

continuous, self-connected structures with radial links extending out from the ring. *See Triennial Review Order* ¶ 45. Carriers use these rings to “aggregate end-user traffic for backhaul to their switch, or other equipment.” *See id.* ¶ 370. Thus, each wire center that contains competitive fiber is linked back to a central point (such as a switch), which in turn connects to other wire centers with competitive fiber, thereby enabling the carrier to connect all the extremities together at single central location, rather than by providing a web of direct connections between them.<sup>63</sup> The Commission has accordingly recognized that when competing carriers provide transport between two or more wire centers, they do not necessarily connect those offices directly, but may also do so *indirectly* — for example, by using their own network or another carrier’s network as an intermediary point.<sup>64</sup>

As the Pilgrim Reply Declaration explains, competing carriers are plainly capable of providing either switched or dedicated connections between different points on their networks, just as ILECs routinely do. *See Pilgrim Reply Decl.* ¶¶ 18-19. This is true even when remote points are connected indirectly through a central switch or hub, rather than directly together. *See id.* To provide a dedicated connection between two points on a CLEC metropolitan fiber network an *actual* dedicated signal path can be created using a digital access cross-connect

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<sup>63</sup> *See, e.g.,* AT&T’s Selwyn Decl. ¶ 57; KMC’s Duke Decl. ¶¶ 7, 16.

<sup>64</sup> *See, e.g., Triennial Review Order* ¶ 401 (competitive transport “do[es] not have to mirror the network path of the incumbent LEC,” but may instead use more efficient arrangements, including routing traffic through the CLEC’s “intermediate” facilities); 47 C.F.R. § 51.319(e) (“A [dedicated transport] route between two points (*e.g.*, wire center or switch ‘A’ and wire center or switch ‘Z’) may pass through one or more intermediate wire centers or switches (*e.g.*, wire center or switch ‘X’).”).

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machine or a manual cross-connection. *See id.*<sup>65</sup> Alternatively, a *virtual* dedicated pathway can be created using packet-switched technology such as ATM or frame relay. *See id.*

A number of CLECs nonetheless claim that, whether or not it is possible to establish dedicated connections between two points in their network, they have not set up their networks in this manner and are not, in the CLECs' words, "operationally ready" to provide transport.<sup>66</sup> These claims are unavailing for several reasons. First, as a legal matter, how CLECs design their networks is entirely up to them, and if they choose to deploy them without the capabilities of providing transport, that is their own decision and cannot form the basis of allowing them to obtain access to UNEs. *See Triennial Review Order* ¶ 367 (holding that where CLECs control "how they design and locate their networks" it is not impairment where CLECs have used that control to make themselves less efficient). Second, the steps, if any, that CLECs would need to take to use their networks to provide transport are nothing more than what the Commission previously concluded were "routine network modifications to existing facilities," that present "no significant operational issues." *Id.* ¶¶ 632-638; *see Pilgrim Reply Decl.* ¶¶ 17-19. Third, the

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<sup>65</sup> MCI concedes (at 161) that "[p]rices for . . . cross-connects have . . . fallen significantly." MCI nonetheless asserts (at 143) — without any support — that "[s]uch transport would be more expensive because it makes use of switching as well as transport." But MCI gets it exactly backwards — using a hub-and-spoke architecture to connect multiple points is much more efficient and cheaper than deploying dedicated connections between them. *See Pilgrim Reply Decl.* ¶¶ 17-19.

<sup>66</sup> *See, e.g.,* AT&T at 45-46; MCI at 143; Covad at 76-77; KMC's Duke Decl. ¶ 16. AT&T asserts, without providing any supporting detail, that a CLEC cannot connect "any two points on its network." AT&T's Selwyn Decl. ¶ 57. But surely when AT&T delivers traffic from one of its local customers to another it keeps that traffic entirely on its own network so that it doesn't have to pay another carrier to do so.

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costs of such modifications are relatively small, particularly in comparison to the costs that the CLECs have demonstrated they have already incurred. *See* Pilgrim Reply Decl. ¶ 10.<sup>67</sup>

Finally, the record also establishes that competing carriers are not only capable of providing connections between two points within their own networks, but also are capable of connecting to each other's networks as well. Thus, each CLEC is capable of obtaining transport not only between all wire centers to which its own network connects, but also between the wire centers to which other CLEC networks connect as well. Because most CLECs use the strategy of connecting to major points of traffic aggregation within a metropolitan area, it is typically the case that competing carriers already have facilities at the same locations, including ILEC central offices, and can therefore interconnect their networks at those locations. *See 2004 Fact Report* at III-17 & Table 10; *Triennial Review Order* ¶ 373; *see also* Attachment J (collecting CLEC representations that their networks typically connect to key points of traffic aggregation). And while AT&T claims that there is “no requirement for connectivity *between* different CLECs' respective network,” *see* AT&T's Selwyn Decl. ¶ 57, the relevant question is whether competing carriers have the ability to establish these connections, not whether they are legally obligated to do so. In any case, AT&T's own experts have admitted elsewhere that AT&T builds its network so that “traffic can flow to all parts of their network, as well as directly or indirectly to the networks of other carriers.”<sup>68</sup>

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<sup>67</sup> Compare, e.g., AT&T's Fea/Giovannucci Decl. ¶ 21 with *id.* ¶¶ 72-73.

<sup>68</sup> Direct Testimony of Robert J. Kirchberger on Behalf of AT&T at 111, *Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements*, Docket No. I-00030099 (PA PUC filed Jan. 12, 2004).

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3. Competing carriers also claim that their networks cannot be used to provide transport at the DS1 or DS3 level.<sup>69</sup> Once again, however, competing carriers fail to provide detailed data to support this claim. Not a single competing carrier provides information regarding the capacity that it is actually using on even a single specific transport route within their networks. And none of the competing providers that admit that they are obtaining transport from competitive suppliers identify the capacity they are purchasing, on which routes, and from what suppliers.

Competing carriers instead ask this Commission to presume that DS1 and DS3 transport is not available anywhere nationwide based on their business-case analyses purporting to show that it is never economic to self-deploy transport at these levels.<sup>70</sup> This is a red herring. As described above, once fiber has been deployed, it is straightforward as both a technical and economic matter to channelize that fiber so that it can be used to provide DS1 and DS3 services. *See* Pilgrim Reply Decl. ¶¶ 9-10; *2004 Fact Report* at III-10 to III-11. And competing carriers that operate fiber networks routinely offer services over those networks at the DS1 and DS3 levels. As noted above, representations to that effect by more than 20 carriers are collected in Attachment J.

A number of competing carriers also argue that, even assuming it is possible to provide transport at the DS1 and DS3 level for themselves, wholesale transport at that level is rarely

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<sup>69</sup> *See, e.g.*, AT&T at 40-41; MCI at 144-45; Covad at 67-68, 73-74; McLeod at 18-31; Loop & Transport at 75-81; Advanced Telecom's Wigger Decl. ¶¶ 11, 24; Eschelon's Kunde Decl. ¶ 17; XO's Tirado Decl. ¶ 35; Time Warner Telecom at 4-5; NuVox at 15-16 (DS1s).

<sup>70</sup> *See, e.g.*, AT&T at 40-41; MCI at 144-145; Covad at 67-68, 73-74; McLeodUSA at 18-31; NuVox at 15-16 (DS1s); Advanced Telecom's Wigger Decl. ¶¶ 36-37; XO's Tirado Decl. ¶ 20.

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available. Their claims again fail as a legal and factual matter. First, from a legal perspective, where it is possible for providers other than the ILEC to deploy competing transport facilities, it simply is not relevant to the impairment analysis whether those providers also choose to offer service to still other carriers on a wholesale basis. *See supra* p. 22. Second, as a factual matter, numerous providers do in fact offer service on a wholesale basis, *see 2004 Fact Report* at III-14 at Table 9, and other carriers admit here that they lease facilities from competitive providers.<sup>71</sup> And Verizon's out-of-region experience provides still further confirmation of this fact. *See Cuddy Decl.* ¶¶ 4-19.

For the same legal and factual reasons, the Commission also must reject the claims that it is “generally not worth the trouble to set up a wholesaling operation” given the “costs and operational hurdles” of setting up a wholesale business and because it would “require an entirely different business model.”<sup>72</sup> Whatever hurdles may exist, it is obvious that competing carriers are able to overcome them and already have.<sup>73</sup> CLECs also can avoid these costs completely by relying on one of a number of companies (*e.g.*, Last mile Connections and Global

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<sup>71</sup> *See, e.g.*, Loop & Transport at 75; Advanced Telcom's Wigger Decl. ¶¶ 33, 48; Broadview's Sommi Decl. ¶ 7; Talk America's Brasselle Decl. ¶ 10; *see also 2004 Fact Report* at III-9, Table 12.

<sup>72</sup> AT&T at 46 & Fea/Giovannucci Decl. ¶ 22; *see also* ALTS *et al.* at 76; KMC's Duke Decl. ¶¶ 17-20; NuVox at 13-14; MCI at 143-144; Advanced Telcom's Wigger Decl. ¶¶ 38-39. These carriers' claims that it is too difficult to establish a wholesale business also can not be credited because none of these carriers provides any details regarding the costs of establishing a wholesale business, nor any comparison of those costs (including the costs of allowing excess capacity to lie fallow) to the potential revenues they could obtain.

<sup>73</sup> Although KMC claims here that it “would be very difficult for KMC to provide wholesale interoffice transport to other CLECs,” KMC's Duke Decl. ¶ 8, its website states that “KMC's *Wholesale Services* portfolio delivers . . . Local Access (*from DS-1 to OC-N*), Origination/Termination Access, Private Line Service.” KMC Telecom, *Wholesale Services* (emphasis added), at <http://www.kmctelecom.com/Wholesale/>.

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Internetworking) that have formed to act as aggregators of high-capacity facilities on CLECs' behalf. *See Verizon Comments at 39; 2004 Fact Report at III-19 to III-20.*

4. Despite the fact that competing carriers have already deployed extensive fiber transport networks in large and small markets throughout the country, they claim that they are able to deploy little if any additional fiber going forward because that prior investment was based on an “irrational” “build-it-and-they-will-come” strategy during the years of the dot-com “bubble,” which led to multiple bankruptcies and which the capital markets will no longer support.<sup>74</sup> This argument fails for at least two reasons.

First, the record shows that competing carriers have widely deployed their own facilities and are successfully serving customers today. The carriers that are competing successfully range from large carriers such as AT&T, to smaller carriers such as Time Warner Telecom and Level 3, as well as many others. *See 2004 Fact Report at I-17, Table 10.* The experience of these successful carriers demonstrates that fiber also can be deployed in those markets and any that have similar characteristics. *USTA II*, 359 F.3d at 575. And, while some carriers may have failed, this says nothing about the opportunities available to an efficient competitor, particularly where other carriers have succeeded. *See id.* at 572. For this reason, the Commission has held that the impairment inquiry “must be based on the most efficient business model for entry rather than to any particular carrier’s business model,” *Triennial Review Order* ¶ 517, and has rejected claims of impairment premised on the failure or financial problems of individual carriers, *see id.* ¶¶ 415, 500.

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<sup>74</sup> *ALTS et al.* at 94; *see also* AT&T at 18; MCI at 147; Covad at 78-79; Broadview’s Sommi Decl. ¶ 7; Xspedius’s Falvey Decl. ¶ 7.

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Second, the commenters' "bubble" theory does not square with the facts. Although a great deal of fiber was undoubtedly deployed during the dot-com boom, a great deal also was deployed well before that period — at least a third of what's in the ground today. *See 2004 Fact Report* at I-2 & Table I, III-3.<sup>75</sup> Even more significantly, competing carriers have continued to deploy fiber extensively since the so-called bubble burst. For example, while CLECs reported 100,000 fiber route miles as of year-end 1999 — three months before the March 2000 collapse of the stock market — today they report 324,000. *See 2004 Fact Report* at I-2 & Table I, III-3. And AT&T, among others, has made clear that it is still deploying new local fiber today. In the first quarter of 2004 alone, AT&T "did 4300 T-1 rolls and added 79 more buildings and approximately 30 more highly reliable UV rings for our corporate customers."<sup>76</sup> Other CLECs — such as Cablevision Lightpath, McLeod, and Time Warner Telecom — have likewise increased their fiber networks over the past year. *See 2004 Fact Report* at III-3 n.8.

5. Because they have chosen to withhold data about their networks, the CLECs are forced to rely on a so-called study by QSI that purports to analyze the data submitted in 14 state trigger proceedings.<sup>77</sup> Although QSI claims that, based on the data compiled in those proceedings, the triggers for transport would have been met only for a small number of routes,

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<sup>75</sup> *See also* Loop & Transport at 4 (acknowledging that a great deal of competitive deployment "already existed" before the 1996 Act.); Notice of Proposed Rulemaking and Notice of Inquiry, *Expanded Interconnection with Local Telephone Company Facilities*, 6 FCC Rcd 3259, ¶ 2 (1991) ("[F]iber-based carriers, sometimes described as Competitive Access Providers (CAPs), now offer access services to large business customers in the central business districts of many major cities.").

<sup>76</sup> *Q2 2004 AT&T Earnings Conference Call - Final*, FD (Fair Disclosure) Wire, Transcript 072204aj.776 (July 22, 2004).

<sup>77</sup> *See* AT&T at 28-29; CompTel at 39-40; ALTS *et al.* at 79-80; Covad at 75-76; MCI at 136-137; Loop & Transport at 78-79, 82-83, 101-02.

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that is legally irrelevant given that the triggers have been found unlawful. In any event, QSI's analysis contains numerous errors that render its conclusions meaningless.

First, the records compiled in the state proceedings were incomplete for a number of reasons. As the Reply Declaration of Lynn Walker explains, many competing carriers that have deployed fiber in the states in which Verizon participated in proceedings did not participate and therefore did not provide data regarding their transport networks. *See* Walker Reply Decl. ¶ 3. In addition, even some of the competing carriers that did participate in the proceedings did not provide complete data regarding their networks. *See id.* ¶¶ 5-19. Verizon itself also did not provide data regarding all of these competitive suppliers since the information it presented was limited by the unlawful triggers and other constraints of the proceedings. Verizon instead provided data only on those routes where there was an exceedingly high probability it would satisfy the triggers (that is, where there were at least three competing carriers self-providing fiber, or at least two carriers providing fiber on a wholesale basis). *See id.* ¶¶ 4, 21.<sup>78</sup>

Second, QSI went out of its way to exclude data that runs counter to the CLECs' desired conclusions. For example, QSI excluded all instances of competitive fiber deployed in ILEC central offices that are used to connect these offices indirectly through a CLEC's central hub or switch; it excluded all fiber that was not certified by a CLEC as being used to provide transport

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<sup>78</sup> In addition, Verizon's affirmative evidence was generally limited to information that it obtained from performing inspections of fiber-based collocations. *See* Walker Reply Decl. ¶ 20. But Verizon was unable to inspect all of its offices, and in any case not all competitive fiber that can be used as transport passes through those wire centers. *See id.* Since the state proceedings, Verizon has obtained more comprehensive (though still far from complete) data regarding the existence of competitive fiber — for example, the GeoTel data that Verizon used to compile the fiber maps in its top-40 MSAs — and those data confirm that there is a great deal of fiber that does not show up from inspections of fiber-based collocation. *See* Verses/Lataille/Jordan/Reney Decl. ¶¶ 15-18 & Exh. 4A.

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at the DS1 or DS3 level; and it excluded all fiber that was not certified by a CLEC as available on a wholesale basis to other carriers. *See* QSI at 15-19. As described above, each of these exclusions are based on arguments that are at odds with the reality of what competitive networks are capable of and how they are operated.<sup>79</sup> Thus, QSI has excluded data that are clearly relevant to the analysis the Commission is required to conduct, and QSI's conclusions are therefore meaningless.

**C. Competitors Are Capable of and Are Using Alternative High-Capacity Loop Facilities**

1. Verizon demonstrated in its opening comments that the extensive fiber networks that competing providers have deployed also are capable of and are being used to provide high-capacity loops to buildings in which there is concentrated demand for high-capacity services. According to competing providers themselves, competitive fiber now provides *direct* connections to approximately 32,000 known office buildings — buildings that are connected to a CLEC's fiber ring with the CLEC's own fiber — and many other buildings that are not known. *See 2004 Fact Report* at III-4, Table 1. And according to competing providers themselves, CLECs also serve *several hundred thousand* additional buildings on their fiber networks using what they describe as *indirect* connections — where the building is connected to a CLEC's fiber ring using a facility leased from an alternative provider, including special access obtained from

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<sup>79</sup> QSI also applied these triggers incorrectly as the number of routes it has identified as meeting the triggers is lower than what the states themselves have concluded. In New York, for example, QSI claims that only 48 routes meet the trigger for 3 or more self providers of DS3 transport. *See* QSI at 17. The comments of the New York PSC, however, indicate (at 18) that 135 routes meet that trigger. In that one state alone, QSI's margin of error is nearly 200 percent.

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an ILEC. *See id.* at III-3.<sup>80</sup> Global Internetworking — a company that aggregates competitive networks and ILEC special access and resells that capacity to competing carriers — reports that it has “long-term wholesale relationships” with “1,300 facilities-based carriers” providing “access to over 535,000 lit buildings.”<sup>81</sup> Under no circumstances may the Commission impose an unbundling obligation to serve these hundreds of thousands of buildings, or others with similar characteristics.

Verizon’s opening comments provided detailed data and maps demonstrating known instances where competing providers are using their fiber to serve buildings in Verizon’s top-40 MSAs. *See Verizon Comments at 48-50 & Attach. H (Maps A, C & D); Verses/Lataille/Jordan/Reney Decl. ¶¶ 19-30.* The maps and related data identified “CLEC-lit” buildings in those MSAs — that is, buildings in which CLECs have provisioned fiber-enabled equipment — based on third-party databases that are generally relied upon in the industry. *See Verses/Lataille/Jordan/Reney Decl. ¶¶ 20-27 & Exhs. 5A & 5B.*<sup>82</sup> For Verizon’s top-20 MSAs, Verizon also correlated this data with additional third-party data that estimate typical aggregate

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<sup>80</sup> For example, AT&T has reported that it serves a total of 186,000 lit buildings on its network (6,500 directly with its own fiber, plus approximately 180,000 indirectly using leased facilities including special access); Time Warner Telecom reports that it serves 17,500 buildings lit buildings on its network (4,500 directly with its own fiber, plus 13,000 indirectly using leased facilities including special access). *See 2004 Fact Report at III-3; Verizon Comments at 48.*

<sup>81</sup> Global Internetworking, Inc., *About Us: Company Overview* (emphasis added), at <http://www.globalinternetworking.com/home/index.php?pg=about>; Global Internetworking, Inc., *About Us: Why Global Internetworking?*, at <http://www.globalinternetworking.com/home/index.php?pg=about&sec=why&reason5=true>; Global Internetworking, Inc., *Agents/Partners*, at <http://www.globalinternetworking.com/home/index.php?pg=agents>.

<sup>82</sup> As noted above, Verizon is providing only 50 unbundled dark fiber loops throughout its entire region, *see Lataille/Jordan/Slattery Reply Decl. ¶ 49*, so to the extent that CLECs are lighting dark fiber in these buildings, they are not using dark fiber UNEs supplied by the ILEC to any meaningful extent.

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telecommunications expenditures in buildings. *See* Verizon Comments at 50 & Verses/Lataille/Jordan/Reney Decl. ¶¶ 37-43. These data confirm that competitors have chosen to target buildings where demand is concentrated, and that the majority of buildings with concentrated demand contain competitive fiber. For example, they show that competitive fiber has been deployed in 65 percent of buildings with greater than \$6 million in aggregate telecommunications expenditures; 57 percent of the buildings with \$4-\$6 million in aggregate telecommunications expenditures; and 50 percent of the buildings with \$2-\$4 million in aggregate telecommunications expenditures. *See* Verses/Lataille/Jordan/Reney Decl. Exh. 6.<sup>83</sup>

2. Although some competing carriers quibble with Verizon's data, they fail to provide any data of their own, and none of their claims undermines the key conclusions from the limited data that are available. For example, while a few commenters provide the total number of buildings they serve directly with their networks,<sup>84</sup> not a single CLEC provides a list of such buildings, or a description of the customers they serve and capacity they provide at each location. These data — which competing carriers obviously possess but have purposely withheld from the Commission — no doubt would corroborate the data that Verizon has submitted and show that

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<sup>83</sup> AT&T argues (at 75) that total expenditures per building are irrelevant because the impairment inquiry should be carrier-specific and look separately at the “committed traffic” each individual CLEC is able to obtain. But as described above, a carrier-specific impairment inquiry is both unlawful and irrational. Under AT&T's approach, if competing carriers had obtained 99 percent of the committed traffic in a building, with the ILEC serving the remaining 1 percent, a new entrant would be deemed impaired and be entitled to obtain the ILEC's high-capacity loop as a UNEs.

<sup>84</sup> *See, e.g.*, Loop & Transport at 109 (XO has “invested approximately \$5 billion to establish metro fiber rings” that “connect directly to . . . 2,164 buildings”); *id.* at 111-12 (Xspedius “has deployed 3,400 route miles of fiber” with “600 buildings directly connected to these networks via its own laterals.”); Time Warner Telecom at 5 & n.3 (Time Warner Telecom serves “approximately 25 percent of its customer locations with its own loops,” and these locations “represent approximately 70 percent of TWTC's revenue”).

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competing carriers are competing on an even more widespread basis than the data that is publicly available would suggest.<sup>85</sup>

In light of the fact that competing carriers have consistently failed to provide detailed data regarding their networks, AT&T's claim (at 74) that data "based on third-party sources" should be given "no weight" rings particularly hollow. In any event, AT&T's and other CLECs' attempts to impugn this data do not withstand scrutiny.

First, AT&T argues that the source of the data that Verizon used to determine CLEC-lit buildings — Telcordia's CLONES database — is unreliable because it may identify some locations where CLECs previously served customers but no longer do (and have failed to remove the listing from the database). *See* AT&T at 72 & Beemon Decl. ¶¶ 6-9. AT&T claims that its review of the database found that up to 30 percent of the 205,048 customer locations — spread across 131,309 building addresses — "are no longer active." AT&T does not indicate how many building addresses (as opposed to customer locations within those buildings) it no longer serves. Regardless, AT&T's own claims prove the point. The fact that AT&T at one time served these tens of thousands customer locations — and still serves hundreds of thousands of others — proves that competing providers are able to serve these locations.<sup>86</sup>

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<sup>85</sup> CLECs provide this kind of data to Verizon when it seeks to rely on these carriers' networks in connections with its out-of-region expansion. *See* Cuddy Decl. ¶ 10; Cuddy Reply Decl. ¶ 3.

<sup>86</sup> While AT&T's declarant states that he believes that the data submitted to CLONES by other CLECs may also contain inaccuracies given the lack of incentives of CLECs to remove that information, *see* AT&T's Beemon Decl. ¶ 9, no other CLECs has come forward with such a claim. And there is every reason to believe that AT&T's experience is, in fact, *sui generis* — as it notes, it has been entering data in CLONES for "the last 40 years," whereas most CLECs have been in operation for only a few years. In any event, as Verizon has explained, the CLONES data also likely *understates*, perhaps significantly, the number of CLEC lit buildings because not

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Second, a few CLECs quibble with the number of CLEC-served buildings that Verizon provided, based on public sources, in its July 2, 2004 *ex parte*.<sup>87</sup> AT&T claims (at 73) that Verizon’s “most embarrassing” mistake is the inclusion of the fiber operated by Pac-West, which has informed the FCC in an *ex parte* letter that it “owns no fiber” and instead “serves all customers via facilities from other carriers.” But this dispute rests on a distinction without a competitively significant difference.<sup>88</sup> Whether Pac-West actually owns the underlying facilities that it uses to provide high-capacity services, or leases those facilities from a third party, the fact remains that Pac-West is competing successfully without access to UNEs. Indeed, Pac-West has reassured investors that it “anticipates no direct impact from [the] recent FCC Triennial Review actions” because “Pac-West does not employ UNEs in its current network architecture in any significant way.”<sup>89</sup> And since that announcement, Pac-West reported that, “[i]n the first half of 2004, we greatly increased the addressable market for enterprise customers on our facilities-based network, expanding the number of customers to which we are able to cost-effectively offer

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all CLECs submit information regarding their networks into CLONES. *See* Verses/Lataille/Jordan/Reney Decl. ¶ 26.

<sup>87</sup> *See, e.g.*, AT&T at 74 & Selwyn Decl. ¶ 39.

<sup>88</sup> AT&T also questions whether the buildings served by two competing carriers — Buckeye Telesystem and Yipes — are actually connected directly to these carriers’ networks or use leased facilities. Whatever the case may be, it shows that these carriers are able to serve these locations. In any event, the source for Yipes is a company press release that states that “Yipes reported it also added 90 buildings to its national network footprint over the past year, bringing the total to 474 buildings in service.” Yipes Press Release, *Yipes Completes Series A Equity Funding — Revenue Growth Strong* (Sept. 15, 2003). The source for Buckeye is a news article that states that Buckeye has 900 “fiber net buildings.” C. Kuhl, *Getting Down to Business*, CED (Nov. 2003), at <http://www.cedmagazine.com/ced/2003/1103/11a.htm>.

<sup>89</sup> Pac-West Telecomm Press Release, *Pac-West Telecomm Anticipates No Direct Impact from FCC Triennial Review Actions* (June 10, 2004) (“June 10, 2004 Pac-West Press Release”).

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our services.”<sup>90</sup> Moreover, although Pac West (and AT&T) misleadingly imply that Pac West’s service is not facilities-based, this stands in stark contrast to multiple Pac-West statements to investors and potential customers, where the company boasts that it is a facilities-based provider. Indeed, Pac-West’s website states that the company “has built one of the most comprehensive and reliable networks in California” and that its “local access coverage . . . is greater than that of SBC and Verizon, the two incumbent monopolies, combined.”<sup>91</sup>

Finally, while the CLECs also dispute the building totals for IDT and KMC, Verizon’s opening comments already account for the corrected figures. *See Verizon Comments at 42; 2004 Fact Report at III-4, Table 1.* Verizon’s opening comments also reflect the corrected building figure for Telcove — from 3,500 buildings to 2,500 — but Telcove has subsequently reported on its website that it now serves “3000+” “on-net” buildings.<sup>92</sup> With respect to a fourth carrier, McLeod, AT&T claims (at 73) that, despite a statement in McLeod’s 10-K that it is “connected to almost 1,500 buildings along [its] network,” McLeodUSA, Inc., Form 10-K (SEC filed Apr. 12, 2002), that a more recent statement indicates that they serve customers exclusively through unbundled loops, UNE-P, or resale, and should therefore be treated as having zero buildings.

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<sup>90</sup> Pac-West Telecomm Press Release, *Pac-West Telecomm Announces Second Quarter 2004 Results* (July 28, 2004).

<sup>91</sup> *See* Pac-West Telecomm, Inc., *Investor Fact Sheet*, at [http://www.pacwest.com/pressroom/investor\\_fact\\_sheet.pdf](http://www.pacwest.com/pressroom/investor_fact_sheet.pdf); *see also* Pac-West Telecomm, Inc., Form 10-Q (SEC filed Aug. 10, 2004) (“Pac-West Form 10-Q”) (Pac-West “built our facilities-based network,” which has a “statewide footprint . . . which encompasses all of the major metropolitan areas of California, [and] provides us with a competitive advantage over incumbent local exchange carriers (ILECs), and other competitive local exchange carriers.”); Pac-West Telecomm, Inc., Cal. P.U.C. CLC 1-T § 6.1 (offering “Dedicated Facilities Based Dialtone (FBDT) Service,” which Pac-West defines as “local exchange business service provided through a Pac-West Digital Local Loop.”) , at [http://www.pacwest.com/customer/california/ca\\_tariff\\_adviceletter183.pdf](http://www.pacwest.com/customer/california/ca_tariff_adviceletter183.pdf).

<sup>92</sup> *See* Telcove, *Company Overview*, at <http://www.telcove.com/about/abgl.htm>.

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But McLeod's own comments here indicate that McLeod has in fact "deployed DS3 loops to individual customers," and they do not dispute the 1,500 total on the record nor provide any contrary figure. McLeod's Lechtenberg Decl. ¶ 6.

In sum, none of these quibbles provides a basis for the Commission to disregard or discount the information that Verizon provided. The only thing these disputes highlight is that competing carriers have every intention of continuing their tradition of attacking the voluminous data provided by the ILECs, without making any serious attempt to provide data of their own.

3. Competing carriers not only fail to provide the actual buildings and other locations they serve with their fiber networks, but also argue once again that the Commission should ignore these extensive networks for purposes of determining impairment for high-capacity DS1 and DS3 loops. Again these claims are misplaced.

First, competing carriers argue that it is uneconomic for them to self-deploy lateral extensions from their rings to buildings in order to serve only a single DS1 or DS3 worth of demand.<sup>93</sup> Competing carriers once again support this claim with naked assertions and back-of-the-envelope cost estimates, none of which can make up for the fact that competing carriers have failed to provide the hard data that the Commission needs to evaluate their claims, such as the lists of the buildings they serve with fiber, and the amount of capacity they are supplying to each customer at each of those locations.<sup>94</sup>

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<sup>93</sup> See, e.g., XO's Tirado Decl. ¶¶ 12-21 & Table 1; AT&T at 32-38 & D'Apolito/Stanley Decl. ¶¶ 15-22; McLeod at 6; Time Warner Telecom at 2-5; Advanced Telcom's Wigger Decl. ¶¶ 15-24; Eschelon's Kunde Decl. ¶ 17; KMC's Duke Decl. ¶¶ 9-11; Xspedius's Falvey Decl. ¶¶ 18-27; ATX *et al.* at 11-13; Conversent's Shanahan Decl. ¶¶ 13-16; Cavalier's Evans Decl. ¶¶ 14-19.

<sup>94</sup> Even under their own terms, the CLECs' business case studies are rife with flawed assumptions, as the Pilgrim Reply Declaration explains. See Pilgrim Reply Decl. ¶¶ 20-22.

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In any event, the question whether it is economic for a competing carrier to deploy a fiber lateral solely to serve a DS1 or DS3 worth of demand is not the proper question for impairment purposes. There already are tens of thousands of locations where competing carriers already have deployed fiber, where no lateral extensions are required, and the Commission must begin (though not end) its impairment inquiry here. At these locations, and any others with similar characteristics, competing carriers can deploy DS1 or DS3 loops by using multiplexing equipment at the customer premises to channelize the fiber. *See* Pilgrim Reply Decl. ¶¶ 9-10.

As demonstrated above, competing carriers that operate fiber networks routinely state that they offer services over those networks at every level of capacity from DS-1 on up. *See 2004 Fact Report* at III-12, Table 7. Attachment J collects and reprints similar statements for a total of more than 20 CLECs. To cite a few 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.”<sup>95</sup> MCI “offers local service over its own network facilities” at “DS-0 . . . DS-1 (1.544 Mbps), and DS-3 (44.736 Mbps)” up to OCn levels.<sup>96</sup> XO offers private line services at “DS-1 to OC-x” over its “extensive intercity and metropolitan network.”<sup>97</sup>

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<sup>95</sup> AT&T, *AT&T Local Private Line Service*, at <http://www.business.att.com/products/productdetails.jsp?productId=lp1s> (Reproduced in Attachment J). *See also* AT&T at 42 (acknowledging that AT&T provides DS1 service at locations where it has existing fiber).

<sup>96</sup> MCI, *Enterprise: Metro Private Line Services*, at <http://global.mci.com/us/enterprise/data/privatelines/metro/> (Reproduced in Attachment J).

<sup>97</sup> XO, *XO Private Line*, at <http://www.xo.com/products/smallgrowing/data/privateline/index.html> (Reproduced in Attachment J).

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Moreover, even at locations that do not currently have fiber, the question is not whether a competing carrier can construct fiber to that location to serve only a single DS1 or DS3 worth of demand. The question is whether there is sufficient total demand to warrant the deployment of fiber. If so, the fiber can be channelized and there clearly is no impairment. If not, then the question is whether there are other ways to serve customers at that location successfully, such as through the use of special access. And if so, there again is no impairment.

As Verizon has demonstrated, competing carriers already use special access extensively to supplement or “fill in” the reach of their own network facilities. *See Verizon Comments at 54; 2004 Fact Report at III-39 to III-40.* Verizon in fact demonstrated, with extensive maps and underlying data, that competing carriers were using special access extensively in locations where competitive facilities had already been deployed, in order to provide loops between customers and these carriers’ fiber rings. *See Verizon Comments at 57 & Attach. H (Maps D & E).* Verizon also demonstrated that this was occurring not only at locations that are close to these carriers’ rings, but also at locations in more far-flung areas that are further away. *See id.* And Verizon also demonstrated that it is true not only in the larger MSAs where demand is most heavily concentrated, but also the smaller ones — such as Reading, Pennsylvania, Burlington, Vermont, and Charleston, West Virginia. *See id.* Moreover, because the demand for special access demand as a whole, as well as the specific demand for DS1s and DS3s, is highly concentrated, customers will largely be in the same areas where competing carriers have already deployed facilities. *See Lataille/Jordan/Slattery Reply Decl. ¶ 6.*

The Lataille/Jordan/Slattery Reply Declaration provides additional data to support this showing. Exhibit 12 to that declaration is a spreadsheet correlating the wire center locations with

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fiber in the top-40 MSAs with the wire center locations in which competing carriers are using special access. It shows that competing carriers are using special access in the same wire center locations where they have deployed fiber, which therefore shows that competing carriers are able to use special access to extend their networks. That same exhibit also presents similar information for individual carriers, showing that many individual carriers with fiber are using special access in the same wire center locations in which they have deployed fiber, which likewise shows that these carriers are able to use special access to extend their networks.

Second, competing carriers claim that even where fiber has been deployed to certain buildings, it is not typically available on a wholesale basis, at least not at the DS1 and DS3 level. But the fact that a competing carrier makes a business decision not to provide access to its facilities to other CLECs is irrelevant for impairment purposes. Moreover, as demonstrated above, competing carriers do, according to their own websites, offer capacity on their networks on a wholesale basis at the DS1 and DS3 level. *See* Attachment J.<sup>98</sup>

4. The Commission also must reject claims that CLECs are limited in their ability to deploy new high-capacity loops going forward due to supposed operational barriers, such as obtaining access to buildings, rights of way, and the like.<sup>99</sup> These claims fail on both the law and the facts.

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<sup>98</sup> While some individual CLECs nonetheless claim that they do not have enough excess capacity to act as loop wholesalers, this is obviously not true of CLECs as a whole. *See* KMC's Duke Decl. ¶¶ 21-25; Advanced Telecom's Wigger Decl. ¶ 38; Talk America's Brasselle Decl. ¶ 7. In fact, AT&T and MCI both acknowledge that there is a great deal of *excess* capacity in local markets. For example, MCI states (at 147) that there was a "glut of production" in the deployment of local fiber, and AT&T states (at 31) that its local fiber networks have "substantial excess capacity."

<sup>99</sup> *See, e.g.*, AT&T at 59 & Fea/Giovannucci Decl. ¶¶ 42-44; ATX *et al.* at 17; McLeod at 17 & Lechtenberg Decl. ¶ 6.

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First, as a purely legal matter, these types of concerns have nothing to do with whether the market has natural monopoly characteristics, but instead involve issues that should be addressed directly through the legal process. As the D.C. Circuit held, where such direct solutions are available — as they are here — the Commission may not use its unwillingness or failure to pursue them as a basis for finding impairment and forcing ILECs to share their networks. *See USTA II*, 359 F.3d at 571.

Second, the claims are not supported by the facts. The record demonstrates that competing carriers are clearly able to serve a very large number of buildings and to serve customers within those buildings using their own or alternative facilities, and have been able to serve an even larger number using special access. Where they are doing so, carriers self evidently have overcome whatever operational barriers may exist.

In any event, the facts show that most building owners do not limit access to a single provider.<sup>100</sup> The Commission has already banned exclusive access arrangements in commercial buildings, and as long as the ILEC is in a building, a CLEC has the right to use the ILEC's in-building risers and conduits to reach its customers.<sup>101</sup> Competing carriers also can generally enter a new building immediately, and without securing a landlord's prior approval, by using special access from an ILEC. Competing carriers are, in fact, serving hundreds of thousands of

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<sup>100</sup> *See Ex Parte Filing of the Real Access Alliance*, Attach. at 3, WT Docket No. 99-217 & CC Docket No. 96-98 (FCC filed June 16, 2000) (Building Owners and Managers Association survey covering roughly 2,100 commercial buildings reported that 80 percent of the respondents said they had more than one telecommunications service provider, and almost 60 percent offer their tenants a choice of three or more providers).

<sup>101</sup> *See* 47 C.F.R. § 64.2500; First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order, *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, ¶ 21 (2000).

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buildings in precisely this manner. *See 2004 Fact Report* at III-3. The competing carrier can then migrate customers to its own facilities at a later date, after it has negotiated for its own direct building access.

With respect to conduits and rights of way, the CLECs overlook the fact that existing conduits can often be leased from existing fiber suppliers. As the Pilgrim Reply Declaration explains, it is almost always possible to use existing conduits, rather than build new conduits. *See Pilgrim Reply Decl.* ¶ 14. Incumbent LECs, competitive LECs, power companies and other utilities, and municipalities all typically make their spare conduits available, and these conduits are rarely full. *See id.* Verizon provides space in its underground ducts at regulated rates, and has already provided extensive access to its conduits to cable companies and competitive carriers. *See id.*; *see also Renaissance Reply* at 1-6 (describing proven technology to install new fiber conduit systems while replacing dilapidated sewer and water pipes).

5. As with respect to transport, the CLECs attempt to substitute the QSI study for providing here any of the actual high-capacity loop data they submitted in the state proceedings, as well as the even more comprehensive data these carriers obviously maintain.<sup>102</sup> But QSI's analysis of the state proceedings is as deeply flawed with respect to high-capacity loops as it is with respect to transport.

In fact, with respect to the Verizon states, the state records on which the QSI study is based are even more incomplete with respect to loops than they are for transport. *See Walker Reply Decl.* ¶¶ 4, 21. For example, the New York PSC notes that the PSC “did not gather any information” regarding high-capacity loops for Verizon. And QSI reports that it reviewed zero

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<sup>102</sup> *See, e.g., Covad* at 75-76; *MCI* at 136-37; *Loop & Transport* at 78-79, 82-83, 101-02.

buildings for New York, yet disingenuously maintains (at 2) that its study is valid precisely because it included New York and the other big states. Moreover, with respect to the data (if any) that was collected in other states, QSI again applied several “filters” based on arguments designed to have regulators ignore the significant amount of fiber deployed by CLECs.<sup>103</sup> As a result, the conclusions reported by QSI are worthless as an evidentiary matter for purposes of this proceeding.

6. Verizon demonstrated in its comments that the data on competitive *fiber* do not provide the full extent to which alternative loop facilities are available, because fiber is not the only technology that competing carriers can use to provide high-capacity loop services. Both fixed wireless and cable networks provide additional competition in the supply of high-capacity loops. *See 2004 Fact Report* at III-22 to III-27 & Tables 13-16, III-38 to III-40 & Table 19. Several commenters claim that cable is not an effective competitor for business customers — either because their networks do not pass enough businesses, or because cable does not offer the kinds of services that business customers demand.<sup>104</sup> But neither of these claims has merit.

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<sup>103</sup> For example, QSI unilaterally excluded all instances of competitive fiber in buildings: (1) where there were fewer than 2 CLECs at that building each acknowledging that they were self-providing loops at the DS3 level, which meant excluding all instances where CLECs were using fiber to provide OCn-level service; (2) where there were fewer than 2 CLECs with fiber in the building each of which with access to the entire premises (as determined by QSI using unspecified criteria); and (3) that were “initially identified by the ILEC for review and for which there was no record in responses to either commission-issued or ILEC/CLEC-issued discovery were removed from the list.

<sup>104</sup> *See NuVox* at 10; *AT&T* at 77; *ALTS et al.* at 56-58.

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First, the facts show that cable companies are already offering service to business customers in at least 90 MSAs. *See 2004 Fact Report* at III-36.<sup>105</sup> Cable companies are both deploying fiber directly to areas of business concentration (usually through their CLEC affiliates), and are extending their hybrid-fiber coax networks into these areas to provide businesses services. *See id.* at III-25, III-36 to III-38 & Table 19. Analysts estimate that nearly 60 percent of “small- to medium-sized businesses (SMB) are located within a few hundred feet of the local hybrid fiber/coaxial network,” and that roughly 25 percent already have a cable drop. *See id.* at III-37. Time Warner Cable has acknowledged that “[c]able is not incredibly difficult to get to the business.” *See id.* at III-38, Table 19. Time Warner Cable is “[d]elivering cost effective, high capacity access solutions to several Fortune 500 customers,” with an infrastructure “that is just ripe for commercial services,” passing “1.2 million businesses.” *See id.* Cox claims that more than 320,000 businesses with “a total telecom spend of roughly \$3.3 billion annually” lie within 100 feet of Cox’s network. *See id.* Cox is accordingly “marketing basic data and video services aggressively to small- and medium-sized businesses the company can easily serve with current network connections.” *See id.*

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<sup>105</sup> While AT&T claims (at 77 & Selwyn Decl. ¶ 113) that the Commission’s data show that cable operators provide service to only 30,000 connections to medium-sized and large businesses nationwide, AT&T relies on two-year old Commission statements relying on three-year old data. AT&T’s Selwyn Decl. ¶ 113 (citing Third Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 17 FCC Rcd 2844, ¶ 45 (2002)). Two cable operators alone — Time Warner and Cox — now report serving more than eight times that amount, and each of the other major cable operators are actively pursuing business customers as well. *See 2004 Fact Report* at III-25, III-36 to III-38 & Table 19. And, of course, given that cable is a relatively new entrant, the more relevant statistic is how many business customers can obtain access to cable, not how many already do.

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Second, there is no question that cable companies are offering the kinds of services that business customers demand. Cable providers are offering larger business customers the same kinds of fiber-based services that other CLECs provide. *See 2004 Fact Report* at III-12, Table 7. For example, Cox offers private line services “[d]elivered over Cox Business Services’ fiber-optic-based network,” at speeds of DS1 on up.<sup>106</sup> Time Warner Telecom “offers custom solutions with end-to-end network connectivity” using its “expansive local footprint and nationwide IP backbone,” at transmission speeds “from 1.5 Mbps to 10 Gbps.”<sup>107</sup> Cablevision Lightpath “offers standard T-1 access through enterprise scale OC-12 floodgates, delivering end-to-end service your company can count on,” all over “Lightpath’s fiber optic backbone.”<sup>108</sup> Cable companies also are offering smaller businesses cable modem services tailored to their needs, including the demand for symmetrical services. *See 2004 Fact Report* at A-3 to A-5 & Table 3. A recent study by In-Stat/MDR found that 41 percent of “enterprises,” 32 percent of “middle market” businesses, and 44 percent of “small businesses” “were using cable modem service in their main offices for some high-capacity services.” *See id.* at A-3. And analysts have found that “an increasing number of business customers are using cable modem service in lieu of traditional special access and private line services.” *See id.* at III-37.

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<sup>106</sup> Cox Business Services, *Internet/Data Service: DS-1*, at [http://www.coxbusiness.com/systems/az\\_phoenix/ds1\\_dataservices.asp](http://www.coxbusiness.com/systems/az_phoenix/ds1_dataservices.asp); Cox Business Services, *Internet/Data Service: Data Services*, at [http://www.coxbusiness.com/systems/az\\_phoenix/dataservices.asp](http://www.coxbusiness.com/systems/az_phoenix/dataservices.asp).

<sup>107</sup> Time Warner Telecom, *Dedicated High Capacity Services*, at <http://www.twtelecom.com/Default.aspx?navId=222&configArgs=src=dctm;doc=0900bb3f801414a7>.

<sup>108</sup> Cablevision Lightpath, *Private Line*, at <http://www.lightpath.net/Interior105.html>; Cablevision Lightpath, *Data*, at <http://www.lightpath.net/Interior9.html>.

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Several commenters also claim that fixed wireless is not a viable technology to serve many businesses. As an initial matter, at least some of these commenters — such as XO and AT&T — have made public the fact that they do use fixed wireless in some instances. *See 2004 Fact Report* at III-24, Table 15; AT&T’s D’Apolito/Stamley Decl. ¶ 16 n.6. In fact, analysts report that a significant percentage of businesses (between 20 and 40 percent, depending on the size of the business) are now using fixed wireless services for at least some high-capacity services.<sup>109</sup> But both AT&T and XO have failed to provide a list of the locations where they themselves are using this technology.

In any event, these carriers’ criticisms are misplaced. First, they claim that fixed wireless is limited to those providers that have a wireless broadband license. *See AT&T* at 76. But as Verizon demonstrated, wireline CLECs may obtain fixed wireless capacity from a number of third-party suppliers. *See 2004 Fact Report* at III-23, Table 14. For example, First Avenue Networks (which has recently acquired Teligent) provides wholesale fixed wireless spectrum in virtually all of the top-150 MSAs. *See id.* at III-24, Table 16 & App. G. Second, AT&T claims that fixed wireless requires a clear line-of-sight. But there are certainly tens if not hundreds of thousands of business for which this is perfectly feasible. In any event, new fixed wireless standards and technologies are helping to alleviate line-of-sight requirements. *See 2004 Fact Report* at III-20 to III-21.

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<sup>109</sup> K. Burney, *et al.*, In-Stat/MDR, *Cash Cows Say “Bye-Bye”*: *The Future of Private Line Services in US Businesses* at 19, Tables 9 & 10 (Dec. 2003) (“In-Stat/MDR December 2003 Study”); *2004 Fact Report* at III-36.

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**D. Competitors Are Not Impaired Without Unbundled Access to Dark Fiber**

The evidence demonstrates that competing carriers are not impaired without unbundled access to dark fiber, and that requiring such unbundling would discourage competing carriers from deploying their own fiber facilities.

Within Verizon's region, competing carriers have obtained a total of only 936 unbundled dark fiber transport facilities and only 50 unbundled dark fiber loops. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 49. This compares, for example, to the more than 11,000 lit buildings identified in Verizon's top-40 MSAs. *See id.* This demonstrates that competing carriers are competing successfully without access to dark fiber, either by using their own lit fiber, obtaining lit or dark fiber from other competitive suppliers, or by using special access service. Indeed, as Verizon has demonstrated, there are at least 80 competitive fiber providers within Verizon's region alone. *See* Verses/Lataille/Jordan/Reney Decl. Exh. 4A. As demonstrated above, these carriers are offering services at all levels of capacity, many of them make that capacity available on a wholesale basis, and all are capable of doing the same. A number of these carriers also represent that they provide dark fiber in addition to lit fiber, *see* 2004 Fact Report at III-18 & Table 11, and Attachment J collects statements to that effect for 20 competitive providers. In addition, Verizon's data show that CLECs are competing successfully using special access to fill in and extend fiber in areas and locations where competitive fiber does not yet reach. *See* Lataille/Jordan/Slattery Reply Decl. ¶¶ 30-31.

Alpheus claims that the benefits of unbundling dark fiber outweigh the costs, but its argument is based on two flawed assumptions. First, it claims (at 11) that unbundling dark fiber is efficient because otherwise the fiber would lie "dormant." But dark fiber is not deployed with

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the intention that it remain dark; it is deployed so that it will be available to be lit as demand increases. *See* Pilgrim Reply Decl. ¶ 7. If, however, competing carriers are permitted to lease that dark fiber as UNEs, then any dark fiber they do lease will not be available for its intended purpose — to fill anticipated demand on the ILECs' networks to serve the ILECs' customers. *See id.* ¶ 8. Therefore, when that anticipated demand actually arises, ILECs will have to deploy *additional* fiber to meet that demand. *See id.* The net result of mandatory unbundling of dark fiber, therefore, is that the cost of fiber deployment will be shifted from CLECs to ILECs, even though, as the Commission found, ILECs have no particular cost advantage over CLECs in the deployment of fiber. *See Triennial Review Order* ¶ 240. And this will ultimately result in less facilities-based competition, because CLECs will rely on the ILEC facilities rather than deploy their own or use the facilities of other competitive suppliers. *See, e.g., Renaissance Reply* at 6 (explaining that eliminating UNEs will help foster investment in innovative fiber deployment technologies).

Alpheus nonetheless claims (at 12-13) that unbundling of dark fiber promotes efficient investment in the electronics that attach to fiber. But that obscures the fact that competing carriers would still be using the ILEC's underlying transmission facilities, which they already do when they obtain special access. As described below, competing carriers provide a vast array of services — everything from wireline and wireless voice to packet-switched data services such as ATM and Frame Relay — by attaching electronics to special access circuits. Indeed, the bulk of special access — 80 percent for Verizon — is sold on a wholesale basis to other carriers, a great deal of which these carriers then resell to end-user customers as part of a service that employs the carrier's own electronics and other network facilities. *See Verses/Lataille/Jordan/Reney*

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Decl. ¶ 51; Nogay Decl. ¶ 23. Thus, requiring unbundled access does not promote any additional investment beyond the investment that competing carriers are already making. Rather, it merely enables competing carriers to obtain the underlying transmission facilities at a lower price, which is not a valid basis for impairment. *See Iowa Utils. Bd.*, 525 U.S. at 390-91.

**E. Competitors Are Capable of and Are Using Special Access To Compete Successfully**

1. Verizon demonstrated in its opening comments that, although competing providers are relying heavily on their own or alternative facilities to provide high-capacity services, they also are extending the reach of those facilities by using special access services purchased from ILECs. Verizon demonstrated that competing providers are in fact using special access to serve customers of all shapes and sizes, and in all geographic markets.

Specifically, Verizon provided maps of the location in its top-40 MSAs where the three largest and three to six smaller competing providers were using special access in those MSAs, and these maps demonstrate that competing providers are using Verizon special access to serve customers in areas of high concentration, where competitive facilities already exist, as well as in areas where demand is less concentrated and competitive facilities have not yet been deployed. *See Verizon Comments at 56-58 & Attach. H (Maps D & E); Verses/Lataille/Jordan/Reney Decl. ¶¶ 46-48.* Verizon also provided a list of the types of customers that this subset of carriers is serving using special access services purchased from Verizon, which includes not only large enterprises, but also small 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-B.* Verizon further demonstrated that competing carriers of all varieties are using special access — both smaller carriers such as

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**[END CLEC PROPRIETARY]**, as well as larger carriers such as **[BEGIN CLEC PROPRIETARY]** **[END CLEC PROPRIETARY]**. *See* Verizon Comments at 39; Nogay Decl. ¶ 20; Verses/Lataille/Jordan/Reney Decl. Exhs. 7A-B.

No party seriously challenges Verizon's showing or provides any information regarding their own use of special access. To the extent some carriers nonetheless claim that special access is not a viable alternative, their claims are misplaced.

2. A few of the smaller CLECs claim that it is not viable for them to use special access to serve the customer segments and geographic markets they have chosen to serve — in particular, small and medium businesses in smaller markets.<sup>110</sup> These carriers claim that, given the revenues these customers generate, and given the rates for UNEs as compared to special access, the only way to serve these customers is through DS1 loops or EELs.<sup>111</sup> But Verizon's data show that competing carriers as a whole are using special access extensively to serve small and medium business customers in both large MSAs as well as smaller ones, and in all parts of those MSAs, including areas close to competitive fiber as well as areas farther away from such facilities. *See* Verizon Comments at 57 & Attach. H (Maps D & E). Verizon's data also show that competing carriers are using special access to extend or fill in their networks in wire center locations where they have deployed fiber networks, or where other competitive fiber exists. *See*

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<sup>110</sup> *See, e.g.*, NuVox at 11-12; Advanced Telcom's Wigger Decl. ¶¶ 21-24; Talk America's Brasselle Decl. ¶¶ 11-17; XO's Tirado Decl. ¶¶ 41-43; Xspedius's Falvey Decl. ¶¶ 34-36.

<sup>111</sup> *See, e.g.*, NuVox at 21-22, 31-34; NTS at 36; MCI at 154-62; CompTel/ASCENT at 27-28; Advanced Telcom's Wigger Decl. ¶¶ 11-14; Xspedius's Falvey Decl. ¶ 43.

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Lataille/Jordan/Slattery Reply Decl. ¶¶ 30-31 & Exh. 12. The fact that some individual CLECs have been unable to replicate the success of these other carriers is not a valid basis for a finding of impairment. Rather, if it shows anything, it strongly suggests that the problem lies instead with these particular carriers and their business model. If competing carriers as a whole are able to use special access to serve small business customers in smaller MSAs, the Commission cannot find impairment based simply on some CLECs' showing that they cannot operate as efficiently as those other CLECs, or that their business models are premised on the availability of UNEs.<sup>112</sup>

3. A few carriers also take issue with Verizon's showing that, to the extent other carriers use Verizon's network to provide high-capacity services, they do so predominantly using special access rather than UNEs.

First, some competing carriers claim that these data are misleading because they include the special access used by long distance and wireless providers.<sup>113</sup> But Verizon demonstrated that when the three traditional IXCs (*i.e.*, AT&T, MCI, and Sprint) are removed from the analysis, the data show that 90 percent of the DS1 loops, 95.5 percent of the DS3 loops, and 91 percent of the DS1 loop/transport combinations that competing carriers purchase from Verizon are purchased as special access rather than as UNEs. *See Verses/Lataille/Jordan/Reney Decl. Exh. 10.* And when wireless carriers are removed together with the three incumbent IXCs, the data still show that more than 90 percent of the DS1 loops and more than 97 percent of the DS3 loops that competing carriers purchase from Verizon are purchased as special access rather than

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<sup>112</sup> *See* Integra at 22 (“Special access can never be a substitute for ILEC network elements at TELRIC for this simple reason: the business plan for Integra Telecom and all companies similarly situated was based on TELRIC pricing for unbundled network elements.”).

<sup>113</sup> *See, e.g.*, Loop & Transport at 53-54; ATX *et al.* at 8-9; McLeod at 37.