ESTABLISHING A LAWFUL UNBUNDLING REGIME

December 1, 2004

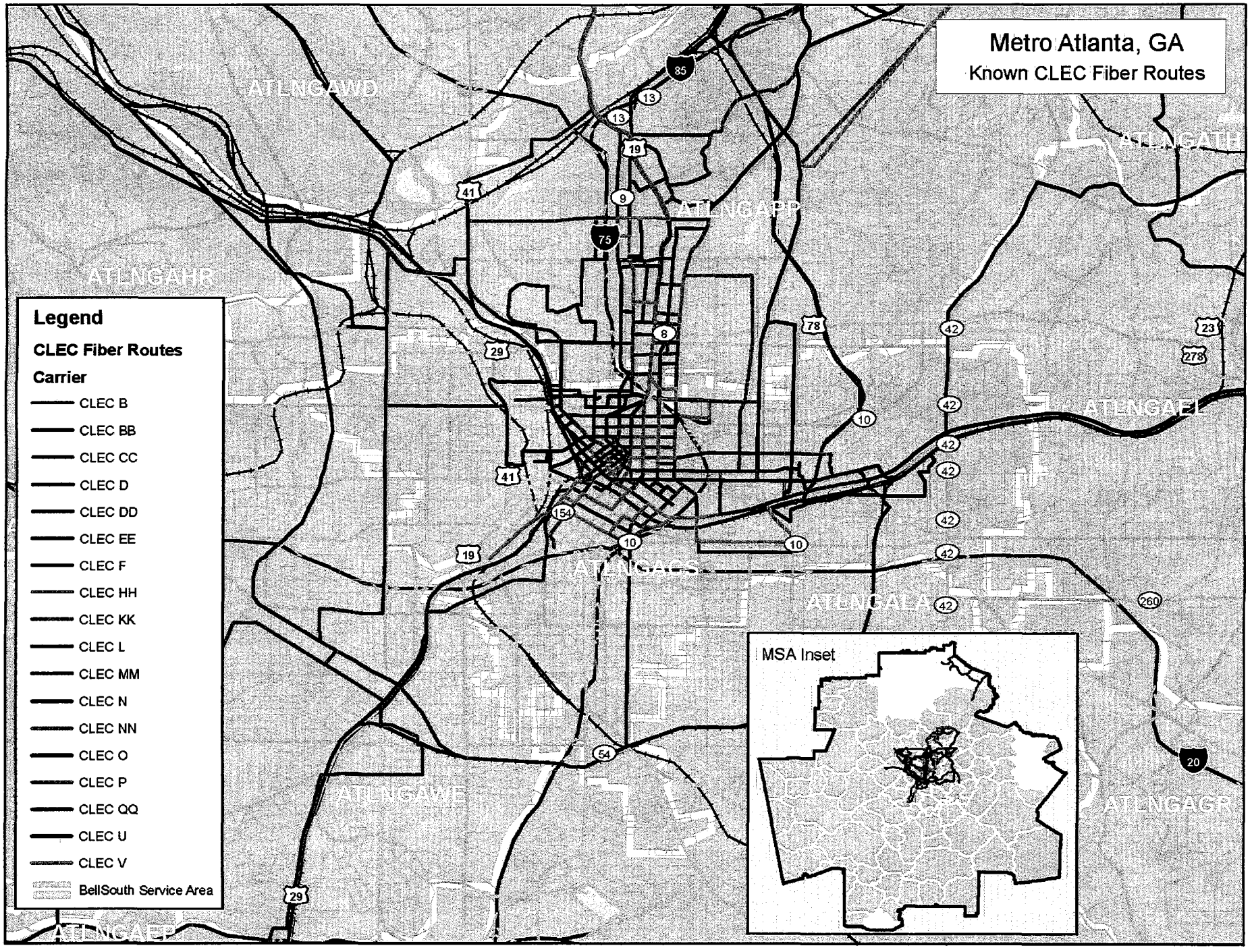
The Commission cannot lawfully find impairment in a market "where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis."

USTA I, 290 F.3d at 422

CLECs HAVE DEPLOYED EXTENSIVE FIBER NETWORKS

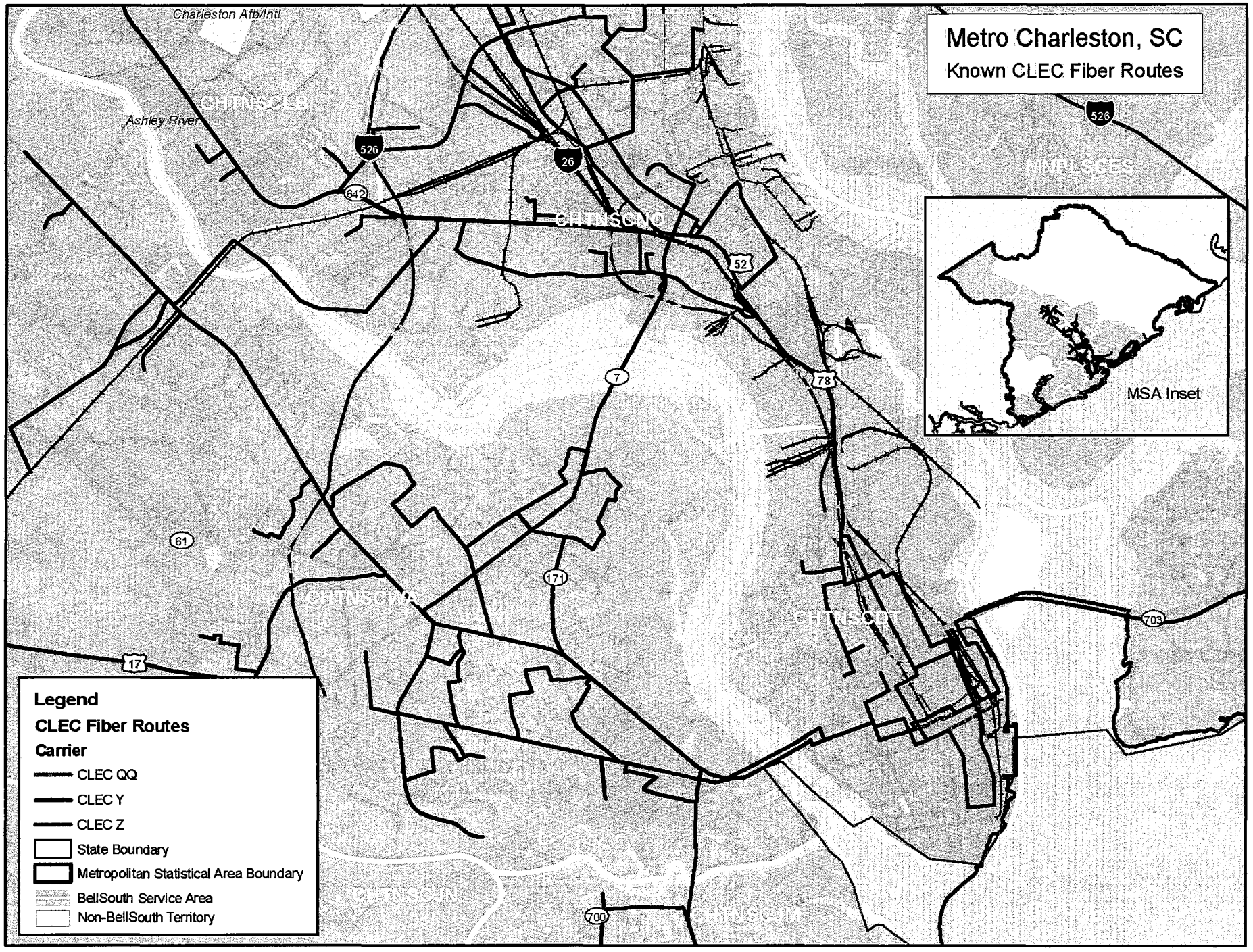
- As of 2003, CLEC networks consist of 324,000 route miles, an increase of 84% from 2001
- As of 2003, there were an average of 19 CLEC networks in the top 50 MSAs, an increase of 30% from 2001
- As of 2003, CLECs have deployed at least one network in 140 of the top 150 MSAs

Source: *UNE Fact Report 2004* at I-2, Table 1; *UNE Fact Report 2002* at I-1, Table 1


Metro Atlanta, GA
Known CLEC Fiber Routes
Legend
CLEC Fiber Routes
Carrier
CLEC B
CLEC BB
CLEC CC
CLEC D
CLEC DD
CLEC EE
CLEC F
CLEC HH
CLEC KK
CLEC L
CLEC MM
CLEC N
CLEC NN
CLEC O
CLEC P
CLEC QQ
CLEC U
CLEC V
BellSouth Service Area
MSA Inset
ATLNGAWD
ATLNGATH
ATLNGAPP
ATLNGAHR
ATLNGAEL
ATLNGACS
ATLNGALA
ATLNGAWE
ATLNGAGR
ATLNGAEP
85
13
19
41
9
75
8
29
78
42
23
278
10
154
260
20
54

EXAMPLE COMPETITIVE FIBER PLACEMENT – DOWNTOWN ATLANTA

EXAMPLE COMPETITIVE FIBER – DOWNTOWN ATLANTA


Metro Charleston, SC
Known CLEC Fiber Routes
Charleston Afb/Intl
Ashley River
CHTNSCLB
CHTNSCNO
CHTNSCWA
CHTNSCDT
CHTNSCJN
CHTNSCJM
MNPLSCES
MSA Inset
526
26
642
52
78
7
61
171
17
700
703
Legend
CLEC Fiber Routes
Carrier
CLEC QQ
CLEC Y
CLEC Z
State Boundary
Metropolitan Statistical Area Boundary
BellSouth Service Area
Non-BellSouth Territory

FIBER BASED COLLOCATION IN BELLSOUTH CENTRAL OFFICES

Central Offices By No. of Business Access Lines	No. of Central Offices	Percent of Central Offices	Number of Fiber-Based Collocators				
			0	1+	2+	3+	4+
Below 5,000	1145	72.8%	96.9%	3.1%	1.0%	0.1%	0.1%
5,000-10,000	199	12.6%	45.2%	54.8%	25.1%	11.1%	4.5%
10,000-15,000	94	6.0%	22.3%	77.7%	53.2%	36.2%	17.0%
15,000-20,000	56	3.6%	17.9%	82.1%	75.0%	66.1%	53.6%
20,000-25,000	32	2.0%	3.1%	96.9%	84.4%	81.3%	65.6%
25,000-30,000	20	1.3%	0.0%	100.0%	95.0%	95.0%	90.0%
30,000-35,000	9	0.6%	0.0%	100.0%	100.0%	100.0%	100.0%
35,000-40,000	3	0.2%	0.0%	100.0%	100.0%	100.0%	100.0%
40,000-45,000	3	0.2%	0.0%	100.0%	100.0%	100.0%	100.0%
45,000-50,000	4	0.3%	0.0%	100.0%	100.0%	100.0%	100.0%
Above 50,000	9	0.6%	0.0%	100.0%	100.0%	100.0%	100.0%
Total	1574	100%	78.3%	21.7%	14.4%	10.6%	7.8%

The Commission cannot lawfully find impairment in a market where "competition is possible," whether or not competition has actually developed or has developed to a lesser extent in that market.

USTA II, 359 F.3d at 571 & 575

The Commission cannot "simply ignore facilities deployment along similar routes when assessing impairment."

USTA II, 359 F.3d at 575

CLECs ADMIT THAT THEY SELF-PROVIDE HIGH-CAPACITY TRANSPORT

- Advanced Telecom, which operates in four states in the Pacific Northwest, has self-provided transport on 25 of the 40 interoffice routes in its system (62.5%)
- KMC, which operates in 35 mid-size markets, self-provides transport along at least 245 routes in its system
- X/O, Xspedius, AT&T and MCI, which operate in numerous states, self-provide transport, but won't say where or under what circumstances

Source: Wigger Declaration ¶ 33; Duke Declaration ¶ 7

CLECs ADMIT THAT HIGH-CAPACITY TRANSPORT IS AVAILABLE FROM OTHER CARRIERS

- Eschelon, which serves 12 large and mid-size markets, found that approximately 60% of its collocations are in central offices served by an alternative transport provider and approximately 20% are served by multiple providers
- Broadview, which operates in the northeast U.S., is able to obtain transport from alternative providers along 25% of its routes
- Talk America, which is a facilities-based provider in Michigan, is able to obtain transport from alternative providers along 35% of its routes

Source: Kunde Declaration ¶ 6; Sommi Declaration ¶ 8; Brasselle Declaration ¶ 10

CLECs ADMIT THAT HIGH-CAPACITY TRANSPORT IS AVAILABLE FROM OTHER CARRIERS (con't.)

- Advanced Telecom purchases interoffice transport from CLECs on 7% of its system routes and estimates that alternative transport is available along 20% of its system routes

Source: Wigger Declaration ¶ 24

CLECs ADMIT THAT THEY SELF-PROVIDE HIGH-CAPACITY LOOPS

- Bay Ring, which operates in New Hampshire, Massachusetts and Maine, has self-provisioned DS1/DS3 loops
- X/O self-provides DS1/DS3 channels connecting to its backbone network using its own fiber optic facilities
- Xspedius self-provides DS1/DS3 channels connecting to its backbone network using its own fiber optic facilities

Source: Wengert Declaration ¶ 10; Tirado Declaration ¶ 4; Falvey Declaration ¶ 10

CLECs ADMIT THAT HIGH-CAPACITY LOOPS ARE AVAILABLE FROM OTHER CARRIERS

- Advanced Telecom purchases 10% of its DS1 loops in Washington from another CLEC
- According to X/O, CLECs offer DS1/DS3 loops on a wholesale basis in approximately 5% of the buildings X/O serves
- Sprint has identified more than 30,000 buildings in which alternative loop facilities are available

Source: Wigger Declaration ¶¶ 45, 48; Tirado Declaration ¶ 11; Comments of Sprint Corp. at 45

THIRD-PARTY DATA CONFIRM THE COMPETITIVENESS OF THE HIGH-CAPACITY SERVICES MARKET (Proprietary)

REDACTED

Source: Starcher Declaration ¶¶ 32-34; RTI International, Survey of Local Telecommunications Competition in North Carolina (Oct. 2004)

THIRD-PARTY DATA CONFIRM THE COMPETITIVENESS OF THE HIGH-CAPACITY SERVICES MARKET (con't.)

- Study commissioned by the North Carolina Utilities Commission found that:
  - CLECs serve 60% of the non-switched digital private line – DS1 or greater connections in North Carolina, the vast majority of which (87.3%) are served through the CLECs' own facilities
  - CLECs have a 58% share of the switched DS1 service market in North Carolina, a substantial portion of which (32.2%) is served through the CLECs' own facilities

The Commission's impairment analysis cannot ignore the ability of competitors to "self-provision."

AT&T Corp. v. Iowa Utilities Bd., 525 U.S. at 389

A LOOP TEST THAT REQUIRED A WHOLESALE ALTERNATIVE WOULD BE UNLAWFUL

- A test that requires the presence of a wholesaler in a building would ignore the ability of CLECs to "self-provision," contrary to the Supreme Court's ruling
- Such a test would allow the business decisions of entrants to dictate impairment, contrary to the Supreme Court's ruling
- Such a test would assess impairment based on whether CLECs have alternatives, and not whether consumers have alternatives, as the D.C. Circuit has required
- Such a test would misconstrue the requirements of § 251(d)(2), which focuses on the "ability" of competitors to offer service without UNEs, regardless of whether that competitor has chosen to become a wholesaler

HIGH-CAPACITY LOOP ALTERNATIVES

- Central office approach is consistent with *USTA II*
- Nationwide finding of impairment would be legally unsustainable given evidence of self-deployment, intermodal competition, and special access availability
- Building-by-building approach is administratively unworkable

The Commission's impairment analysis "cannot ignore intermodal alternatives."

USTA II, 359F.3d at 572-573

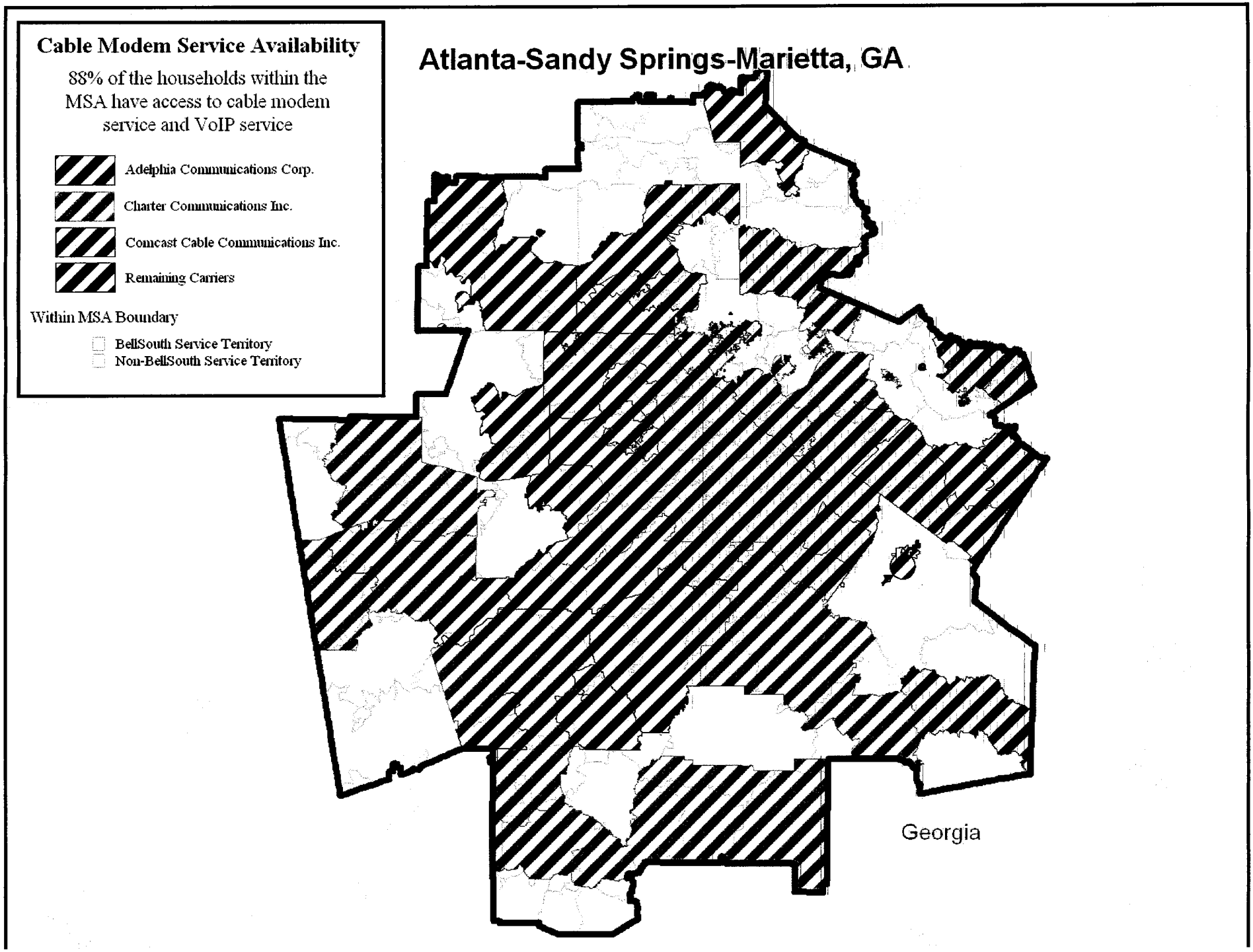
EXTENSIVE INTERMODAL COMPETITION EXISTS FOR HIGH-CAPACITY SERVICES

- A recent In-Stat/MDR study found that 41% of enterprises, 32% of middle market businesses, and 44% of small businesses were using cable modem service for high-capacity services
- Top cable companies currently provide high-capacity services to hundreds of thousands of business customers
  - Cox provides high-capacity service to more than 100,000 business customers in 18 markets nationwide
  - Time Warner Cable provides high-capacity service to more than 149,000 business customers nationwide

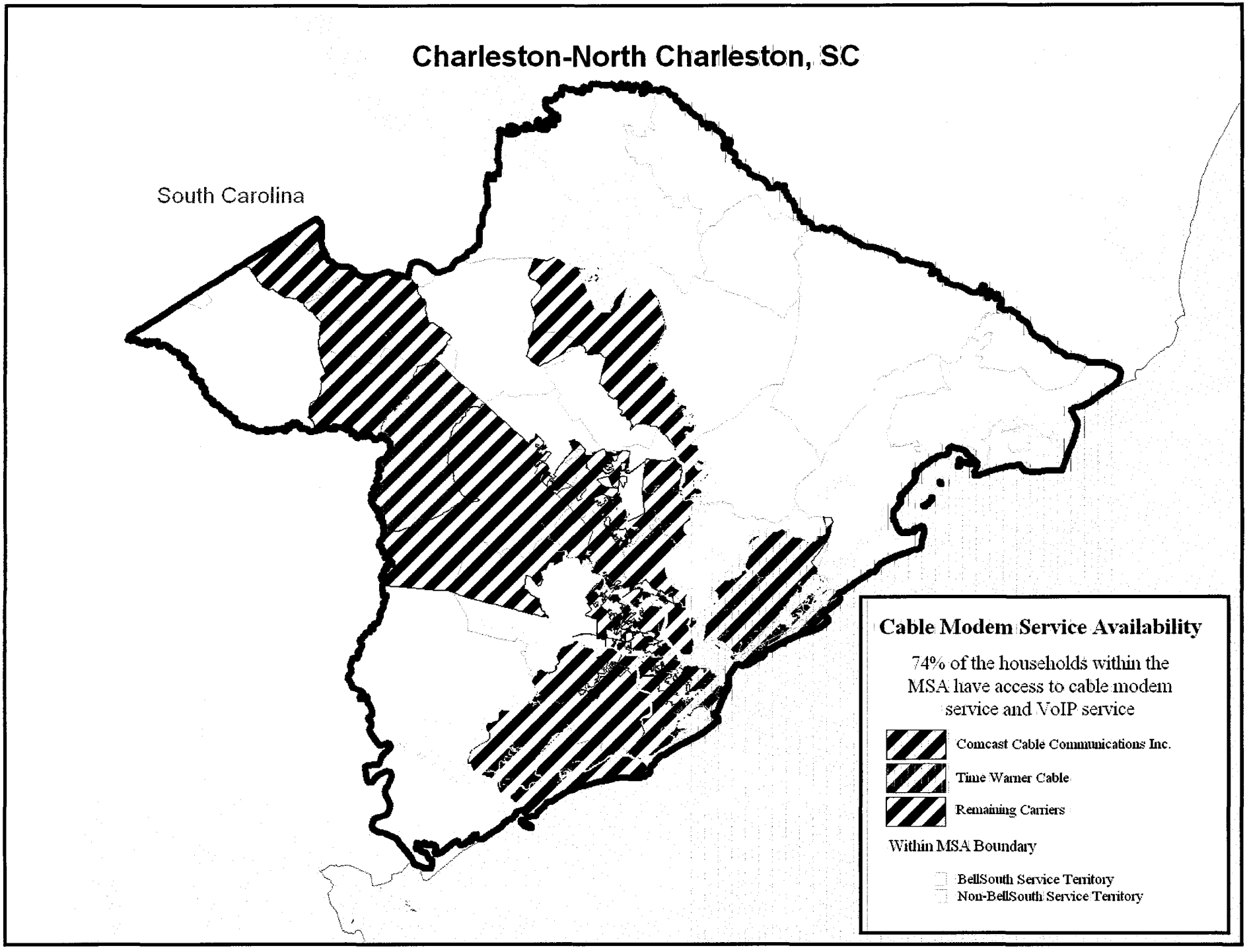
Source: November 8, 2004 ex parte from Jon Banks to Marlene Dortch

EXTENSIVE INTERMODAL COMPETITION EXISTS FOR HIGH-CAPACITY SERVICES (con't.)

- Cable networks pass numerous businesses, and cable operators are aggressively extending their fiber to large office buildings
  - 60% of small to middle market businesses are located within a few hundred feet of a cable network, and 25% already have a cable drop
  - According to Cox, more than 320,000 businesses with a total telecom spend of $3.3 billion annually lie within 100 feet of Cox's network
  - Cox expects to reach 25% of businesses within its franchise by end-of-year 2004


Cable Modem Service Availability
88% of the households within the MSA have access to cable modem service and VoIP service
Adelphia Communications Corp.
Charter Communications Inc.
Comcast Cable Communications Inc.
Remaining Carriers
Within MSA Boundary
BellSouth Service Territory
Non-BellSouth Service Territory
Atlanta-Sandy Springs-Marietta, GA
Georgia

Charleston-North Charleston, SC



The Commission "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired…"

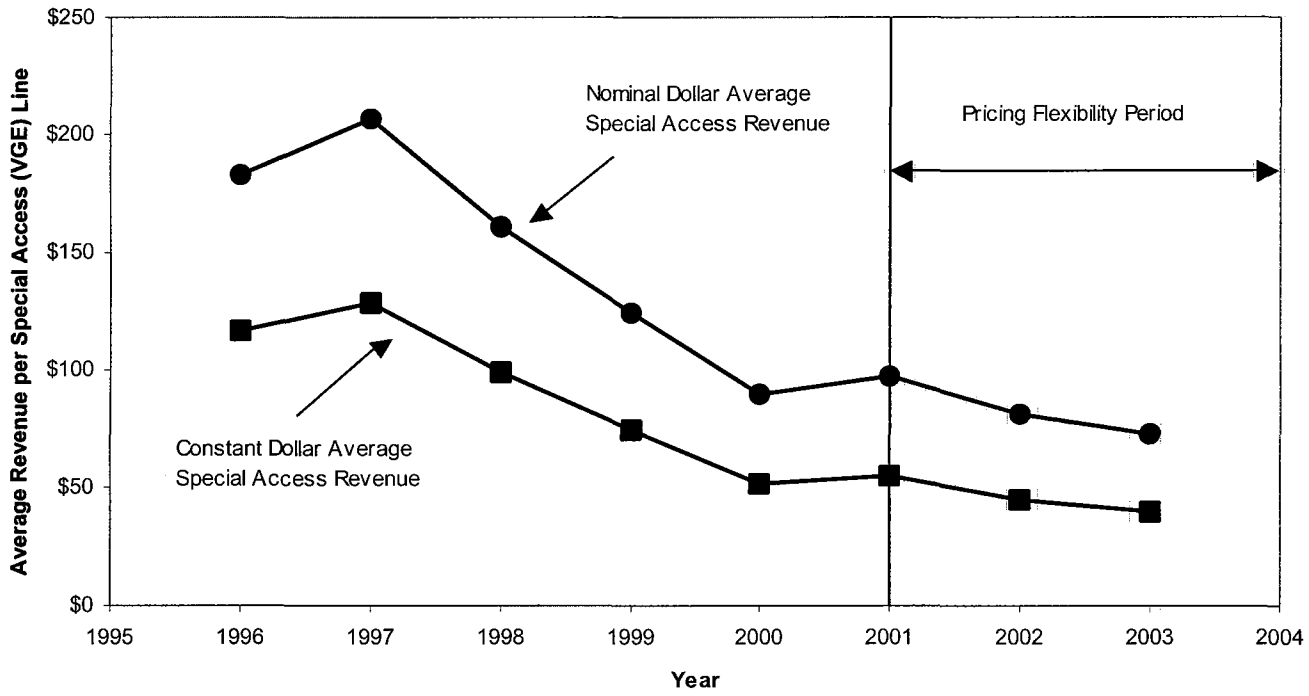
USTA II, 359 F.3d at 577

CLECs ARE COMPETING SUCCESSFULLY FOR HIGH-CAPACITY SERVICES USING SPECIAL ACCESS

- CLEC use of special access is extensive
  - In BellSouth's region, there are 106,640 buildings served by CLECs using DS1 circuits either purchased as special access, UNEs, or both
  - 55,240 of these buildings (51.8%) are served exclusively by special access, and 12,050 (11.3%) are served by both special access and UNEs
  - 70% of all DS1 circuits purchased from BellSouth are in the form of special access
- Special access prices have fallen

Source: Padgett Affidavit ¶ 26; *UNE Fact Report 2004* at III-39; November 10, 2004 Ex Parte from Glenn Reynolds to Marlene Dortch

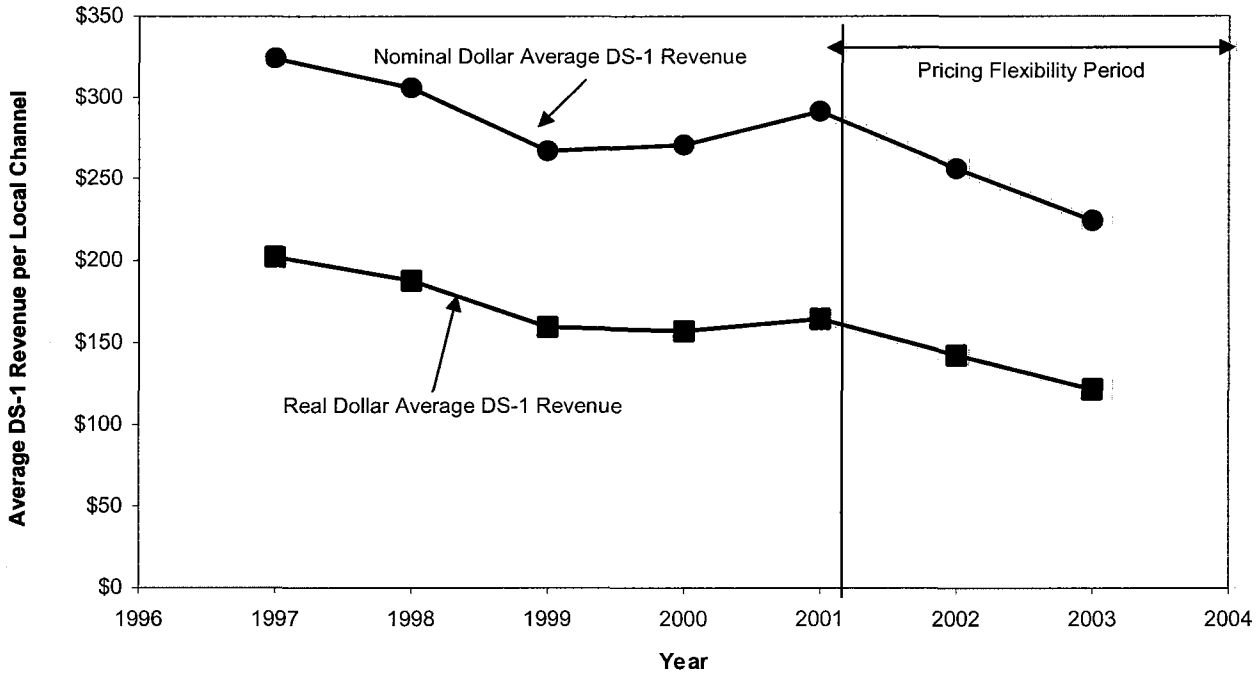
BELLSOUTH'S SPECIAL ACCESS REVENUE (PER VOICE GRADE EQUIVALENT SPECIAL ACCESS LINE), 1996-2003



COMPOUND ANNUAL GROWTH RATE OF BELLSOUTH'S REVENUE PER SPECIAL ACCESS (VOICE GRADE EQUIVALENT) LINE

Period	Nominal CAGR	Real CAGR
Full Period (1996-2003)	-12.36%	-14.33%
Price Caps (1996-2001)	-11.84%	-13.95%
Pricing Flexibility (2001-2003)	-13.65%	-15.29%

BELLSOUTH'S DS-1 REVENUE PER LOCAL CHANNEL, 1997-2003

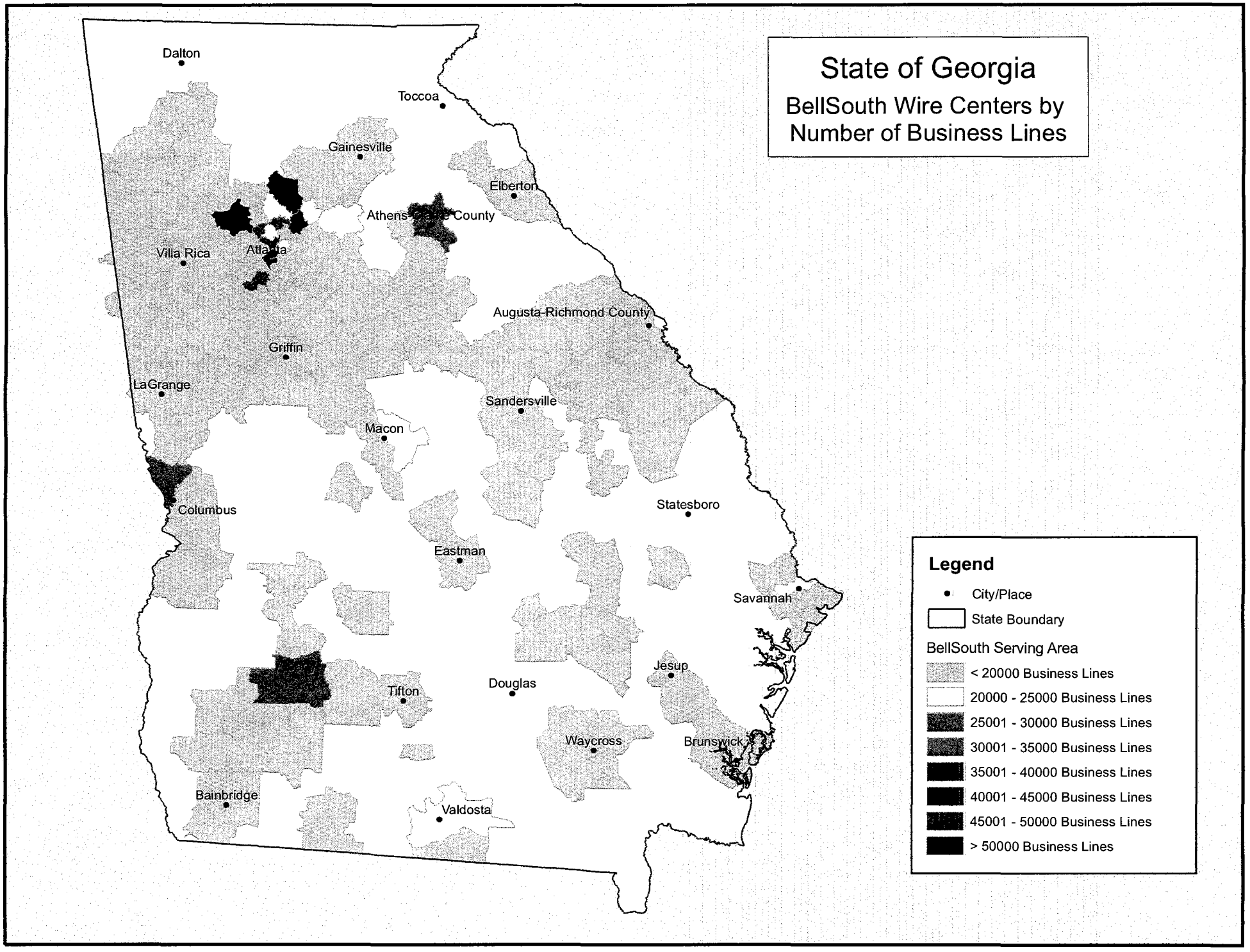


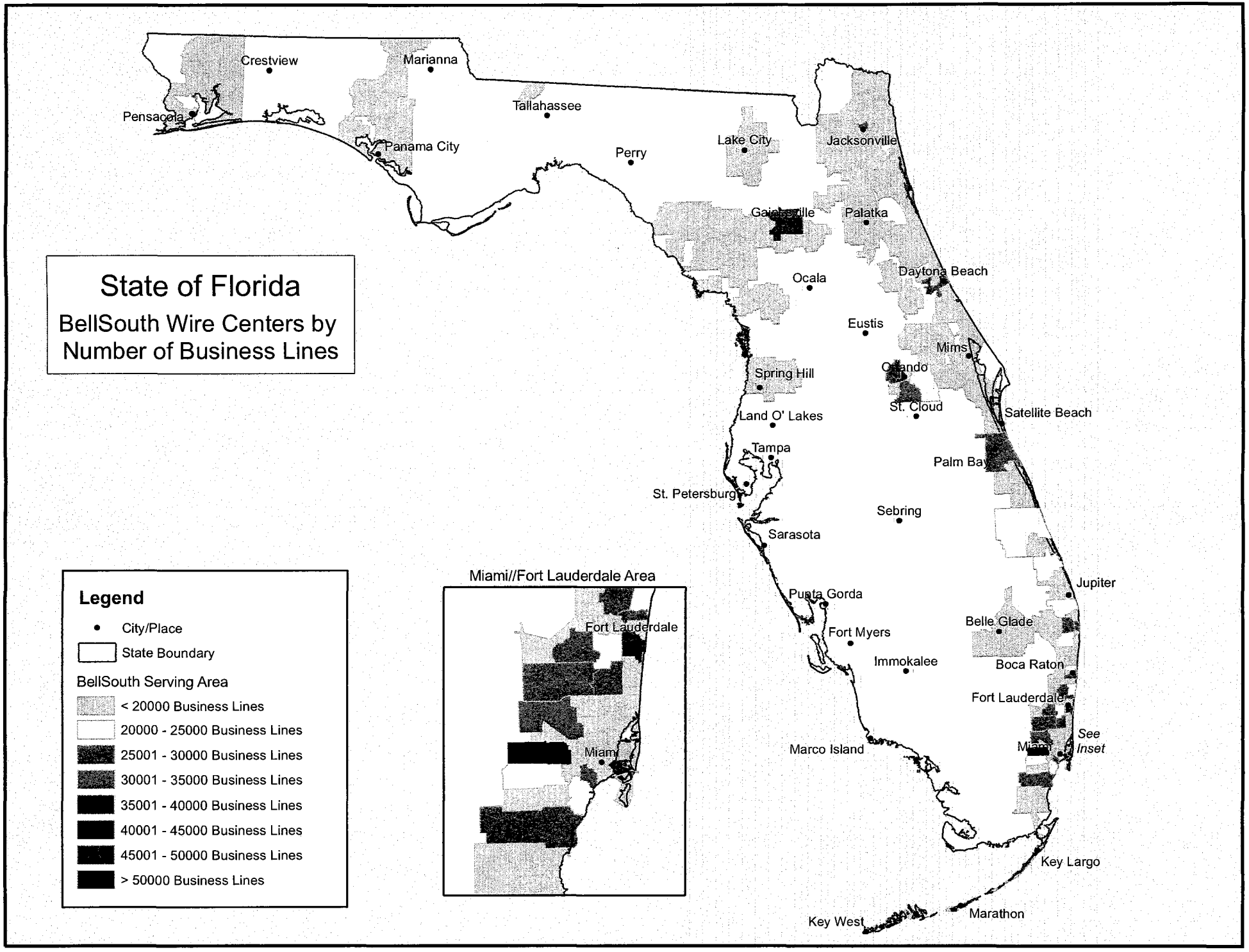
COMPOUND ANNUAL GROWTH RATE OF BELLSOUTH'S REVENUE PER DS-1 LOCAL CHANNEL

Period	Nominal CAGR	Real CAGR
Full Period (1997-2003)	-5.94%	-8.06%
Price Caps (1997-2001)	-2.59%	-4.96%
Pricing Flexibility (2001-2003)	-12.30%	-13.96%

SPECIAL ACCESS CONVERSIONS SHOULD BE PROHIBITED

- No conversion rule would be consistent with D.C. Circuit's impairment standard because a carrier using special access to serve a customer cannot be impaired without access to UNEs to serve that same customer
- No discrimination issue because carriers utilizing special access to serve customers are not similarly situated to those carriers that rely upon UNEs


State of Georgia
BellSouth Wire Centers by Number of Business Lines
Dalton
Toccoa
Gainesville
Elberton
Athens
County
Villa Rica
Atlanta
Augusta-Richmond County
Griffin
LaGrange
Sandersville
Macon
Columbus
Statesboro
Eastman
Savannah
Jesup
Douglas
Tifton
Waycross
Brunswick
Bainbridge
Valdosta
Legend
City/Place
State Boundary
BellSouth Serving Area
< 20000 Business Lines
20000 - 25000 Business Lines
25001 - 30000 Business Lines
30001 - 35000 Business Lines
35001 - 40000 Business Lines
40001 - 45000 Business Lines
45001 - 50000 Business Lines
> 50000 Business Lines


State of Florida
BellSouth Wire Centers by Number of Business Lines
Legend
City/Place
State Boundary
BellSouth Serving Area
< 20000 Business Lines
20000 - 25000 Business Lines
25001 - 30000 Business Lines
30001 - 35000 Business Lines
35001 - 40000 Business Lines
40001 - 45000 Business Lines
45001 - 50000 Business Lines
> 50000 Business Lines
Miami//Fort Lauderdale Area
Fort Lauderdale
Miami
Crestview
Marianna
Pensacola
Panama City
Tallahassee
Perry
Lake City
Jacksonville
Gainesville
Palatka
Ocala
Daytona Beach
Eustis
Mims
Orlando
Spring Hill
St. Cloud
Satellite Beach
Land O' Lakes
Tampa
Palm Bay
St. Petersburg
Sebring
Sarasota
Jupiter
Punta Gorda
Belle Glade
Fort Myers
Immokalee
Boca Raton
Fort Lauderdale
See Inset
Miami
Marco Island
Key Largo
Key West
Marathon

UNE-P TRANSITION

- No new adds upon adoption of UNE rules
- Proposed transition mechanism is reasonable

OTHER ISSUES THE COMMISSION MUST ADDRESS

- Interplay of Section 251 and 271 and role of state public service commissions
- Non-251 commercial agreements and role of state public service commissions
- Implementation of new UNE rules and change of law process