilities so "extensively" that there are now "very few locations in which deployment would have been economic but were missed" and in many locations there is a "glut of production."

2. Verizon also demonstrated that where competitive fiber is present within a wire center, it is reasonable to assume that competing carriers are capable of using that fiber to provide transport between that wire center and other wire centers with competitive fiber. This does not mean to suggest there actually is fiber directly between each of these wire centers, but it does show where, in the D.C. Circuit's word, it is "possible" to establish connections between wire centers.

This is so because of the way that competing carriers deploy fiber. As the Commission has recognized, when competing carriers enter a market, they "typically deploy fiber rings that may connect several incumbent LEC central offices in a market" as well as other points of traffic aggregation. *Triennial Review Order* ¶ 370; *see also 2004 Fact Report* at III-29. These rings are

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Fact Report at III-4, Table 1. AT&T takes issue (at 78-79) with the route miles that Verizon listed for two CLECs — Cablevision and IDT — in Verizon's July 2, 2004 ex parte filing. The *2004 Fact Report* already contains corrected figures for these two CLECs, and the statistics reported here and in Verizon's opening comments reflect this correction.

[62] For example, while AT&T claims (at 48) that it "has already built transport facilities . . . to almost every ILEC wire center that could economically support self-deployed facilities construction," it does not identify a single one of those facilities or any of the individual ILEC wire centers that they serve.