

4. During the course of the state proceedings, the TRO's impairment framework and its attempted subdelegation of authority to state commissions were vacated by the D.C. Circuit in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). Accordingly, none of the state commissions in the states served by SBC incumbent LECs issued a decision with respect to impairment for dedicated transport or high-capacity loops. Nonetheless, the information that was obtained in those proceedings – in large part, from competing providers – is still available. The Commission asked parties to provide information regarding the state proceedings in the August 20, 2004 Notice of Proposed Rulemaking ("*NPRM*") that opened the present comment cycle.

Rebecca L. Sparks

5. My name is Rebecca L. Sparks. I am the Executive Director-Planning and Strategy for SBC Operations, Inc. In this position, I participate in the development of long-term wholesale marketing plans for Local Interconnection Services. The Local Interconnection Services organization's primary responsibilities include wholesale account and product management functions for local wholesale services.
6. I began employment with Southwestern Bell Telephone in 1974 and have over 30 years of experience in the telecommunications industry. From 1974 to 1982, I held a number of positions in SWBT's Kansas operations, including assignments in the business office and sales groups. From 1982 to 1990, I held various staff positions in support of Southwestern Bell's customer care organizations. From 1990 to 1996, I was a product manager for special access products. In this position I was involved in various aspects of state and federal regulation, including tariff filings and FCC proceedings. In 1996, I joined SBC's Wholesale Marketing organization as a wholesale product manager

responsible for unbundled network elements (“UNEs”) and interconnection. I participated in decisions relating to the activities of the wholesale marketing/regulatory support group, while coordinating with subject matter experts in other SWBT departments relating to interconnection/regulatory and legal compliance. I have worked on various aspects of SBC’s implementation of the Act, including participating in negotiations and arbitration of interconnection agreements with numerous requesting carriers and managing regulatory activities regarding applications under section 271 by SBC operating companies before the Commission. Effective September 1, 2004, I accepted the position of Executive Director-Planning and Strategy.

7. In the state *TRO* proceedings for Illinois and Kansas, I presented testimony on behalf of SBC regarding dedicated transport and high-capacity loops. I also presented testimony on SBC’s behalf regarding high-capacity loops in Texas. In that capacity, I reviewed and analyzed extensive data on facilities deployment that was received from competing providers in discovery, from independent third parties, from SBC’s own business records, and from public sources.

Purpose of Declaration

8. The purpose of this declaration is to review the record of the proceedings that were conducted by state commissions to implement the subsequently-vacated delegation of authority in the *TRO*, and to rebut the claims of AT&T, McLeodUSA, and the CLEC “Loop & Transport Coalition” regarding those proceedings. In its opening Comments, SBC summarized the various state proceedings and provided the underlying factual details, in accordance with the Commission’s request at paragraph 15 of the NPRM.

SBC analyzed the data from the state proceedings and showed how that evidence (coupled with other and more recent data, such as the availability of special access services) supports the conclusion that CLECs are not impaired without unbundled access to dedicated transport or high-capacity loops in a large number of markets. As a compromise offering, SBC proposed that the Commission find that CLECs are, at a minimum, not impaired without unbundled access to (i) DS3 or higher capacity levels on a nationwide basis, (ii) DS1-level transport between wire centers that serve 10,000 or more business lines, or between one such wire center and a wire center with between 5,000 and 10,000 business lines, and (iii) DS1-level loops in wire centers that serve 15,000 or more business lines.¹

9. The CLECs, however, have submitted a “study” prepared by QSI – an organization that includes witnesses retained by CLECs to support their position in several state proceedings – and claim that the state proceedings support a finding of impairment for dedicated transport and high-capacity loops. The Commission should give no weight to the QSI “study,” for several reasons. First, the study does not even attempt to apply a lawful impairment analysis that would comply with the D.C. Circuit’s mandate, as the Commission seeks to do here. To the contrary, the study is based on QSI’s interpretation of the impairment triggers that the D.C. Circuit *vacated*. Second, QSI does not reflect an independent analysis of the information gathered or presented by the parties in the various state proceedings. Nor does it present a “database of CLEC owned and operated

¹ SBC Comments at 69-70, 89.

loop and transport facilities.”² Instead, QSI “filtered” out much of the evidence of competitive deployment. Third, even for the limited group of locations QSI did consider, its assertions either ignore or mischaracterize the evidence.

10. In fact, notwithstanding the limited information CLECs provided in state proceedings regarding their deployment of high-capacity loops and transport, even that limited information demonstrated that CLECs can and do deploy their own loop and transport facilities (including at the DS1, DS3 and higher levels), that they can and do obtain such facilities from alternative providers, and that they are not impaired without unbundled access to such facilities.

The Overwhelming Evidence Of Competitive Deployment Belies The CLECs’ Claims Of Impairment

11. As we will describe in the sections that follow, the QSI study suffers from numerous and substantial specific factual errors and omissions. But the Commission should first look at the big picture and consider the absurd conclusions that QSI attempts to draw. QSI’s study purports to review some of the most intensely competitive telecommunications markets in the nation, including (in SBC’s regions), Los Angeles, San Francisco, Chicago, Dallas and Houston. In these areas, competing providers have made impressive gains and deployed extensive amounts of high-capacity transmission facilities (both through traditional fiber optic technology and through intermodal technologies such as fixed wireless and cable).

² QSI Study at 2.

12. These areas are literally engulfed in a sea of competitive fiber loop and transport facilities. In an *ex parte* filing submitted to the Commission, SBC presented maps of buildings “lit” by competitive fiber loops in selected SBC wire centers with 15,000 or more business lines.³ And the maps SBC submitted with its comments depict thousands of buildings in SBC’s serving areas that an independent third party, GeoResults, was able to identify as already being served by CLEC fiber.⁴ SBC also presented maps of selected wire centers at a more detailed “street level” in several state *TRO* proceedings.⁵ These maps show competitive fiber routes (as determined by GeoTel, a third party) and “lit” buildings: the locations at which competitors have deployed high-capacity loops, as confirmed by the competing providers themselves in the state *TRO* proceedings. Examples of these maps for wire centers in Chicago, Dallas, Los Angeles, and San Francisco are attached hereto as Exhibit 1.
13. As these maps show, competing providers have successfully covered each area with high-capacity fiber loops. The maps also show that competing providers have deployed fiber “backbones” that run up and down key streets in these wire centers, giving them the opportunity to serve additional buildings along those streets in the future by simply extending a short fiber “lateral” from the backbone facility to the desired building.

³ *Ex Parte* Letter from Christopher Heimann, SBC to Marlene Dortch, FCC, CC Docket Nos. 01-338 *et al.* (Sept. 21, 2004).

⁴ SBC Comments Attach. C.

⁵ SBC Comments Attach. A-CA Ex. 6 Parts 8-16; Attach. A-IL Ex. 6 Parts 10-15; Attach. A-OH Ex. 6 Parts 13-14. The Texas commission submitted evidentiary exhibits and transcripts for its *TRO* proceedings in electronic form with its own Comments. The fiber maps SBC provided in those Texas proceedings can be found in that submission as Texas Docket No. 28745, SBC Ex. 15 (Sparks Direct Testimony), Attachments RLS-11 through RLS-15. Similarly, fiber maps submitted in the Michigan proceedings are included in the Michigan commission’s submission of the evidentiary record for Case No. U-13796 (Exs. A-29 & A-30). Due to the accelerated schedules of the state proceedings, and to the fact that the state proceedings were held under rules that were challenged (and ultimately held) as unlawful, SBC limited its analysis of such fiber maps to a small number of urban and commercial wire centers in California, Illinois, Michigan, Missouri, Ohio, and Texas.

14. The maps of competitive deployment likewise show substantial deployment of competitive transport facilities. In the state proceedings, SBC also provided maps of competitive fiber transport facilities. Examples of these maps, showing the Chicago, Dallas, Los Angeles, and San Francisco areas, are attached hereto as Exhibit 2. The data used to prepare these maps were provided by an independent third party. Exhibit 3 hereto graphically depicts the evidence of competitive deployment in the state *TRO* proceedings for these areas. Although the maps were designed to reflect trigger rules that understate the evidence of competitive deployment (and were vacated by the D.C. Circuit), these maps nonetheless show a significant number of SBC central offices where two or more competing providers have established “fiber-based collocation arrangements” into which they had deployed fiber transport facilities. The transport routes between those central offices are depicted as colored lines. (The routes are depicted as straight lines because the *TRO* rule in place at the time of the state proceedings provided that a transmission path between two central offices is the same “route” regardless of the physical path or intermediate facilities in between.) These maps, along with the maps submitted with SBC’s comments, show that there is already a robust transport infrastructure in place, with numerous competing providers and with alternative fiber routes that cover the downtown centers.
15. These results should come as no surprise, given the historical data of competitive development that the Commission has already seen. Even before the 1996 Act, the Commission reported that competitive access providers (CAPs) already carried “significant amounts of high capacity special access traffic in certain urban centers,”

including Los Angeles, San Francisco, Chicago, Dallas, and Houston.⁶ By the time of the *TRO*, the Commission noted continued growth in these areas, stating that “competitive LECs have deployed fiber that enables them to reach customers entirely over their own loop facilities” and “competitors have built fiber loops to buildings that carry a significant portion of the traffic in certain MSAs”, including New York, San Francisco, Washington, D.C., and Los Angeles, which “account for 40% of all data revenue nationwide.”⁷ Indeed, in this Commission’s *TRO* proceedings “[b]oth competitive LECs and incumbent LECs report[ed] that approximately 30,000, i.e., between 3% to 5%, of the nation’s commercial office buildings [we]re served by competitor-owned loops.”⁸ Based on its experience, the Commission “expect[ed] that the triggers” established in the *TRO* would “provide incumbent LECs *substantial relief*” by focusing on the buildings that “account for *a large fraction of the traffic*” in metropolitan areas.⁹

16. Yet QSI looks at these same highly competitive, densely fibered areas and contends that the evidence from the state proceedings yields only a mere handful of “non-impaired” locations – and in California, QSI contends that there is not a single non-impaired location or route at any capacity level anywhere.¹⁰ The way QSI portrays competitive deployment, the maps of competitive fiber for Chicago, Dallas, Los Angeles, and San Francisco would be nearly *blank* – the same as a competitive fiber map of Antarctica. The CLECs’ conclusions are absurd on their face and contrary to history and the Commission’s own expectations. Not surprisingly, QSI’s study is also contrary to the

⁶ *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd. 7369, ¶ 4 & n.5 (1992).

⁷ *TRO* ¶ 298 & n.858.

⁸ *Id.* n.856.

⁹ *TRO* ¶ 322 (emphasis added).

¹⁰ QSI Study at Tables 1-9.

actual evidence produced in the state proceedings, which shows extensive evidence of deployment for both high-capacity loops and dedicated transport, along with a vibrant wholesale market.

High-Capacity Loops

17. In the state proceedings, the competing providers themselves admitted that they had extensively deployed high-capacity loop and transport facilities, particularly in the dense urban and commercial areas where this Commission expected to find such deployment. With respect to high-capacity loops, the state evidentiary records show that several providers have successfully deployed fiber loops to a large number of locations, and that there are numerous locations that already had two or more competing providers present. In California, 16 separate competing providers confirmed their deployment of high-capacity loops at over 2,000 locations in the aggregate, with the top carrier (in terms of the number of loop locations identified) disclosing over 1,000 loops and the second largest carrier confirming its deployment of approximately 500 loops.¹¹ In Texas, the top 15 competing providers confirmed their deployment to nearly 1,200 locations in the aggregate, and the top three competing providers admitted having fiber loops at 300 or more locations each.¹² And in Illinois, competing providers had deployed fiber loops to approximately 430 locations.

18. A strand of fiber optic cable has virtually unlimited capacity to carry information. The transmission capacity of a fiber optic facility is defined by the type and capacity of the “optronic” equipment connected to the fiber. The capacity level is described as “OC-n”

¹¹ SBC Comments Attach. A-CA Ex. 7 Parts 3-4 & 11-13.

¹² Texas PUC Comments, Record Submission for Docket No. 28745, SBC Exs. 1A, 2A, & 5A.

where the “n” serves as a placeholder for the applicable transmission level, expressed as a multiple of the DS3 level. Each OC-n loop (or transport) facility can be “channelized” to carry separate DS1 or DS3 channels simultaneously, simply by adjusting the optronic equipment attached to the fiber. “Channelizing” does not physically divide the fiber optic cable; it simply allocates part of the facility’s transmission capacity to a particular customer or purpose. A “DS1” channel has capacity equivalent to 24 DS-0 voice-grade circuits; a “DS3” channel, in turn, has capacity equivalent to 28 DS1 circuits. The evidence in the state proceedings confirmed that carriers have deployed fiber optic facilities and “channelized” them to the DS3 and DS1 levels in this manner.

19. The discovery responses for individual competing providers provide vivid evidence of facilities-based competition at all capacities – from DS1 on up. Time Warner’s data for California and Texas alone fill over 100 pages, comprising over *** circuits at over *** locations.¹³ At many locations, Time Warner has deployed its own facilities to serve multiple customers throughout the building, taking advantage of the fact that fiber optic cable has virtually unlimited capacity that can be (and is) channelized to serve customers at the DS1 and DS3 capacity levels. Many of Time Warner’s loops are currently being used by other CLECs to serve their own end users, while many others are being used to serve Time Warner’s own enterprise customers. Time Warner’s deployment of multiple loops also graphically proves the point it confirmed directly in discovery – ***BEGIN CONFIDENTIAL

¹³ SBC Comments Attach. A-CA Ex. 7 Part 16; Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 2A.

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20. Two of the other leading competitors – AT&T and MCI – have demonstrated similar success, contrary to their present claim that they are somehow “impaired” in deploying high-capacity loops. AT&T’s own data show that it has deployed high-capacity loops to approximately *** *** locations in California, approximately *** *** locations in Texas, and over *** *** locations in Illinois.¹⁵ MCI’s data show that it has deployed over *** *** high-capacity loops in California, over *** *** high-capacity loops in Texas, and approximately *** *** such loops in Illinois.¹⁶ Looking at SBC’s 13-state territory in the aggregate, AT&T and MCI combined have – by their own admission – deployed approximately *** *** high-capacity fiber loops.¹⁷

21. The state records also refute the CLECs’ contention that there is little deployment at lower capacity levels such as DS3 or DS1. In reality, those competing providers that disclosed the precise capacity and quantity of their facilities – as shown below, several carriers (including in some instances AT&T) withheld this information – stated that they had “channelized” many of their self-deployed fiber facilities into DS3 and DS1 circuits. In California, one leading carrier (*** ***) stated that nearly *three-quarters* of its loops had been deployed at the two-DS3 level or below: Of the 168 total locations

¹⁴ SBC Comments Attach. A-IN Ex. 7 Part 15 at 4.

¹⁵ SBC Comments Attach. A-CA Ex. 7 Parts 3-4; Attach. A-IL Ex. 7 Part 2; Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 1A.

¹⁶ SBC Comments Attach. A-CA Ex. 7 Parts 11-13; Attach. A-IL Ex. 7 Part 5C; Texas PUC Comments, Record Submission for Docket No. 28745, Ex. 5A.

¹⁷ The above figure is conservative, in that it does not include amounts for Nevada (where the TRO proceedings were terminated by settlement) or Connecticut, Kansas, and Missouri (due to the provisions of the state protective orders). Further, AT&T did not provide data on fiber loops for Arkansas or Oklahoma; in those states, AT&T stated in discovery that it had not deployed any DS1 or DS3 loops, without stating whether it had deployed fiber loops and then channelized those loops into DS1 or DS3 circuits.

to which that carrier had deployed high-capacity loops, 53 consisted of two or fewer DS3s, while 73 consisted solely of one or more DS1 loops.¹⁸ For Indiana and Michigan – two states where AT&T did provide information on the quantity of DS3s at some locations – AT&T presented evidence that *** percent of its fiber loops were deployed at the one-or-two DS3 level.¹⁹ Likewise, an MCI internal policy document shows that approximately *** percent of its deployments are at the one-or-two DS3 level.²⁰ In Texas, three different carriers (*** (***) stated that their *entire portfolio* consists of DS1-level loops.²¹ And in Oklahoma, one carrier had deployed loops, consisting solely of one or more DS1 circuits, to over 100 locations.²²

22. Discovery in the state proceedings also provided evidence that carriers are deploying high-capacity loops by using intermodal transmission technologies as alternatives to fiber optic technology. In Illinois, AT&T listed over *** addresses that it can serve using wireless last-mile technology.²³ XO stated that it has *** LMDS licenses in the Chicago market, and that it is already providing service by *** (***) at some locations.²⁴ XO further stated that it uses its LMDS

¹⁸ SBC Comments Attach. A-CA Ex. 7 Part 16.

¹⁹ SBC Comments Attach. A-IN Ex. 7 Parts 8 & 16; Attach A-MI Ex. 7 Parts 13 & 24.

²⁰ SBC Comments Attach. A-WI Ex. 7 Part 13 at 11.

²¹ Ex. 6 hereto.

²² The carrier's identity and its discovery response are not provided here, due to the provisions of the state protective order.

²³ SBC Comments Attach. A-IL Ex. 7 Part 2, No. 23.

²⁴ SBC Comments Attach. A-IL Ex. 7 Part 8A, No. SBC IL-XO 1-23.

spectrum to deliver ***
Chicago.²⁵

*** services to end user locations in

Dedicated Transport

23. The extent of competitive deployment is equally impressive for dedicated transport. In its opening Comments in this proceeding, SBC presented evidence from its own collocation records showing that at least one competing provider has established “fiber-based collocation” in the majority of central offices that have over 10,000 business lines.²⁶ In the state proceedings, the competing providers agreed that they had established fiber-based collocation arrangements in the vast majority of central offices identified by SBC’s own collocation records. In several cases, CLECs identified *still more* fiber-based collocation arrangements. QSI does not purport to dispute that evidence.²⁷

24. Although the “route by route” analysis that governed the state *TRO* proceedings was subsequently vacated as unlawfully unrestrictive (in that it understated the extent of competitive deployment), discovery in California nevertheless confirmed 455 “routes” where at least two competing carriers verified that they established collocation arrangements and had deployed fiber transport facilities at both ends of the route.²⁸ In Illinois, there were 269 routes where at least two competing carriers verified that they had established collocation and had deployed fiber transport facilities at both ends of the

²⁵ *Id.* No. 1-33.
²⁶ SBC Comments at 78.
²⁷ See QSI Study Table 10.
²⁸ SBC Comments Attach. A-CA Ex. 6 Part 3.

route.²⁹ And in Texas, discovery confirmed 231 routes where at least two competing carriers verified that they were collocated and had deployed fiber transport facilities at both ends of the route.³⁰ Just as SBC has shown in this proceeding, carriers have extensively deployed their own facilities in these dense urban and commercial wire centers.

25. In sum, the deployment and extent of competitive transport facilities were virtually undisputed in the state *TRO* proceedings. The CLECs opposing a finding of non-impairment instead argued that their facilities did not “count” towards the since-vacated triggers. QSI and the CLECs continue to make such arguments here, and we address their erroneous theories below.

Availability of Wholesale Loops and Transport

26. The state records also show a vibrant wholesale market for loops and transport – refuting the CLEC claim that wholesale offerings are virtually nonexistent. In California, Illinois, and Texas, several competing providers (including Level 3, Looking Glass, McLeodUSA in Illinois, and Time Warner in California and Texas) expressly admitted in discovery that they were *currently providing* or offering transmission facilities to other carriers.³¹

27. In addition to these admitted wholesalers, the evidence shows that several other carriers offer wholesale service, notwithstanding their refusal to directly confirm their wholesale status in discovery. MCI confirmed that it ***“BEGIN CONFIDENTIAL”³²

²⁹ SBC Comments at 72 & Attach. A-IL Ex. 6 Part 4.

³⁰ SBC Comments at 72 & Attach. A-TX at 14 & Ex. 9 Part 4.

³¹ SBC Comments Attach. A-CA Ex. 7 Parts 7, 8, 15 & 16; Attach. A-IL Ex. 7 Parts 4, 6A & 6B; Texas PUC Comments, Record Submission for Docket No. 28744, SBC Ex. 2A, 3A & 6A.

³² Texas PUC Comments, Record Submission for Docket No. 28745, Sprint Ex. 4A at 3.

END CONFIDENTIAL ***.³³ With respect to transport, MCI stated that it ***BEGIN CONFIDENTIAL

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28. XO expressly admitted offering wholesale transport service in one state, and on a national basis XO publicly offers an “XO Carrier Private Line” which “provides high-speed dedicated point-to-point connectivity,” featuring “customized circuits between locations,” and “high-capacity bandwidth from DS-1 (1.5 Mbps) to DS-3 (45 Mbps) to OC-n.”³⁶ XO advertises that it serves CLECs, and is “committed to serving the needs of emerging and established carriers” including “Competitive Local Exchange Carriers.”³⁷

29. In the state proceedings, AT&T claimed that it did not offer wholesale loops at all.

However, on cross-examination AT&T’s own witness in Texas testified that AT&T is

³³ *Id.*

³⁴ SBC Comments Attach. A-MI Ex. 7 Part 7.

³⁵ Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 15 (Sparks Direct Testimony) Attachment RLS-8.

³⁶ ***; Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 15 (Sparks Direct Testimony) Attachment RLS-4.

³⁷ Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 15 (Sparks Direct Testimony) Attachment RLS-4 at 1.

perfectly willing to provide loops to carriers, just as it would provide loops to end users.

In AT&T's words:

AT&T doesn't differentiate between customers...[I]f it was an IBM or if it was an XO or if it was a Schlotzsky's Sandwiches, we don't differentiate. We would offer the services provided we had facilities available on-net to *all these customers—to any customer* We don't differentiate.³⁸

30. Further, AT&T's own public website expressly offers wholesale services “for you” and “for your customers.”³⁹ AT&T's “comprehensive” wholesale portfolio includes a “private line” (described as a “point to point connection from your premises to a carrier's point-of-presence (POP)” or “to an AT&T POP” among other options) and “dedicated entrance facilities” (which AT&T describes as a “channelized, dedicated communication path between a customer's premises and the AT&T LNS node, or between a customer's premise and a designated premise”).⁴⁰ AT&T's offer expressly includes DS1 and DS3 “speeds,”⁴¹ and expressly extends “where AT&T SONET facilities are available.”⁴²

31. In the marketplace, other carriers have taken AT&T up on its wholesale offer. Two carriers, *** confirmed in discovery that they had obtained wholesale loops from AT&T.⁴³ Another carrier, Xspedius, publicly touts itself as “an

³⁸ SBC Comments Attach. A-TX Ex. 8 Tr. 395 (Lynott) (emphasis added); Texas PUC Comments, Record Submission for Docket No. 28745, Tr. 395.

³⁹ Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 15 (Sparks Direct Testimony) Attachment RLS-9.

⁴⁰ Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 20 (private line), SBC Ex. 23 at 1 (entrance facilities), SBC Ex. 24 at 1-2; SBC Comments Attach. A-TX Ex. 8 Tr. 396-399 (Lynott) Texas PUC Comments, Record Submission for Docket No. 28745, Tr. 396-399.

⁴¹ Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 20 at 1, SBC Ex. 23 at 1, SBC Ex. 24 at 1, Tr. 398-399; SBC Comments Attach. A-TX Ex. 8 Tr. 398-399 (Lynott).

⁴² Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 20 at 2, SBC Ex. 23 at 2, Tr. 399-400; SBC Comments Attach. A-TX Ex. 8 Tr. 399-400 (Lynott).

⁴³ SBC Comments Attach. A-WI Ex. 7 Part 6 at 8 & 29; Ex. 7 hereto.

approved provider for AT&T's Accu-Ring,"⁴⁴ the umbrella under which AT&T offers its private lines and dedicated entrance facilities. And AT&T's most recent annual report to the Securities and Exchange Commission shows that wholesale products generally (and loops in particular) are significant enough to warrant special mention in AT&T's description of its business. Under the banner "WE OFFER TRANSPORT SERVICES TO OTHER CARRIERS," AT&T affirms that it offers "conventional dedicated lines services" and "dedicated switched services," and that its "wholesale customers" include "competitive local exchange carriers."⁴⁵

QSI Ignores Evidence Of Competitive Deployment

32. As the preceding discussion shows, the state proceedings provided substantial evidence of competitive deployment. QSI, however, contends that CLECs are impaired on virtually every customer location and transport route in the states it reviewed. QSI does not *examine* the evidence (because its conclusions are directly contrary to the evidence) but instead (i) continues to apply its own interpretations of the vacated rules, which understate the extent of competition, (ii) applies undisclosed and improper "filters" to the evidence, and (iii) ignores and mischaracterizes the state evidentiary records. Moreover, QSI applies its erroneous methods without even providing the Commission with the raw data that it purports to summarize.

⁴⁴ Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 15 (Sparks Direct Testimony) Attachment RLS-5 at 4, Tr. 404-405; SBC Comments Attach. A-TX Ex. 8 Tr. 404-405 (Lynott).

⁴⁵ Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 31 at 4, Tr. 347-348; SBC Comments Attach. A-TX Ex. 8 Tr. 347-348 (Sparks).

QSI's Study Is Of No Value, Because It Is Founded On The Vacated Rules

33. The purpose of this rulemaking is to formulate an impairment analysis, and unbundling rules, that comply with the D.C. Circuit's mandate and the 1996 Act. QSI's "study" makes no attempt to propose, much less apply, an analytical framework that would comport with the mandate. To the contrary, QSI simply presents its largely unexplained and unsupported conclusions about the state proceedings that were conducted pursuant to the rules that the D.C. Circuit *vacated* as unlawful. Necessarily, QSI's conclusions about those proceedings are of no utility here.
34. First, the evidence that was gathered in the state proceedings was gathered to apply the vacated impairment standards and market definitions of the *TRO*. The *TRO* defined the "market" for assessing transport and loops to be a specific point-to-point transmission route: either between incumbent LEC switches (for transport) or between a switch and a customer location (for loops). The D.C. Circuit held that the *TRO*'s approach was unduly restrictive and improperly "ignore[d] facilities deployment along similar routes."⁴⁶ The trigger rules also required multiple competitors on each individual route, an approach that also improperly limited the analysis. Further, the *TRO*'s rules did not permit the parties or the states to consider the availability of loop and transport services under the incumbent's special access tariffs as a means to demonstrate non-impairment. Here, too, the D.C. Circuit held that the *TRO* was unduly restrictive.⁴⁷
35. Second, over and above the limitations imposed by the vacated rules, the accelerated time frames of the state proceedings (coupled with the fact that the underlying rules were the

⁴⁶ *USTA II*, 359 F.3d at 575.

⁴⁷ *Id.* at 576-77.

subject of a pending legal challenge and ultimately were vacated) caused SBC to limit the scope of its case. Many states (such as Illinois and Wisconsin) precluded SBC from identifying additional non-impaired routes or customer locations after an initial position statement or the filing of direct testimony. As a result, SBC was unable to present evidence that the *TRO*'s "triggers" were satisfied for locations not identified by the state-imposed cutoff, even if that evidence was received from competing providers in discovery after the cutoff. SBC also focused on carrier deployment of fiber, without analyzing the impact of intermodal alternatives such as fixed wireless and cable.

36. Third, the evidence at the state level was in large part limited to that provided by the competing carriers in discovery. Much of the evidence of competitive facilities deployment rests with the competing providers themselves. Due to the accelerated schedules of the state proceedings, SBC did not have sufficient time to adequately follow up on all incomplete or evasive responses, or to fully investigate differences between the CLEC responses and SBC's own records or available third-party deployment data. Thus, to the extent competing providers did not respond (or failed to respond fully or on a timely basis) to discovery requests, the state records would again understate the extent of competitive deployment.

37. QSI's underlying approach here is to apply the vacated "trigger" rules to the incomplete records generated under those rules. (As we describe below, QSI added additional improper filters to the rules.) Specifically, QSI looked only at transport routes or customer locations that were identified under the *TRO*'s triggers: namely, where the

incumbent alleged that two competing providers were already present.⁴⁸ In so doing, QSI considered only a small subset of locations and routes in each state, and ignored most of the evidence of competitive deployment. QSI ignored all transport routes or customer locations where a single competing provider had deployed facilities – for example, in California QSI ignored approximately 1,800 customer locations at which a single provider had deployed high-capacity loops. Further, QSI did not consider whether transport routes or customer locations *could* support a competing provider, even if none was present at the time of the state proceedings. As a result, QSI attempts to draw conclusions about the entire state of California by assessing only 500 transport routes and 200 customer locations.⁴⁹ QSI’s “study” of the eight other SBC states it selected considered only 700 transport routes and 600 customer locations in the aggregate.

38. More fundamentally, QSI’s conclusions about whether the evidence satisfies the vacated impairment standards have no bearing on what conclusions the Commission would draw if it applied a proper legal standard to a full body of evidence. The vacated rules and the CLECs’ analysis of those rules no longer have relevance. There is no basis to continue to apply the vacated triggers as if they are lawful indicators of non-impairment.

QSI Improperly “Filtered” Out Much Of The Evidence

39. Above and beyond the limitations imposed by the vacated rules and the shortened time frames of the state proceedings, QSI applied improper “filters” to ignore still more evidence. For high-capacity loops, QSI (and its CLEC backers) take the curious position that most competitive deployment does not “count” in assessing non-impairment – not

⁴⁸ QSI Study at 9-10 & 15-16.

⁴⁹ *Id.* at 12 & 19.

because CLECs have failed to deploy DS3 loops at a location but because they have deployed *too many*. QSI’s test for non-impairment at a given location considers only whether two CLECs had expressly confirmed the deployment of precisely one or two DS3 loops at a location. QSI’s analysis thus excluded any carriers that deployed three or more DS3 loops at a location.⁵⁰ Similarly, QSI considered competing transport facilities only if the CLEC expressly stated that it had deployed twelve or fewer DS3s’ worth of capacity.⁵¹

40. The CLECs’ theory purports to be based on the *TRO*’s triggers. Putting aside for a moment the fact that the *TRO*’s impairment standards were vacated, the CLEC filter finds no support in the *TRO*. The since-vacated rule for loops required only that a trigger carrier have “deployed DS3 facilities,” either on “its own” or by attaching optronics to activate certain dark fiber facilities.⁵² The Commission did not say that the carrier only counted if it had “deployed two or fewer DS3 facilities” – in fact, it did not specify any number of “DS3 facilities” at all.⁵³ Moreover, the *TRO* specifically stated that the purpose of the state proceedings is to identify locations where CLECs are “*providing multiple DS3s to a specific customer location*” and it instructed the states to look for locations where “*this deployment has occurred.*”⁵⁴

41. More importantly, the CLECs’ filter makes no sense in determining the scope of competitive deployment. Where a location has capacity to serve many DS3s’ worth of

⁵⁰ *Id.* at 4, 10 & 11. As described in more detail below, where a carrier was silent (or evasive) as to the quantity of DS3 loops deployed to a location, QSI improperly assumed that the carrier had deployed more than two DS3s, and excluded that carrier from further consideration.

⁵¹ *Id.* at 4, 16 & 17.

⁵² 47 C.F.R. § 51.319 (a)(5)(i)(A).

⁵³ *Id.*

⁵⁴ *TRO* ¶ 321.

traffic, the CLECs themselves have conceded that the *potential* revenues from entry are sufficient to exceed the costs of deployment.⁵⁵ And their contention that a CLEC may nonetheless desire access to one or two DS3s as UNEs misses the point. The question is whether competition is impaired in particular circumstances. The answer to that question must be “no” where competitive fiber has already been deployed, regardless of whether additional competitors may (or may not) want access at a particular capacity level.

Dedicated Transport

42. A second improper “filter” is that QSI ignored competitive transport facilities even where a competing provider admitted that it had established collocation arrangements and deployed facilities at both central office “end points” of a transport route, and that it had connected those facilities to the rest of its transport network. Although QSI agreed that carriers have collocated and deployed facilities at both ends of numerous transport routes,⁵⁶ it did not “count” those facilities unless the competing provider expressly stated that it currently provides dedicated transport between the two central offices in question. In this vein, it is clear that QSI adopted the CLEC position from the state proceedings, and excluded any transport facilities where the competing provider stated it had an intermediate switch along the route, on the theory that the competing provider could not provide “dedicated” transport and could only provide “switched” transport.⁵⁷
43. QSI’s filter is wrong for several reasons. First, the presence of an intermediate switch does not prevent a carrier from providing dedicated transport between two points.

⁵⁵ AT&T Comments at 14-15, 32-33; CLEC Coalition Comments at 99-100.
⁵⁶ QSI Study at 21.
⁵⁷ See QSI Study at 17.

Dedicated transport does not require that a physically distinct *facility* (e.g. a strand of fiber cable) be devoted to a particular customer or purpose. Rather, it is provided by assigning electronically a portion of the capacity on that facility. Thus, the multiplexers that are used to create a DS3 channel “within” a fiber optic “OCn” facility can also be used to dedicate that capacity to a particular carrier. As the Commission has acknowledged:

Incumbent LECs generally operate their interoffice transport networks at OCn capacity levels. When transport is leased as an unbundled element to competing carriers, for example, a DS3 capacity circuit, the leased dedicated circuit is channelized within the larger OCn circuit operated by the incumbent LEC. Therefore, *competing carriers are not necessarily leasing physically separate facilities, but rather, dedicated bandwidth capacities along a given route. However, through electronic equipment such as multiplexers and de-multiplexers, the circuit is provided to the requesting carrier at the requested capacity on the relevant interface, such as a DS3 interface.*⁵⁸

44. AT&T has acknowledged before the Commission that add/drop multiplexers (along with related equipment such as “digital cross-connects,” which “groom” a facility so that traffic can pass from one physical strand of fiber cable to another) are part of any efficient CLEC’s “typical” collocation arrangement and in a typical switch location.⁵⁹ As one would expect, then, competing providers like Time Warner, Level 3, Looking Glass, and McLeodUSA confirmed in several states that they can (and in some cases already do) provide dedicated transport.⁶⁰ In Michigan, MCI admitted ***BEGIN CONFIDENTIAL

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⁵⁸ TRO ¶ 372.

⁵⁹ Michigan PSC Comments, Record Submission for Case No. U-13796, Ex. I-61, Attachment A at 6, Attachment B at 3.

⁶⁰ See, e.g., SBC Comments Attach. A-CA Ex. 7 Parts 5, 7 & 15; SBC Comments Attach. A-WI Ex. 7 Parts 15 & 35; Texas PUC Comments, Record Submission for Docket No. 28744, SBC Exs. 2A, 3A & 6A.

CONFIDENTIAL ***.⁶¹ And MCI submitted promotional materials in Indiana showing that it offered and could provide dedicated transport as defined by the *TRO*.⁶²

45. AT&T was the principal carrier to contend that it could not provide dedicated transport. However, AT&T admitted in discovery that its standard network design provides for ***BEGIN CONFIDENTIAL⁶³

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Necessarily, then, AT&T can provide the same dedicated service at its collocation arrangements.

46. AT&T further acknowledged that the provision of a dedicated path is possible so long as there is a digital cross-connect at each point of presence or switch location.⁶⁶ While AT&T claimed that “the expense and associated inefficiencies” of digital cross-connects “are highly unlikely to be justified,”⁶⁷ AT&T’s network witness admitted at the evidentiary hearing in Texas that AT&T already *has* digital cross-connect systems in all

⁶¹ SBC Comments Attach. A-MI Ex. 7 Part 17 (Item 01).

⁶² SBC Comments Attach. A-IN Ex. 7 Part 8 (SBC Cross Exhibit 8C).

⁶³ Michigan PSC Comments, Record Submission for Case No. U-13796, ***. See also SBC Comments Attach. A-MI Ex. 7 Part 1 (Response 2-1(b)), Part 17 (Item 01). In the Michigan proceedings, the parties and witnesses described competitive facilities on the public record, using “code names” to protect the identities of carriers. Accordingly, information that might reveal the “code names” has been labeled as confidential here.

⁶⁴ *Id.*; SBC Comments Attach. A-MI Ex. ***. ***.

⁶⁵ SBC Comments Attach. A-MI Ex. ***. ***.

⁶⁶ Texas PUC Comments, Record Submission for Docket No. 28745, AT&T Ex. 3A at 18-19.

⁶⁷ *Id.* at 20.

of its switch locations.⁶⁸ AT&T's illustration ***BEGIN CONFIDENTIAL

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47. The ability of AT&T and other carriers to provide dedicated transport between two central offices, even where they have an intermediate switch in between, should come as no surprise. SBC has switches (*e.g.* tandem switches or other central office switches) in between its central offices on many transport routes, yet it still offers dedicated transport on these routes. In fact, dedicated transport rides over the same physical inter-office fiber facilities that SBC uses for inter-office switched traffic. Thus, the Commission's trigger rule stated that "[t]ransmission paths between identical end points (*e.g.*, wire center or switch "A" and wire center or switch "Z") are the same 'route,' irrespective of whether they pass through the same intermediate wire centers or switches, if any."⁷⁰
48. Likewise, a technical expert of the Illinois Commerce Commission staff testified that "[i]f a carrier has fiber-based collocations at two [SBC Illinois] central offices, it would *strongly suggest* that the carrier is able to route transport traffic from one end point to the other over its own network."⁷¹ Staff recommended that the Illinois commission establish a presumption as to the deployment of transport facilities in such cases, absent specific concrete evidence to the contrary.⁷²

⁶⁸ SBC Comments Attach. A-TX Ex. 8 Tr. 381-382 (Lynott); Texas PUC Comments, Record Submission for Docket No. 28745, Tr. 381-382.

⁶⁹ SBC Comments Attach. A-MI Ex. 7 Part 1 (Response 2-1(b)).

⁷⁰ 47 C.F.R. § 51.319(e).

⁷¹ SBC Comments Attach. A-IL Ex. 6 Part 26 (Liu Direct (Transport)) at 29 (emphasis in original).

⁷² *Id.* at 33-34.

49. More fundamentally, QSI's filter ignores the bottom line. The Commission's objective is to assess whether competing providers would be "impaired" without access to unbundled transport from the incumbent LEC. Competing carriers have argued that they are impaired due to the time and cost associated with constructing new transport facilities: such as obtaining rights of way, laying fiber optic facilities, and obtaining collocation space in the SBC central offices at each end of the transport "route." But there was no dispute in the state proceedings that several carriers have *already* obtained rights of way, deployed fiber transport facilities, and obtained collocation space. In short, they have already incurred the time and cost to build a transport network connecting points "A" and "Z." If they have transport facilities between A and Z but choose not to use those facilities, or if they choose for their own business reasons to insert a switch in between A and Z, they can hardly claim that they need the incumbent's network to get from A to Z, or that they are somehow "impaired" in getting from A to Z.

Availability of Wholesale Transmission Capacity

50. QSI applied a similar CLEC-biased "filter" to wholesale loops and transport, and excluded a wholesale provider unless the provider expressly stated (i) that it provided wholesale capacity at the particular location or route in question, and (ii) that its offerings satisfied the legal requirements of the vacated trigger rules.⁷³ QSI thus ignored the carrier's own public offers of transport capacity, and also ignored the reality that wholesale providers do not selectively offer transmission capacity on a few individual routes; rather, they offer capacity wherever facilities are available.

⁷³ QSI Study at 13 & 19.

51. The most prominent example of QSI’s improper filtering is AT&T. As noted above, AT&T contended that it did not offer wholesale loops at all. However, AT&T’s own website advertises wholesale loop offerings, and AT&T’s own witness ultimately admitted that AT&T is willing to provide “private lines” to other carriers. Nevertheless, QSI simply accepted AT&T’s litigating position at face value and ignored the real-world evidence.
52. As the evidence showed, AT&T’s denial was nothing but a play on words. In AT&T’s view, a loop is a “loop” when it is being used by an end user, but the exact same facility is magically transformed into a “service” when it is being used by a carrier. Whatever labeling AT&T might choose for litigation purposes, however, a “communication path” that provides a “point to point connection” from the customer premises to a carrier’s “node,” “switch,” or any other “designated premises” is a loop.⁷⁴ Indeed, AT&T’s witness confirmed that AT&T’s *wholesale* loops use exactly the same “customer ring” facilities, the same service codes, the same ordering codes, and the same “circuit IDs” as its retail loops.⁷⁵
53. AT&T also contended that its wholesale loops are somehow inferior because they run from the end user’s premises to AT&T’s switch location or “node” rather than to an SBC switch location. As a threshold matter, AT&T’s premise was incorrect, because it publicly offers connectivity from the end user to “local exchange carriers” among

⁷⁴ Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 20 (private line), SBC Ex. 23 at 1 (entrance facilities), SBC Ex. 24 at 1-2; SBC Comments Attach. A-TX Ex. 8 Tr. 396-399 (Lynott) Texas PUC Comments, Record Submission for Docket No. 28745, Tr. 396-399.

⁷⁵ SBC Comments Attach. A-TX Ex. 8 Tr. 401-402, 410, 421-422 (Lynott); Texas PUC Comments, Record Submission for Docket No. 28745, Tr. 401-402, 410, 421-422.

numerous other locations; the connection is not limited to AT&T's switch.⁷⁶ AT&T's conclusion is also wrong. AT&T is hardly an outcast in the telecommunications world, and a connection to AT&T's network is hardly the dead end that AT&T portrayed it to be. To the contrary, there are many connections between the AT&T network and that of SBC, and a competing carrier can easily get from the AT&T switch location to a desired SBC central office.⁷⁷

54. QSI's filter on wholesale service is also one-sided. Where a CLEC *denied* being a wholesaler, QSI accepted that denial without question and without considering contrary real-world evidence, as it did with AT&T above. But even where CLECs unequivocally admitted that they satisfy the wholesale trigger – and where QSI's own Mr. Ball conceded that the trigger was satisfied – QSI's study *ignores* their admission. For Wisconsin, QSI's study here represents that there are no transport routes that satisfy either trigger. QSI's Mr. Ball reached that conclusion in prefiled testimony in the Wisconsin proceeding, and stated that he relied on the CLECs' discovery responses. But cross-examination revealed that Mr. Ball had failed to consider discovery responses that the leading trigger candidates provided – in response to discovery requests issued by Mr. Ball's own client AT&T – in which they went through every element of the wholesale trigger and admitted that they satisfied each one.⁷⁸ Upon reviewing those responses, Mr. Ball conceded at the evidentiary hearing that at least 16 transport routes satisfied the wholesale trigger.⁷⁹ QSI utterly ignores that conclusion here.

⁷⁶ Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 20 at 1, SBC Ex. 23 at 1.
⁷⁷ SBC Comments Attach. A-TX Ex. 8 Part 1 Tr. 337 (Sparks).
⁷⁸ SBC Comments Attach. A-WI Ex. 8 Part 1; Attach. A-WI Ex. 7 Parts 21, 25, 35 & 38.
⁷⁹ SBC Comments Attach. A-WI Ex. 8 Part 1 at 2.

QSI Ignores Much of the State Evidentiary Record, and Mischaracterizes the Rest

55. Even for the extremely limited pool of competitive facilities that QSI considered after adding its own filters to the unlawfully restrictive trigger rules, QSI’s “study” ignores or misrepresents the evidence gathered in the state proceedings.

Quantity of DS3 Loops

56. Consider first QSI’s assertion that the state proceedings proved that carriers rarely deploy DS3 loops in quantities of one or two at a given location. The evidence shows that is not true. First, many of the principal competing providers did not disclose the quantity of DS3 loops that they had deployed at any particular location. Indeed, in some states AT&T itself took the position that the quantity of DS3 loops deployed by a given competing provider was irrelevant.⁸⁰ QSI simply *assumed* that where a carrier was silent, it deployed more than two DS3 circuits – a circular argument that provides no support for its position.

57. Some carriers *did* disclose the quantity of DS3 loops at some locations, and as described above their discovery responses showed that the deployment of one or two DS3s is quite common. Some carriers confirmed their deployment of loops at the *DS1* level. And for Indiana and Michigan – two states where AT&T did provide information on the quantity of DS3s at some locations – AT&T presented evidence that *** percent of its fiber loops were deployed at the one-or-two DS3 level.⁸¹

58. QSI ignored these facts. Further, as shown above, QSI’s analysis ignored *all* locations other than those that happened to have two or more competing providers at the same

⁸⁰ See, e.g., SBC Comments Attach. A-IL Ex. 7 Part 2 at 25.

⁸¹ SBC Comments Attach. A-IN Ex. 7 Parts 8 & 16; Attach A-MI Ex. 7 Parts 13 & 24.

time, because QSI’s methodology was based on the vacated trigger rules. Thus, QSI improperly restricted its search to a “needle in the haystack” – a location that has sufficient capacity to support *multiple* carriers, but not enough capacity to warrant the deployment of more than two DS3s by either carrier.

59. In its comments, AT&T contends that the deployment of one or two DS3s by one carrier at a location might be the result of exceptional circumstances.⁸² But where sophisticated carriers deploy loops at those capacities at many different locations – as is clearly the case here – such deployment is not an exception but a common practice.

Building Access

60. Next, the evidence also refutes the CLEC suggestion that building owners deny or restrict access to CLECs, preventing them from reaching all the potential customers at a given location. As with the quantity of DS3s, there were many instances in which competing providers failed or declined to provide information one way or another on building access. Most importantly, carriers typically did not say whether they had even *requested* any access beyond the level of access they received; in other words, a carrier might not have received access to an entire building for the simple reason that it did not ask for or want full access. QSI improperly assumed that these carriers were *denied* building access by the owner.

61. Where carriers were more forthcoming, their discovery responses show that CLECs have generally not been denied access. First, the sheer number of locations to which competitors have deployed loops (and thus by definition have obtained access) belies the

⁸² AT&T Comments at 7 & 27.

CLECs’ theory. Second, as discussed previously, one leading competitor stated in discovery that it generally received whatever access it needed to reach customers, a point confirmed by the fact that it has deployed loops to serve multiple customers throughout many of its customer locations.⁸³ A second large competing provider, *** ***, affirmed in discovery that it had access to the “riser cables” (which typically allow carriers to access all customers in a building) in many customer locations.⁸⁴ For other locations, that competitor stated that its access was limited to a particular floor; however, on cross-examination QSI’s own Mr. Ball admitted that there was no evidence that the carrier had even *asked for* greater access in any of those instances (and no evidence that such access was denied).⁸⁵

62. In Illinois, SBC asked competing providers point-blank to identify locations at which they had been denied access to some or all of the building. Almost all of the carriers that responded did not identify any such instances. Two carriers (***) (***) affirmatively stated that they were not aware of any location at which they had been denied access.⁸⁶

Third Party Data on Fiber-Lit Buildings

63. In some states, SBC used information obtained from GeoResults in its initial “trigger” filings, where it was required to identify non-impaired locations before CLEC discovery responses were provided or before the results of discovery could be analyzed.

GeoResults is used throughout the industry to identify locations served by competitive

⁸³ SBC Comments Attach. A-IN Ex. 7 Part 15 at 4.

⁸⁴ SBC Comments Attach. A-CA Ex. 7 Part 12; SBC Comments Attach. A-WI Ex. 7 Part 11; Texas PUC Comments, Record Submission for Docket No. 28745, SBC Ex. 5A.

⁸⁵ Michigan PSC Comments, Record Submission for Case No. U-13796, Tr. 735 (Ball).

⁸⁶ Ex. 8 hereto, Parts 1 & 2 (response no. 1-21).