as UNEs. *See* Verses/Lataille/Jordan/Reney Decl. Exh. 10.[114] An analysis of individual CLECs further confirms that many competing carriers — of different sizes — are providing high-capacity services using special access rather than UNEs. *See id.*[115]

Second, a few competing carriers nonetheless claim that data showing the percentage of high-capacity circuits that competing carriers are purchasing as special access rather than UNEs are misleading because these carriers' orders for UNEs have been rejected on "no facilities" grounds.[116] As an initial matter, the fact that competing carriers were able to serve customers successfully using special access demonstrates that they did not need access to UNEs, regardless of whether they would have preferred to have obtained those same circuits at a lower price.[117] In any event, Verizon has confirmed that even when UNE orders rejected for lack of facilities are factored into the previous analysis by assuming that all of those rejected orders would have been

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[114] These results accordingly disprove the speculative claims made by XO in its August 11, 2004 ex parte letter in this docket, which AT&T repeats (at 96) here.

[115] Although the Loop and Transport Coalition claims (at 53) that its members rely predominantly or entirely on UNEs rather than special access, that is irrelevant. The fact that a large number of other competing carriers are relying predominantly or exclusively on special access, and are serving all types of customers in all types of markets, shows that competition is possible using special access.

[116] *See, e.g.*, AT&T at 96; XO's Tirado Decl. ¶ 45; Loop & Transport at 55-60; Broadview's Sommi Decl. ¶ 15; Xspedius's Falvey Decl. ¶¶ 37-38; BayRing's Wengert Decl. ¶ 16; Covad's Derodeff/Bennet/Richman Decl. ¶ 44; McLeod at 40.

[117] The claim that CLECs "typically do not opt for special access services by choice" and would "*prefer* to purchase" facilities at TELRIC rates fundamentally misconceives the impairment inquiry. Loop & Transport at 55; Integra at 22; *see also* McLeod at 20-21, 39-42; CompTel/ASCENT at 21. As the Supreme Court held, the fact that UNEs are cheaper than other means of competing does not demonstrate impairment if competition remains possible without UNEs. *See Iowa Utils. Bd.*, 525 U.S. at 390-91. For the same reason, commenters' labored efforts to demonstrate that special access rates are higher than TELRIC rates are beside the point. *See, e.g.*, NuVox at 21; Integra at 22-23; Covad at 84-87; Loop & Transport at 46-47. The only relevant question is whether entry is possible without UNEs, not whether it would be more lucrative with UNEs.

purchased as UNEs instead of special access, carriers still would have purchased 93 percent of their DS1s and 98 percent of their DS3s as special access circuits compared to UNEs. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 37.[118] Verizon's analysis also shows that the lack of facilities did not in fact prevent competing carriers from obtaining access to UNEs. Rather, even in instances where UNE orders were initially rejected, CLECs were still able to obtain access to facilities as special access, and then convert those special access circuits to UNEs after one to three months. *See id.* ¶ 35. This holding period is merely a way for Verizon to recover some part of the costs of constructing facilities on the CLECs' behalf.[119] Third, some carriers also claim that the fact that competing carriers have been using special access does not prove that they have been successful or profitable at it.[120] Yet these commenters fail to identify a *single* company that has relied primarily or exclusively on special access that has failed because of that strategy. While they point to a list of 48 CLEC bankruptcies, they provide no evidence that any of those CLECs relied primarily on special access as opposed to UNEs, or that this is the reason they failed.[121] The fact of the matter is that several competing carriers that rely predominantly or exclusively on special access are successful.

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[118] Integra claims (at 23) that Verizon's data are misleading because, prior to January 2002, for special access converted to UNEs Verizon used a billing adjustment rather than full reclassification. As the Lataille/Jordan/Slattery Reply Declaration explains, however, these past billing adjustments were properly classified as UNEs for purposes of Verizon's analysis. *See* Lataille/Jordan/Slattery Reply Decl. ¶¶ 51-52.

[119] Even this brief holding period is not a an absolute bar, and some carriers may convert special access to UNEs immediately and pay the relatively small penalty. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 38.

[120] *See, e.g.*, AT&T at 96; Loop & Transport at 64-65; ALTS *et al.* at 14.

[121] Mayo/MiCRA/Bates White Economic Analysis at 16, Table 1 (Oct. 4, 2004), attached to Ex Parte Letter from Thomas Cohen, The KDW Group, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, *et al.* (Oct. 5, 2004).

As an initial matter, whether a CLEC is financially successful is typically measured by whether it is achieving positive Earnings Before Interest Taxes, Depreciation & Amortization or "EBITDA." *See* Lataille/Jordan/Slattery Reply Decl. ¶ 54. As Time Warner Telecom explains, this " recognized metric of operating performance and liquidity" is "widely used by analysts, investors, and other interested parties in the telecommunications industry because it eliminates many differences in financial, capitalization, and tax structures, as well as non-cash and non-operating charges to earning."[122] EBITDA can provide a relatively good "apples-to-apples" comparison between companies in the same industry without consideration of how they are financed or how they calculate depreciation. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 54. Further, since EBITDA eliminates capitalized long term costs from its calculation, it is an especially good way to isolate and compare core operating performance for start-up companies. *See id.* While start-ups would tend to have significant up-front costs — both capitalized and expensed — removing the capitalized portion is a better way to compare their results. *See id.*

The record shows that a number of carriers that rely predominantly or exclusively on special access are EBITDA positive. *See id.* Exh. 29. For example, Time Warner Telecom's most recent earnings statement reports that it "Produced EBITDA of $55.2 million and EBITDA margin of 34%."[123] PAETEC states in its comments here (at 3) that it is "happy to report that it has been a net income positive business for eight consecutive calendar quarters." US LEC, a carrier about which the Loop and Transport Coalition claims (at 65) analysts are now "bearish,"

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[122] Time Warner Telecom Press Release, *Time Warner Telecom Announces Second Quarter 2004 Results* (Aug. 4, 2004) ("August 4, 2004 Time Warner Telecom Press Release"). Exhibit 29 to the Lataille/Jordan/Slattery Reply Declaration contains excerpts from recent SEC filings by seven different CLECs that likewise use EBITDA.

[123] August 4, 2004 Time Warner Telecom Press Release.

just reported on October 1, 2004 a $150 million private placement — "one of only a few successful telecom financings this year" — "demonstrating our ability to access the capital markets again with solid operational results."[124] US LEC also reports positive EBITDA — $13 million in its most recent earnings statement.[125] Pac-West, another CLEC that "does not employ UNEs in its current network architecture in any significant way" and that does use special access also reported positive EBITDA for the first half of 2004 ($6.7 million) and for 2003 ($29 million).[126] Telepacific also has "reported that it generated positive earnings before interest, taxes, depreciation and amortization (EBITDA) in the second quarter of 2004."[127] These statements confirm what ALTS has concluded: "CLECs that rely primarily on old-fashioned special access (instead of unbundled network elements) have logged impressive growth."[128]

In sum, the commenters here have not introduced any evidence — let alone substantial evidence — demonstrating that their "reliance on special access has not posed a barrier that makes entry uneconomic." *USTA II*, 359 F.3d at 575; *see also id.* at 592 ("CLECs have pointed

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[124] US LEC Press Release, *US LEC Completes $150 Million Private Placement* (Oct. 1, 2004).

[125] US LEC Press Release, *US LEC Achieves $91.6 Million in Revenue and $12.9 Million of EBITDA* (July 29, 2004) (quoting Michael K. Robinson, Executive Vice-president and Chief Financial Officer).

[126] Pac-West Form 10-Q at 12; June 10, 2004 Pac-West Press Release; *see also* Ex Parte Letter from R. Rindler, Counsel for Pac-West, to Marlene Dortch, FCC, at 2, CC Docket Nos. 01-338, *et al.* (Sept. 7, 2004) ("Pac-West serves all customers via facilities obtained from other carriers, with much of that being obtained from the ILECs.").

[127] Telepacific Communications Press Release, *Telepacific Communications Posts Positive EBIDTA in Second Quarter of 2004* (July 28, 2004).

[128] ALTS, *The State of Local Competition 2003*, at 5 (Apr. 2003), *at* http://www.alts.org/Filings/2003AnnualReport.pdf.

to no evidence suggesting that they are impaired [without UNEs] with respect to the provision of long distance services").

4. Despite the evidence that competing carriers as a whole, including individual carriers both large and small, are competing successfully using special access, a number of CLECs claim that the tariffed rates for special access are still too high for them to compete.

As an initial matter, even assuming there were concerns about the rates for special access — and, as demonstrated below, there is no valid reason for such concerns — this is not a basis on which the Commission may lawfully find impairment. Rather, the price for special access is a matter that the Commission can address directly, and it has already done so both through regulation under price caps, and through deregulation pursuant to the framework established in the *Pricing Flexibility Order*. If there is ever a concern that special access rates are uncompetitive, the Commission must address those concerns in that pre-existing framework, not in this one.

In any event, Verizon has demonstrated that competing carriers are able to purchase special access at deep discounts off the tariffed "base" rates for these services — on the order of 5 to 40 percent — when they enter into volume and/or term commitments (ranging from 1 to 7 years, depending on the service and geographic area). *See* Verses/Lataille/Jordan/Reney Decl. ¶ 60. As Verizon explained, competing carriers are availing themselves of these discounted rates and in general are purchasing special access services from Verizon at discounts that typically are approximately 35 to 40 percent off the base rates for these services. *See id.* And the fact that carriers are successful serving end-users using special access purchased at these prices is conclusive proof that they are not impaired in their ability to compete.

Because competing carriers typically purchase special access service at these deep discounts, or at a minimum have the opportunity to do so, the claim that the tariffed rates for special access service have increased since ILECs were granted pricing flexibility, which several carriers repeat here, is irrelevant.[129] And the fact is that prices have declined during the period of pricing flexibility — including prices for DS1 circuits in particular —and Verizon's prices have declined even faster than BOC prices as a whole. *See* Taylor Special Access Pricing Decl. ¶¶ 7-9; Taylor Reply Decl. ¶ 21; Verses/Lataille/Jordan/Reney Decl. ¶ 61.[130] Dr. Taylor has also demonstrated that, the prices that carriers have actually paid for special access have dropped faster during the pricing flexibility period than before. *See id.* ¶ 11; *See* Taylor Reply Decl. ¶¶ 8-9.[131] And when revenues from DSL are removed from the data (to account for the fact that DSL lines are not included in these ARMIS reports), the results for Verizon show even greater year-over-year price reductions than before, with those reductions greater during the pricing flexibility period (an average of 21 percent per year in nominal terms and 22 percent in real terms) than

[129] *See, e.g.*, AT&T at 123; ALTS *et al.* at 59-60; MCI at 154-62; Talk America's Brasselle Decl. ¶¶ 11-17; XO's Tirado Decl. ¶ 41; ATX *et al.* at 18; NuVox at 41-45; McLeod at 11-12, 38-39.

[130] ALTS claims (at 60) that Verizon's special access rates have increased by 10 percent in Manhattan since it was granted pricing flexibility. But Verizon's data show that the average price per circuit that Verizon's carrier customers are paying for DS1 special access circuits in New York has declined by 17 percent since 2001 (and by a larger amount in real terms when inflation is taken into account). *See* Lataille/Jordan/Slattery Reply Decl. ¶ 17.

[131] AT&T argues that that rates for special access are generally much higher in areas where pricing flexibility has been granted, than in MSAs where ILECs have not yet obtained such relief. *See* AT&T at 106 & Stith Decl. Att. 1. But AT&T's analysis is fundamentally flawed — it looks only at month-to-month and select discount plans, and does not take into account what carriers actually purchase, including the contract pricing that is allowed only in pricing flexibility areas.

under price caps (an average of 12 percent per year in nominal terms and 14 percent in real terms). *See* Taylor Reply Decl. ¶ 8 & Table 1.

AT&T claims (at 107) that these declines in revenues per line are misleading, because it is "due principally to a changing mix of services" — with higher capacity services, that have a lower effective price per DS0 equivalent, growing at a faster rate than lower capacity services. But, as Dr. Taylor explains, the changing mix of services cannot account for the dramatic price reductions carriers have received in recent years. *See* Taylor Reply Decl. ¶¶ 17-23. In fact, Verizon's data show that prices for DS1 circuits alone have declined during the pricing flexibility period. *See id.* ¶ 21; Verses/Lataille/Jordan/Reney Decl. ¶ 61.

AT&T also repeats its timeworn claim that reported special access returns show that prices are not competitive. AT&T at 93, 107 & Stith Decl. ¶ 17. As Verizon has explained, however, such claims calculate BOC margins using ARMIS data, which the Commission has found is not suited for this purpose.[132] For example, although the Commission's accounting rules group revenues associated with DSL services and other interstate packet-switched services together with traditional special access services, they assign a significant portion of the underlying costs associated with those services to other categories.[133]

5. A number of competing carriers claim that, to the extent competing carriers are able to obtain special access at rates that enable them to compete, it is only by locking into term

[132] Order on Reconsideration, *Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd 2637, ¶ 199 (1991).

[133] *See* Declaration of Alfred E. Kahn & William E. Taylor at 7-9, attached to Opposition of Verizon, *AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access*, RM-10593 (FCC filed Dec. 2, 2002).

and volume commitments, which they claim have the effect of discouraging the use of competitive facilities in favor of special access.[134] These claims are misplaced.

Term and volume plans are an indicator that markets are competitive and are beneficial to consumers; they are not, as the commenters would have the Commission believe, a way for ILECs to thwart that competition. As the Commission has held:

> [V]olume and term discounts are generally legitimate means of pricing services to recognize the efficiencies associated with larger volumes and the certainty of longer- term arrangements. Restricting the offering of volume and term discounts in a competitive market could create a pricing umbrella for competitors, thereby depriving customers of the benefits of more vigorous competition and potentially undermining the efficiency goals of the Commission's rules by preventing the incumbent LEC from competing effectively even if it is the low cost service provider.[135]

In the special access context, the Commission has accordingly permitted Bell companies to offer term and volume discounts upon a showing "where sufficiently competitive conditions exist such that unreasonable and unlawful discrimination will not likely result."[136] And if there are any concerns about whether those decisions were premature, the Commission can — and must — address those concerns directly, it may not use them as an excuse to order unbundling here.

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[134] *See, e.g.*, AT&T at 152-56; NuVox at 45-49; Time Warner Telecom at 14; ALTS *et al.* at 31-32.

[135] Order, *ATU Telecommunications Request for Waiver of Sections 69.106(b) and 69.124(b)(1) of the Commission's Rules*, 15 FCC Rcd 20655, ¶ 17 (2000) (citing Memorandum Opinion and Order, *Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154, 5200 (1994)).

[136] Order on Review, *AT&T Corp. et al. Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Various Countries*, 13 FCC Rcd 23924, ¶ 17 n.38 (1998) (citing Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, *Access Charge Reform*; *Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing*; *Usage of the Public Switched Network by Information Service and Internet Access Providers*, 11 FCC Rcd 21354, 21435 (1994)).

In any event, Verizon has conducted an analysis of its term pricing plans that demonstrates that customers may exit these plans without suffering significant financial consequences. Of course, carriers are not required to enter these term plans to begin with — they do so in order to obtain significant discounts, which they can then pass on to consumers. *See* Lataille/Jordan/Slattery Reply Decl. ¶¶ 20-21. In fact, Verizon provides an example of a carrier, **[BEGIN CLEC PROPRIETARY]** **[END CLEC PROPRIETARY]**, that could *save* money by converting its existing UNEs and combining them with its existing special access circuits under a discount plan. *See id.* ¶ 28. But even if a carrier later decides that it would rather use some other alternative, it can do so by paying a termination charge that does not make the carrier any worse off than it would have been had it decided not to enter that term agreement in the first instance, and generally gives the carrier the benefit of any shorter term plan they would have qualified for based on their date of termination. *See id.* ¶¶ 23-24. So, for example, if a customer places a circuit on a seven-year term plan and terminates after three years, the most the customer would pay is the difference between the seven-year and three-year discount rates under those plans. *See id.* ¶ 24.

Verizon's discount term plans also do not "lock" carriers into maintaining service with Verizon or require them to commit a major percentage of their total special access revenue spending with Verizon. *See id.* ¶ 25. Verizon offers two types of discount plans, neither of which requires such commitments. *See id.* ¶ 21. The first type of discount plan is strictly a term of years pricing plan that is circuit specific, with the amount of the discount increasing as the term commitment increases. *See id.* Carriers can opt to place circuits under this plan on a circuit-by-circuit basis. *See id.* Verizon's second type of discount plan is called a Commitment

Discount Plan, which is designed for carriers that purchase a minimum of 336 DS0s or their equivalent (*e.g.*, 14 DS1s or 1 DS3). *See id.* ¶ 22. This plan also requires a one-year minimum service period, and also requires a carrier to agree to a minimum volume level, for DS1s and DS3s, equal to 90 percent of the total number of channel terminations for the service type that they have in service with Verizon at the time they subscribe to the plan. *See id.* For example, a carrier who has 100 DS1s with Verizon and subscribes to the plan must agree to maintain at least 90 DS1s with Verizon for the term of the plan. *See id.* Carriers are free, however, to remove individual circuits as they choose, without termination liability, as long as they meet these commitments. *See id.* This enables growing carriers that do reach a point where they can build some facilities (or obtain them from another provider at a lower rate) to move individual circuits off of Verizon's special access services as they are able to do so. *See id.* For example, this would allow a carrier to reduce the number of special access circuits in one area as it builds out its own facilities, while adding special access circuits in another area as it begins to build a customer base there in advance of deploying facilities there as well, and to continue the pattern in additional areas. *See id.*

While competing carriers nonetheless claim that term and volume plans discourage competing carriers from using their own facilities, they provide no actual proof this has in fact occurred.[137] Nor does this argument make economic sense. Where high-capacity UNEs are available at rates considerably below special access rates, competing carriers will have even stronger incentives to rely on the ILEC's facilities than they would in the absence of those lower priced alternatives. The fact that UNEs can be purchased on a month-to-month basis, whereas

[137] *See, e.g.*, AT&T at 153-54; NuVox at 45-49; Time Warner Telecom at 14.

the largest discounts for special access are available only through long-term commitments, makes the problem worse, not better as some commenters claim.[138] Such month-to-month arrangements effectively lower the price of UNEs even further below the costs of special access and facilities-based alternatives, providing still further incentives for competing carriers to rely on the ILEC's network *ad infinitum.*

6. Because they cannot demonstrate that special access has in fact posed a barrier through the present, competing carriers argue that eliminating UNEs will enable ILECs to increase special access prices in the future and engage in anticompetitive price squeezes for various services that use special access as an input.[139] This argument rests on the deeply cynical (and wholly unsupported) premise that the Commission "lacks the resources" or ability to monitor special access rates as effectively in the future as it has done in the past.[140] But the Commission has consistently rejected these sorts of claims, and has found that it is capable of regulating special access prices and guarding against potential price squeezes involving special access.[141] As the Commission has stated, "price-cap regulation of the BOCs' access services sufficiently constrains a BOC's ability to raise access prices to such an extent" that the BOC

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[138] *See, e.g.*, AT&T at 153-54; ALTS *et al.* at 31-32.

[139] *See, e.g.*, AT&T at 95-96; Loop & Transport at 48-52; MCI at 169; NuVox at 45.

[140] *See, e.g.*, AT&T at 89-90, 115-20; MCI at 163-65; NuVox at 41-45; Covad at 81-84; ALTS *et al.* at 33-34.

[141] *See LEC Classification Order* ¶ 126 (noting that any concerns about a price squeeze could be addressed directly by regulating the prices for special access itself); *see also id.* ¶ 128 (observing that, in the unlikely event that predatory pricing behavior were to occur, it would be easily detected and, as a result, "it could be adequately addressed" through the Commission's complaint process); *Pricing Flexibility Order* ¶ 131 n.351 ("Intermedia's concerns about a potential price squeeze are best addressed in the context of a complaint filed under section 208 of the Act alleging that a rate charged pursuant to a contract tariff or volume or term discount is unreasonably low and thus violates section 201.").

could create a price squeeze. *LEC Classification Order* ¶ 126. And, to the extent that Bell companies have obtained relief from price caps, it is because the Commission has found that there is sufficient competition that "makes exclusionary pricing behavior costly and *highly unlikely to succeed.*" *Pricing Flexibility Order* ¶¶ 69, 80 (emphasis added).[142] Yet even assuming that there was some legitimate concern, the Commission must address that concern directly. It cannot, as the competing carriers argue, use this speculative concern as a basis for finding impairment. As the D.C. Circuit has explained, such an approach would be "irrational" and inconsistent with the court's "admonition in *USTA I* that the Commission must balance the costs and benefits of unbundling." *USTA II*, 359 F.3d at 570.

In any event, the competing carrier's wholly speculative claims that ILECs will engage in anticompetitive price squeezes are completely unfounded. To begin with, the burden for establishing a price squeeze is extremely high. As the Supreme Court has observed, because "[t]he success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain . . . , *there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.*" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (second emphasis added). This is especially true with respect to those services where ILECs face regulation at *both* the wholesale *and* the retail level, as is the case with respect to some or all of the services about which the competing carries complain here. As then-Judge Breyer explained

[142] For the same reasons, the Commission also must reject AT&T's claim (at 95) that the Commission has eliminated safeguards to protect against a potential price squeeze — such as § 272 requirements and OI&M restrictions — which were eliminated based on findings that they were not needed to protect competition and were instead more likely to impede it. *See* Report and Order and Memorandum Opinion and Order, *Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, 19 FCC Rcd 5102, ¶¶ 27, 31 (2004).

in *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), "where [an alleged monopolist's] prices are regulated at both the primary and secondary levels," a price squeeze is so unlikely that, as an antitrust matter, it is not even worth *asking* about it. *Id.* at 22.[143] In such circumstances, this Commission has observed, "carriers are likely to squeeze competitors who buy from them . . . only if those competitors operate *less* efficiently, *i.e.*, at higher costs." *INFONXX* ¶ 21 (first emphasis added).[144] And preventing this kind of price squeeze is counterproductive, as it "will more likely discourage efficient operations and deprive consumers of prices that reflect lower costs." *Town of Concord*, 915 F.2d at 26.

Just as the CLECs' price-squeeze claims fail as a matter of theory, they are unsupported as a matter of fact. First, these claims do not come close to meeting the evidentiary requirements for demonstrating a price squeeze. In particular, they do not come close to showing that current rates "*doom* competitors to failure" in the relevant retail market. *Sprint Communications Co. v. FCC*, 274 F.3d 549, 554 (D.C. Cir. 2001). To the contrary, carriers allege price-squeeze *theory*, while ignoring the *fact* of their own success in the market. For example, while AT&T alleges a price squeeze with respect to Frame Relay services, it does not even allege, much less prove, that it has been unable to compete in this market, and in fact AT&T remains the nation's largest Frame Relay provider by far. *See 2004 Fact Report* at III-32 to III-33.[145] Likewise, while

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[143] *See also* Memorandum Opinion and Order, *INFONXX, Inc. v. New York Tel. Co.*, 13 FCC Rcd 3589, ¶ 21 (1997) ("*INFONXX*").

[144] *See also Town of Concord*, 915 F.2d at 26 (where the wholesale input is regulated, "an integrated utility's prices are likely to squeeze independent distributors who buy from it at wholesale only if those distributors operate less efficiently").

[145] AT&T complains about a price squeeze for "T3 based frame relay service" in Verizon's region for one particular configuration that it asserts "is becoming more common." AT&T's Benway *et al.* Decl. ¶ 97. But these naked assertions do not amount to evidence that

AT&T complains about local private line service, its allegations could not be more vague: it has "largely" discontinued service in the limited case "where it relies upon leased access for the 'last mile' special access at both end [sic] of the circuit," but does not state where this may be, and acknowledges that it continues to provide service to "customers with the high level of demand" to whom AT&T is "able to provision the service using primarily its own network facilities." AT&T's Benway *et al.* Decl. ¶ 101. Moreover, AT&T's comparisons of its retail prices to what it pays for special access are littered with numerous assumptions that AT&T scarcely explains. *See* AT&T at 125 & Selwyn Decl. ¶¶ 103-104.[146] And other commenters that makes similar claims provide even less (and in most cases no) data for the Commission to evaluate such claims.[147]

Finally, BOC experience in long-distance and wireless markets puts the lie to CLEC concerns about a price squeeze. Although long-distance providers warned for more than a decade of the threat of a price squeeze once the Bell companies were permitted to enter long distance markets, in the five years since Verizon and other Bell companies began to obtain section 271 relief and enter the long distance market, these prophecies of doom never came to pass. To the contrary, as described in more detail below, the long-distance market today is more competitive than ever. Likewise, while wireless carriers have argued that Bell companies would

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there is a lack of competition for this particular service configuration, much less frame relay and packet

[146] Even a cursory review of AT&T's assumptions shows that its analysis is flawed. For example, while AT&T calculates the cost of obtaining one end of an interstate DS1 circuit from Verizon at $281 per month, *see* AT&T's Benway *et al.* Decl. Attachs. 1 & 2, the average that all of Verizon's customers actually pay is only $141, *see* Verses/Lataille/Jordan/Reney Decl. Exh. 15.

[147] *See, e.g.*, Talk America's Brasselle Decl. ¶¶ 12-14; Cbeyond's Batelaan Decl. ¶ 9.

use their control over special access to "alter their tariffs and thereby engage in a vertical price squeeze," the D.C. Circuit rejected that theory and held that the Commission could not require unbundling for wireless service.[148] Indeed, as demonstrated below, competition in the wireless market continues to thrive.

Verizon also has conducted an analysis showing that there are likewise no legitimate grounds for concern with respect to the high-capacity services that are used by long-distance carriers and other competing carriers. To the contrary, Verizon's data show that, contrary to the claims of AT&T and others, Verizon actually is *losing* market share at the retail level in the provision of DS1 services that the commenters allege the ILECs control. At the same time, its wholesale business is growing, as a result of competing carriers purchasing high-capacity services and reselling them together with their own retail services. From July 2003 through July 2004, Verizon's wholesale DS1 volume grew by **[BEGIN VERIZON PROPRIETARY]** **[END VERIZON PROPRIETARY]** percent, while Verizon's retail division experienced **[BEGIN VERIZON PROPRIETARY]** **[END VERIZON PROPRIETARY]**. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 18.

7. Finally, several competing carriers contend that special access does not provide an adequate substitute for UNEs because it is not subject to the same performance monitoring standards that are used to guarantee the quality of service that ILECs provide.[149] But even

[148] Brief of Wireless Intervenors on Behalf of Respondent at 9, *USTA v. FCC*, No. 00-1012, *et al.* (D.C. Cir. filed Jan. 16, 2004); *see id.* at 9 & n.10 (stressing that this matter is "of particular concern for wireless carriers that are not affiliated with an ILEC" and that, as a result, have to "compete with ILECs that control the pricing of critical inputs"); *see USTA II*, 359 F.3d at 576.

[149] *E.g.*, AT&T at 88, 110-12.

assuming there were some legitimate concerns about special access service quality — and, as described below, such concerns are unfounded — this is yet another instance where the Commission can address those issues directly, and therefore is not permitted to use them as an excuse for finding impairment. And, in fact, the Commission has already initiated a proceeding to do just that.[150]

In any event, the CLECs once again fail to provide any data demonstrating that special access quality is currently a problem. Rather, AT&T merely cites (at 110-11) data filed with the Commission between two and four years ago, and equally antiquated decisions from state commissions. No other commenter provides more recent evidence (to the extent they provide any at all).[151] Nor do the commenters offer any proof that these supposed concerns have caused them harm in the retail markets where they use special access. They make the obvious point that their customers "prefer high quality service," AT&T at 122, but do not state, much less prove, that they have been unable to satisfy these customers' needs.

Verizon has nonetheless reviewed its special access performance and this data show that its performance has been excellent in recent years according to standard metrics that the Commission has approved in other contexts. First, the data show that, from 2002 through 2004, Verizon has returned firm order confirmations on a timely basis more than 95 percent of the time, and an average of 97 percent of the time in the first eight months of 2004. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 45. Second, during that same time period, Verizon has installed special access services by their due date between 94 and 95 percent of the time. *See id.*

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[150] *See* Notice of Proposed Rulemaking, *Performance Measurements and Standards for Interstate Special Access Services*, 16 FCC Rcd 20896 (2001).

[151] *See, e.g.*, Time Warner Telecom at 15.

¶ 46. And, contrary to the claim that Verizon has a greater incentive to discriminate once it enters the retail long distance market,[152] its performance has actually improved the most in some states where it has been competing in long distance the longest — for example, in New York, its on-time performance has improved from 79 percent in 2001 to 92 percent in the first eight months of 2004. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 46. Third, Verizon's mean time to repair special access circuits that suffer outages has improved from an average of 5.8 hours in 2001 to 4.5 hours in the first eight months of 2004. *See id.* ¶ 47.

Finally, while Verizon's special access performance is excellent and continues to improve, it is simply not true that there is insufficient monitoring of special access performance today. In fact, Verizon provides to more than 30 of its carrier-customers performance reports on a monthly, and in some cases a weekly, basis. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 48.

F. The Commission Must Eliminate Unbundling for All Customers, Services, Facilities, and Market Segments for Which Competition Is Particularly Intense

As demonstrated above, the Commission should eliminate unbundling of all high-capacity facilities in all markets. This is the approach that best squares with *USTA II* and the market facts, and that is most likely to further the Act's goals of promoting facilities-based competition. At a minimum, however, the Commission must eliminate unbundling for certain customers, services, facilities, and market segments for which competition is particularly intense, and for which there also can be no finding of impairment.

As Verizon explained in its opening comments, *USTA II* reaffirmed the court's previous holding that the impairment inquiry must take a "nuanced" approach that analyzes whether

[152] *See, e.g.*, AT&T at 83, 91.

competition is impaired in "specific markets or market categories." 359 F.3d at 574 (citing *USTA I*, 290 F.3d at 426). The court squarely held that "competitors cannot generally be said to be impaired" in a particular market category or categories "where robust competition in the relevant market belies any suggestion that the lack of unbundling makes entry uneconomic." *Id.* at 592; *accord id.* at 576. This is true, the Court made clear, regardless of whether that robust competition developed by competing carriers using their own facilities, or whether they are using ILEC-supplied alternatives to UNEs such as special access.

Thus, in all individual market categories where robust competition has emerged without UNEs, including those categories where competitors rely on special access, it is not only unnecessary, but counterproductive — and unlawful — for the Commission to introduce UNEs for the first time, either by permitting competing carriers already in the market to switch to UNE-based alternatives, or by facilitating new entry by making UNEs available. Such an approach could only impede the competition that has already taken hold in these market segments, by giving UNE-based competitors the ability to undercut facilities-based rivals, thereby devaluing those facilities-based investments and reducing the incentives to make additional investments going forward.

1. Large Enterprise Customers

Verizon demonstrated in its opening comments that there is intense competition in the provision of services to enterprise customers, which account for the vast majority (85 percent in Verizon's region) of high-capacity services purchased by end-user business customers as a whole. Verizon Comments at 67 & Bruno Decl. ¶¶ 3-6. Verizon explained that this was true both with respect to services provided to large enterprise customers generally, and also with

respect to each of the individual services on which large enterprise customers rely — including packet-switched broadband services like ATM and Frame Relay. *See* Verizon Comments at 67-68, 69-70; *2004 Fact Report* at III-32 to III-34. As Verizon demonstrated, the incumbents in this market are AT&T, MCI, and Sprint, and these three carriers still account for more than half of all total revenues from large enterprise customers; nearly three-quarters of large corporate accounts; *three quarters* of the market for Frame Relay and ATM services; and they also are the major providers of other specialized high-speed data services provided to business customers, such as IP Virtual Private Network ("IP-VPN") services. *See* Verizon Comments at 67-68; *2004 Fact Report* at III-32 to III-33. Verizon also demonstrated that many other CLECs serve large enterprise customers, and provide ATM, Frame Relay, and IP-VPN services, as well. *See* Verizon Comments at 67-68, 69-70; *2004 Fact Report* at III-33.[153]

None of the commenters provide any detailed data regarding their provision of service to large enterprise customers either as a general matter or with respect to specific services. Nor does any commenter provide evidence that competing carriers are having difficulties competing in the provision of services to this customer segment. Rather, competing carriers acknowledge that they are fully capable of deploying facilities to customers that generate a significant amount of traffic, as large enterprise customers invariably do.[154] AT&T nonetheless claims (at 129) that

[153] Verizon also now faces competition for large enterprise customers within its own region from other BOCs, including SBC, which according to one analyst has recently deployed a "'SuperPOP' in Manhattan, a large out-of-region facility used for telephony traffic" that is a "very tangible example of SBC's aggressive move into the Enterprise market." C. Larsen, *et al.*, Prudential Equity Group, *SBC: Tour of SBC Facility in Manhattan Highlights the Company's Plans for the Enterprise Market* (Oct. 4, 2004).

[154] *See, e.g.*, MCI at 147-48; AT&T at 134; Advanced Telcom's Wigger Decl. ¶ 23; XO's Tirado Decl. ¶¶ 19-20.

"current market share data are not indicative of market power" in the large enterprise market and that it and the other IXCs that dominate this market are now "vulnerab[le] to price squeezes." As demonstrated above, however, these are speculative price-squeeze claims fail as a matter of theory and fact. Thus, the record of evidence established that competing carriers are not impaired in their ability to serve large enterprise customers, but are instead thriving, and the Commission must accordingly make a finding of no impairment with respect to this category of customers.

2. Wireless and Long Distance

Verizon demonstrated in its opening comments that both wireless providers and long-distance carriers use high-capacity services extensively to transport traffic within their networks, to connect their networks to other carriers, and, in the case of long-distance carriers, to provide high-speed connections directly to large end users, and that competition for both wireless and long-distance services has thrived, even though providers of these services have not relied on UNEs. *See* Verizon Comments at 70-75; *2004 Fact Report* at III-29 to III-30.

With respect to wireless services, no commenter disputes that competition has thrived despite the fact that wireless carriers do not use UNEs, nor could they. T-Mobile nonetheless argues (at 18-19) that wireless carriers should be permitted to obtain UNEs in place of special access so that wireless is better able to compete against wireline services. That is absurd. As Verizon has demonstrated, and as discussed further in Part III below, wireless services *already are* competitive with wireline services. *See* Verizon Comments at 101-03; *2004 Fact Report* at II-28 to II-31. That is particularly true with respect to price. In fact average wireless prices dropped below average wireline prices in 2003, *see 2004 Fact Report* at II-31, and have been

declining at an average of about 20 percent a year according to the Commission's own *Ninth CMRS Report*.[155]

T-Mobile is accordingly left to argue that, because wireless offers a different quality of service than wireline, if the price were even lower, an even greater number of consumers would likely switch to wireline. *See* T-Mobile's Williams Decl. ¶ 22. But that does not establish that wireless carriers are impaired. While wireless service does have some different qualities than wireline, the main difference is mobility, which is major advantage for wireless. And the fact of the matter is that, regardless of quality differences, wireless competes directly with wireline for both minutes and lines. There is accordingly no basis to conclude that wireless carriers are impaired in their ability to provide *wireless* services, which is all that matters here.

The comments also do not demonstrate that competing carriers would be impaired without access to UNEs in the provision of long-distance service. While AT&T claims (at 129) that "conditions have radically changed" in this market, because the Bell companies have been permitted to enter, in the five years since that entry began the long-distance has grown only more competitive, not less so, as Verizon has demonstrated. *See* Verizon Comments at 74-75; *2004 Fact Report* at II-17 to II-18. And contrary to the claims of AT&T and others that the Bell companies have increased incentives to raise their special access prices after entering long distance markets, the facts show that the opposite has in fact occurred. Verizon has analyzed the average price per circuit that its wholesale customers are paying for DS1 special access circuits in New York and in the former GTE states, where Verizon has had authority to offer long

[155] Ninth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 04-111, FCC 04-216, ¶¶ 168-171 (rel. Sept. 28, 2004).

distance services since at least 2001. This analysis demonstrates that the average price per circuit has declined by an average of 17 percent from 2001 through April 2004 in New York, and by an average of 8 percent in the former GTE states during that same time period. *See* Lataille/Jordan/Slattery Reply Decl. ¶¶ 16-18. These findings are consistent with the analysis of Dr. Taylor, which shows that Verizon special access prices have fallen by an average of 21 percent per year since 2001 in nominal terms and by 22 percent in real terms. *See* Taylor Reply Decl. ¶ 8 & Table 1.

Although AT&T also complains that the Bell companies have gained market share in consumer long distance services, it is completely disingenuous in suggesting (at 133) that this has "lead[] . . . to AT&T's announcement that it will no longer compete for mass market long distance customers." AT&T has not, in fact, actually stopped competing for these customers, it has merely decided to do so using a different platform — its own VoIP-based service. *See 2004 Fact Report* at II-9 to II-10.

3. Enhanced Extended Links (EELs)

Verizon demonstrated in its opening comments that competing carriers are able to compete successfully without access to individual high-capacity UNEs in general, and without access to combinations of those elements in the form of EELs; that there is accordingly no basis to permit competing carriers to convert their current special access arrangements to EELs; and that these same facts establish that there is no basis for requiring access to EELs generally. For example, the evidence Verizon submitted shows that that 94 percent of DS1 loop and transport combinations that competing carriers purchase from Verizon are purchased as special access rather than EELs. *See* Verses/Lataille/Jordan Reney Decl. ¶¶ 57-59. And even when AT&T,

MCI, and Sprint are removed from the totals, competing carriers are purchasing 90 percent of DS1 loop and transport combinations from Verizon as special access rather than EELs. *See id.*, Exh. 10A. Verizon also demonstrated that even those carriers who have purchased EELs first served customers for extended periods of time using special access before converting to EELs, and that a number of carriers that use special access services extensively have not converted any special access circuits to UNEs or have converted only a small fraction. *See id.* ¶ 59.

The comments dispute the fact competing carriers would continue to thrive without access to EELs in many instances, for the same reasons they make such claims with respect to loops and transport generally. And, as demonstrated above, these comments provide insufficient evidence to support such claims, and their arguments are flawed as both a legal and factual matter. Beyond those issues that relate to loops and transport generally, the principal issue with respect to EELs concerns the so-called eligibility criteria for the these facilities.

As Verizon explained, however, if the Commission retains an unbundling obligation for high-capacity UNEs under any circumstances, including either individual elements or combinations in the form of EELs, it also must revisit its current eligibility criteria for the use of those elements.

In doing so, the Commission must ensure that whatever restrictions it adopts apply both to individual elements as well as to EELs (to the extent either still has to be provided). Where competing carriers have been successful without access to high-capacity UNEs, there is no basis to allow them access to those UNEs, regardless of whether they are provided on a stand-alone basis or combined. Otherwise, competing carriers would be able to obtain individual UNEs, combine them themselves, and use them in place of the other competitive alternatives, such as

special access, that competing carriers have previously been using successfully. Moreover, if the Commission were to allow carriers to obtain access to individual elements such as high-capacity loops without regard to the limitations addressed below, for example, then carriers that have been using special access circuits for years to provide long distance or other services could convert the loop component of those services to UNE pricing. Likewise, they could add new circuits to provide these services by combining a UNE loop with special access transport even though they self evidently are not impaired in their ability to provide those services. By subjecting part of those special access services to UNE pricing, the result would be to undermine existing competition for these services. *See Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8, 16 (D.C. Cir. 2002). Accordingly, both individual elements and combinations of those elements must be subject to the limits on conversions and eligibility addressed below.

As an initial matter, the Commission cannot permit carriers to convert pre-existing special access circuits that they are already using to provide service. By definition, a "conversion" can occur only if the requesting carrier is *already* using special access to provide the services that it seeks to offer; otherwise, there would be nothing to convert. In that circumstance, the carrier plainly does not require the lower rates in order to offer those services. *See USTA II*, 359 F.3d at 576, 592. The sole effect of the price break is thus to increase the other carrier's profits, which the Supreme Court found could not be the basis for an impairment finding. *See Iowa Utils. Bd.*, 525 U.S. at 389-90. Moreover, the fact that some carriers are competing successfully with special access suggests that other carriers can compete in the same manner and do not need access to individual high-capacity UNEs or EELs.

Next, even if the Commission determines that individual high-capacity UNEs or EELs should be made available under certain circumstances, it must limit their use to the specific services for which it finds impairment. As described above, this means prohibiting their use in connection with long-distance, wireless, and packet-switched broadband services, where there is intense competition that has emerged without competing carriers relying on individual high-capacity UNEs or EELs. In order to ensure that EELs and individual high-capacity UNEs are not used to provide these competitive services, the Commission must do more than merely reinstate some version of its previous eligibility criteria, which had the very different purpose of merely ensuring that competing carriers were capable of providing local service. Thus, even though the D.C. Circuit upheld the Commission's previous criteria in the abstract, *see USTA II*, 359 F.3d at 592-93, that does not give the Commission cover to avoid adopting new standards that prevent the use of EELs and individual high-capacity UNEs for use in the provision of other services that are demonstrably competitive already. The Commission should instead adopt entirely new criteria that expressly prohibit the use of EELs and individual high-capacity UNEs for individual services for which no impairment can be found.

If, however, the Commission seeks to reinstate the same fundamental approach it took in the past, at a minimum it must reform its prior criteria to focus on whether a particular facility is in fact used for local service, not on whether it *could in theory* be used for that purpose. In this regard, although the Commission should continue to require CLECs to certify that they are using EELs and individual UNEs for local service, the Commission also must adopt actual tests to enforce this. And, critically, it must require CLECs to provide up front when they order UNEs the information described immediately below to demonstrate that they meet these tests. This will

help obviate the need for expensive and intrusive audits while at the same time assuring that carriers use UNEs only for the services for which the Commission has found impairment.

As a starting point, the Commission should tighten the service criteria that requires a CLEC to maintain only one interconnection trunk for every 24 DS1 EELs that it serves, to require instead that a CLEC maintain at least 1 trunks for every 5 DS1 EELs.[156] Next, the Commission should require that there be an identified local telephone number for each DS1 of capacity ordered. The Commission also should require that each of those circuits connect to a local voice switch. The Commission should further require that a competing carrier obtain collocation in each of the wire centers where it is obtaining one of these circuits.[157] The Commission should therefore require that when a CLEC orders high-capacity UNEs or EELs that it provide information with its order regarding the local telephone number assigned to each circuit, the interconnection trunk identification number, the local switch CLLI code to which the circuit is attached, and the collocation terminating connecting facility assignment.

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[156] A local interconnection trunk should not count for purposes of the EEL-to-trunk ratio if Calling Party Number is not provided on calls delivered for termination by that trunk to an ILEC switch. Mixed-use trunks should count for this test only to the extent they are carrying a majority of local traffic. In addition, the Commission should not count one-way local interconnection trunks used by CLECs to terminate traffic with an ILEC, and should only assign half weight to two-way local interconnection trunks used for this purpose.

[157] The Commission should also clarify that collocation is limited to actual collocation, not so-called "reverse" collocation. ILECs have sought reverse collocation from CLECs in order to avoid paying inflated rates to the CLECs for access facilities – and CLECs have denied those requests virtually across the board. Consequently, CLECs could contend that ILECs have "agreed to" reverse collocation anywhere and everywhere.. In no sense, however, would this show that the CLEC is using EELs for a significant amount of local traffic, particularly since reverse collocation would most likely be used by the ILEC to terminate *its* traffic to the CLEC, and not the other way around.

4. Entrance Facilities

The Commission has found that entrance facilities are "the most competitive type of transport," and competitive deployment of these links is "pervasive." *Triennial Review Order* ¶ 367 n.1122. In its opening comments, Verizon presented data that confirm these findings. These data show that competing providers have been steadily replacing entrance facilities they have obtained from Verizon with their own competitive transport, and have performed such migrations for more than 32,000 entrance-facility circuits from the beginning of 2003 through the middle of 2004. *See* Declaration of Mohit Patel ¶ 15 ("Patel Decl.") (Attachment F to Verizon Comments). Verizon further demonstrated that, to the extent that competing providers continue to obtain entrance facilities from Verizon, they typically purchase special access rather than UNEs. Of the high-capacity entrance-facility circuits that carriers purchase from Verizon, approximately 97 percent are special access, while only 3 percent are UNEs. *See* Verses/Lataille/Jordan/Reney Decl. ¶ 56 & Exh. 13; Patel Decl. ¶ 16. Finally, Verizon explained that entrance facilities are not part of Verizon's legacy network, and that when a competitive carrier orders an entrance facility from Verizon, Verizon must design, engineer, and construct that facility to order. None of the commenters seriously dispute these facts. Thus, the record shows that competing carriers plainly are not impaired in their ability to deploy these facilities.

5. Dense Wire Centers

The Commission also must eliminate unbundling of high-capacity UNEs in those wire centers that have concentrated demand for high-capacity services, and that also are particularly likely to attract competitive entry. Verizon's data show that these conditions are met for wire centers with 5,000 or more total *business* lines (retail plus wholesale). As Verizon explained,

within its region, there are a total of roughly 950 wire centers that contain 5,000 or more business lines — about 15 percent of Verizon's total wire center locations with special access revenues — and competing carriers have deployed fiber in more than half of such wire centers. *See* Verses/Lataille/Jordan/Reney Decl. ¶ 63 & Exh. 16. Exhibit13 to the Lataille/Jordan/Slattery Reply Declaration provides the list of fiber providers in wire centers with 5,000 or more business lines that are located within the top-40 MSAs. It demonstrates that there is an average of more than four alternative providers with their own fiber facilities. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 32.

Verizon also has conducted an additional analysis that shows that wire centers with 5,000 or more business lines have high concentrations of business activity and numbers of employees. Using information by Donnelley Marketing (formerly American Business Institute), which compiles statistics of business activity, Verizon has been able to determine that 72 percent of all business employees within Verizon's service area were located in wire centers with 5,000 or more lines. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 7. These wire centers also contain 69 percent of business establishments in industry sectors that use a high intensity of telecommunications in the production process. *See id.*

Because at least of half of the wire centers with 5,000 or more business lines have already attracted competitive fiber, the Commission must presume that other wire centers with the same level of concentration, and that are therefore similarly situated with respect to competitive entry, are able to as well. *See USTA II*, 359 F.3d at 575. The Commission also must take into account the availability and use of special access, and the evidence shows that competing carriers that have deployed fiber in wire centers meeting this threshold are using special access to extend or

"fill in" their networks, enabling them to serve customers throughout the wire center and the larger markets where those wire centers are concentrated.

Finally, there is no merit to the proposals by some carriers that the Commission presume that competitive fiber deployment is possible only in wire centers that contain at least 40,000 or 50,000 business lines.[158] Competing carriers claim that this threshold is a reliable predictor of where multiple competitors already exist. But the impairment inquiry turns on whether competition is possible, not on where multiple competitors already exist. And the facts show that competition is in fact possible on a much wider scale than these proposals permit. For example, Verizon's data show that it has a total of only 25 wire centers with 50,000 or more business lines. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 56. Yet, Verizon's data show that competing carriers have deployed fiber in a minimum of 342 wire centers just within the small subset of wire center locations that account for 80 percent of demand for high-capacity special access service. *See* Verses/Lataille/Reney/Jordan Decl. ¶ 18 & Exh. 4B. Verizon's data also show that there are an average of four competing networks in wire centers with 5,000 or more business lines in Verizon's top-40 MSAs. *See* Lataille/Jordan/Slattery Reply Decl. ¶ 32.

III. MASS-MARKET UNES

Verizon demonstrated in its opening comments that technological and market developments since the *Triennial Review* proceeding conclusively show that competitors are not impaired without access to unbundled mass-market switching or the UNE platform ("UNE-P"). In particular, there has been widespread deployment of competing voice telephone services by intermodal providers such as cable operators, VoIP providers, wireless companies, and others.

[158] *See* Loop & Transport at 82; *see also* ALTS *et al.* at 81 (proposing similar presumption for wire centers with 40,000 or more business lines).

Nearly 90 percent of U.S. homes now have access to cable modem service and, therefore, access to competitively supplied VoIP services, whether provided by their cable operator, by national providers such as Vonage, by major long-distance carriers such as AT&T, or by others. Wireless carriers also have continued to make substantial gains at the expense of mass-market wireline service — with nearly 20 million new wireless lines and more than double the percentage of users giving up their landline phones since the time of the *Triennial Review* proceeding. Meanwhile, the number of wireline lines has declined, and an even greater percentage of wireline voice traffic has been displaced by data and wireless networks.

The evidence of these dramatic changes is so compelling that even AT&T, the nation's largest UNE-P provider and long its most die-hard advocate, has given up the cause. Although AT&T and others long argued that UNE-P was necessary so that carriers could "transfer . . . customers off the ILECs' switches entirely onto" the CLECs' own switches, and that the only alternative was "NO COMPETITION AT ALL,"[159] AT&T now states (at i) that it "no longer seeks permanent rules that require the unbundling of mass market switching and the maintenance of the UNE-P," and acknowledges that access to unbundling switching is no longer needed to "foster *facilities-based* competition." And this time, for a change, these are no mere words — AT&T's actions confirm that it now views VoIP as an economic way to serve mass-market customers, and AT&T is already offering this service in more than 120 major markets throughout the country and plans to have 1 million subscribers by 2005 using this new strategy. *See* Verizon Comments at 95; *2004 Fact Report* at II-9.

[159] AT&T Reply Comments at iii, CC Docket Nos. 01-338, *et al.* (FCC filed July 17, 2002); AT&T Comments at 61, CC Docket Nos. 01-338, et al. (FCC filed Apr. 5, 2002).