

December 8, 2004

**VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: *Notice of Ex Parte Communication - Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338.

Dear Ms. Dortch:

This letter proposes a rational, sustainable rule governing section 251 unbundling obligations for DS1 loops. As an initial matter, the undersigned parties urge the Commission to make a national finding of impairment for DS1 loops. The Commission, of course, made such a finding in its *Triennial Review Order*, which we believe was not vacated by the D.C. Circuit in its *USTA II* opinion.<sup>1/</sup> Although we recognize that concerns have been expressed that such a nationwide finding of impairment may be unsustainable under the D.C. Circuit's *USTA I* and *USTA II* opinions, the record developed in this proceeding firmly supports the Commission in again reaching that conclusion.<sup>2/</sup>

While we disagree that the Commission should do more than make a national finding of impairment regarding DS1 loops on the basis of the record before it, we propose the following rule to allow for findings of non-impairment in specific customer locations. The rule is designed to minimize the error costs of both false-positives (a finding of impairment where there is none) or false negatives (a finding of lack of impairment where impairment exists). The rule is predicated on the overwhelming record evidence that alternatives to ILEC DS1 loops are extremely limited and the determination of such alternatives is not susceptible to generalized inferences. The rule is far more reasonable than any of the alternatives suggested by the Bell Companies

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<sup>1/</sup> *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

<sup>2/</sup> *See United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

because the Bell Company proposals fail to address the actual entry barriers that result in impairment and would, therefore, lead to far greater errors. Moreover, as explained below, carriers are equally impaired without access to DS1 enhanced extended links ("EELs"). We therefore propose that this rule be applied to determine where carriers are impaired without access to DS1 transport when used as a component of the EEL. Finally, we explain that a self-provisioning test would be unreasonable for DS1 facilities.

## **PROPOSED RULE**

Our proposed rule would provide that incumbent LECs are not obligated to provide unbundled access to DS1 loops to any customer location served by at least two wholesale providers of DS1 loops. Such a test is reasonable and lawful, however, only if it includes measures that would (i) ensure that no company qualifies as a "wholesale provider" unless it provides an actual and meaningful alternative DS1 loop facility that is technically equivalent to the facilities provided by the ILEC today, and (ii) the application of the test is made by an independent third party. We think that these qualifications can be accomplished by adoption of the following conditions and procedures in the final rule.

### **1. Qualifications of a Wholesale Loop Provider**

It is critical that a company provide an actual, currently available, and economic alternative DS1 loop facility in order to qualify as a "wholesale provider" under the proposed rule. What drives our proposed test is an agreement that CLECs are not impaired in their access to DS loops wherever they can purchase loop facilities from several DS1 loop vendors that compete against one another in the wholesale market and those loop facilities are technically equivalent to those that are provided today by the LEC. The presence of at least three providers (*i.e.* the incumbent LEC and at least two competitive LECs) would provide competitive LECs with access to alternate physical loop facilities, presumably at a reasonable price (as explained later, a simple duopoly cannot be expected to produce adequate price competition). However, to make this test work, the DS1 loop facilities must be such that they can be used to reach actual customers (*i.e.*, individual tenants' demarcation points not just buildings), be of a type that is reasonably interoperable and technically equivalent to those provided by the ILEC and compatible with competitive LEC networks, and be reasonably accessible by competitive LECs that desire to purchase the facilities. To that end, we believe that the following conditions, adopted in total and reasonably administered, could provide reasonable assurance that a company with facilities into a particular customer location provides an actual wholesale alternative sufficient to qualify as a DS1 loop "trigger" candidate. Specifically, we believe that each trigger candidate must satisfy *each* of the following qualification criteria:

1. The Wholesale Provider Must Be Unaffiliated with the Incumbent LEC.

Clearly, to provide a meaningful choice, the wholesale provider must be completely independent of the incumbent LEC, and driven by a desire to compete with it. Thus, no wholesale provider can be affiliated with an incumbent LEC (defined as a ownership stake of 10% or more), controlled by the incumbent LEC or under common control with an incumbent LEC.

2. The Wholesale Provider Must Offer DS1 Loops at Wholesale Prices on a Common Carrier Basis. The linchpin of this test is the presence of an effective choice in DS1 loop providers. Clearly, to have a such a choice, the alternative provider must make its DS1 loop product available to all interested carrier customers on just, reasonable, and nondiscriminatory terms.

3. The Wholesale Provider Must be Capable of Delivering DS1 Loops that Connect to All Customers in a Building at the Customer-Specified Point of Demarcation. As is clear in the record of this proceeding and explained later herein, simple construction of a fiber lateral to a building is not the same as connecting to customers in the building.<sup>3/</sup> Carriers often build to reach a single customer in a building, but are simply unable (due to lack of riser space, building owner intransigence, *etc.*) to reach other customers at the same location.<sup>4/</sup> Again, what matters for purposes of impairment analysis is whether an actual and effective DS1 loop alternative is available to serve customers; *i.e.*, the monopoly bottleneck extends all the way to the customer and not just to a building basement. Thus, to qualify as a wholesale trigger candidate, a provider should be required to have arranged access in a building sufficient to deliver DS1 loop facilities all the way to each customer's wire closet. This is absolutely critical, and a wholesale provider test simply would not measure a lack of impairment without such a condition.

4. Service Must Be Provided over Facilities Owned by the Competitive LEC.

To alleviate impairment, the DS1 facility must be an actual alternative. Simple resale of incumbent LEC facilities would not provide effective competition and choice, because the incumbent LEC would effectively control access and pricing by its control of the underlying transmission facilities. By the same token, two competitive LECs offering

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<sup>3/</sup> For instance, a "data only" company may have fiber transmission both to the building and within the building for use in providing data services, but may not be able to provide voice service to ANY customer in the building. Cogent Communications, for example, provides internet access over Ethernet facilities to 780 buildings served by their own fiber network. However, none of these facilities would be a suitable replacement for DS1 facilities being provided by the ILEC today. Therefore, this provider cannot qualify as a wholesale provider under a legitimate wholesale provider test.

<sup>4/</sup> As a major facilities based CLEC, XO Communications' network is indicative of the challenges with accessing multiple customers within a building. XO has found that in the buildings to which it has built fiber, XO can only serve multiple (and not necessarily all) customers in less than 40% of those buildings. For example, a recent audit of XO on-net buildings in the New York area which confirmed that XO has cost effective access to multiple tenants in 33% of the XO on-net buildings.

wholesale service over a single competitive LEC supplied fiber facility would not lead to effective price competition. Thus, it is important that each wholesale provider trigger candidate offer its wholesale DS1 service over its own transmission facilities.

5. DS1 Service Must be Delivered over an Industry Standard Interface. DS1 capacity must be delivered over an Industry Standard DS1 interface meeting industry recognized performance parameters, including but not limited to Telecordia compatibility with Telecordia Standard GR-499 in order to ensure that the facilities offered on a wholesale basis will be reasonably interoperable with these networks in order an effective choice.<sup>5/</sup>

6. Wholesale Loops Must Be Delivered Directly to a Collocation (ILEC or Carrier Hotel). It should go without saying that a wholesale product is meaningless unless the facility can be connected to competitive LEC networks at a reasonably convenient access point. Extremely lengthy backhaul, for example, would render use of alternative facilities totally uneconomic. Thus, wholesale loops must be delivered by the wholesale providers to competitive LEC backbone networks or access points to qualify as a trigger candidate. Additionally, if that interconnect is at the ILEC facility, the cost of interconnect which must be paid to the ILEC will further inhibit the CLEC ability to compete with the ILEC on pricing. The purpose of the "Wholesale Provider Test" is to ensure adequate market based competition to ILEC UNEs. In this instance, the ILEC will have an impact on the pricing of the CLEC services to other carriers.

7. Electronic Ordering and Provisioning Systems Must be Available. The Commission has repeatedly recognized in the 271 process that the availability of facilities on a wholesale basis is not meaningful unless the wholesale offering is supported by OSS that is adequate to enable wholesale purchasers to order facilities and track implementation on an electronic basis. The criteria used in the 271 process must be imported into the trigger analysis here.

## **2. Identification of Qualifying Wholesale Providers Must Be Undertaken by an Independent Third Party**

It is also critical that the determination of qualifying wholesaler providers be made in a fair, timely, and reasonable manner. One imperative is that the identification of qualifying wholesalers be undertaken by a neutral third party. It should go without saying that incumbent LECs have powerful incentives to misapply any trigger analysis.

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<sup>5/</sup> For example, XO has determined that services provided by data centric carriers are neither technically suitable nor compatible with XO's requirements. For example, XO cannot utilize Cogent Internet Access Services as an alternative to the ILEC. Similarly, coaxial cable facilities would not suffice.

They simply cannot be relied upon to fairly determine whether wholesale DS1 loop providers exist at particular locations.

There are a number of potential approaches that could be considered, including for example collection of wholesale trigger information by the FCC as part of its annual carrier reporting process. However, we believe that the most reasonable and effective way to administer a wholesale trigger test likely would be to enlist the aid of State Commissions in the process. Although the D.C. Circuit ruled in *USTA II* that State Commissions may not make the ultimate decision on whether impairment exists at a particular location, the Court also made clear that the FCC is free to seek State Commission assistance in "fact finding," "information gathering" and advice and "recommendations." 359 F.3d at 567-68.

### **3. Unbundled Access Pending Final Determinations**

A critical aspect of the rule is that incumbent LECs must continue providing DS1 loops pending the determination of locations with wholesale alternatives consistent with the proposed rule. Any other rule would result in unacceptable levels of false-negatives (denying unbundled access where carriers are, in fact, impaired). This is because the record overwhelmingly demonstrates that the availability of non-ILEC alternatives for DS1 level facilities is extremely limited. More importantly, the record demonstrates that the availability of DS1 alternatives is likely to turn on the specific circumstances extant at a particular location. There is no reasonable ability to infer lack of impairment for DS1 level services at a specific location based on generalized criteria such as the number of business lines at a wire center or the presence of competitive fiber. Fiber is never deployed to provide DS1 services. Thus, the presence of fiber does not by itself indicate the availability of wholesale DS1 service. Rather a more detailed inquiry must be made to determine whether the fiber carriers at each location are actually in the business of providing wholesale service and capable of providing the requesting carrier wholesale DS1 service between the customer location and a requesting carrier access point. All of these points are described in more detail below in addressing the lawfulness of the proposed rule and explaining why a self-provisioning test would be unreasonable.

Under the rule described herein, in the event the Commission does *not* make a finding of national impairment for DS1 loops, as we believe it can and should based on the current record, an appropriate transition period should be adopted in those cases where a determination of non-impairment is made at specific locations. We and other CLECs have a large based of embedded DS1 loops purchased as UNEs under pre-existing rules and interconnection agreements. Where the Commission delists DS1 UNEs at specific buildings, including through application of a rule such as that described herein, existing customers should be allowed to remain in place while the CLECs provision to another method to provide service to their existing customers. One aspect of the transition should be that pending orders for UNEs at the affected locations should also

be honored, as well as orders for new DS1 loops at these locations for a limited time following the finding of non-impairment. The actual transition completely away from DS1 loops at affected locations should occur over an extended period. The transition model adopted by the Commission in the *Triennial Review Order* for unbundled switching and the platform would be a good starting point for adoption of a transition period for DS1 loops. Of course, the transition contained therein would have to be adapted to the different circumstances of DS1 loops as opposed to switching, and the respective triggers for non-impairment, but the general concepts behind the particulars for the transitions for each type of element could be the same. The transition rules adopted could be integrated into new and successor interconnection agreements and apply to existing agreements to the extent provided for in, and pursuant to, carriers' change-of-law amendment provisions.

## **THE PROPOSED RULE FULLY SATISFIES THE CONCERNS EXPRESSED IN *USTA II***

### **1. The Rule Does Not Create an Impermissibly Broad National Category**

The *USTA II* Court held that the Commission "cannot proceed by very broad national categories where there is evidence that markets vary decisively (by reference to its impairment criteria), at least not without exploring the possibility of more nuanced alternatives and reasonably rejecting them." 359 F.3d at 570. The Court also expressed skepticism that there could be impairment in markets where the element in question is "significantly deployed on a competitive basis" suggesting that the element in question is suitable for competitive supply. *Id.* at 574 (quoting *USTA I*, 290 F.3d at 422). Finally, the Commission must explain that its determination of the relevant market minimizes error costs. *Id.* at 575.

Initially it is worth noting that the Bell Companies have themselves defined a broad category consisting of all high capacity facilities. Using the Bell Companies' definition, the vast majority of the facilities within the category have already been exempt from unbundling. The category of high-capacity facilities, as the Bell Companies seek to define it, ranges from DS1 facilities, which equal 24 individual lines, to OC 192 circuits, which have a capacity of 129,024 individual lines, and even higher capacities. All of these functionalities, except DS1s and, to a limited extent DS3s (limited by the 2 DS3 loop cap and the 12 DS3 transport cap), have been eliminated from unbundling obligations.

The proposed rule addresses a very narrow category of these facilities at the lowest capacity levels, DS1 level capacity. The question then is to craft an unbundling rule that captures any decisive market variation with reference to the impairment criteria and which minimizes error costs at this capacity level. The rule proposed herein does exactly that with respect to DS1 facilities. This is because, to the extent there is any

decisive market variation based on impairment criteria for DS1 services, it only occurs at the level of individual customer locations. Thus, any rule which would seek to assess DS1 impairment in a broader fashion, such as at a wire center and MSA level, would not be rationally related to actual impairment and would lead to unacceptably high incidences of false negatives.

## **2. The Proposed Rule Is Narrowly Tailored To Address DS1 Impairment and Fully Substantiated by the Record**

The rule reasonably identifies the instances in which a carrier may not be impaired without access to DS1 facilities as UNEs. It is clear from the record that alternatives to the incumbent LEC for DS1 capacity are extremely limited. The lack of alternatives for incumbent LEC DS1 loops flows directly from the substantial barriers to self-deployment of last-mile facilities that form the heart of the impairment criteria and were approved by the court. As the Commission reasonably found in the *TRO*,<sup>6/</sup> the conjunction of substantial fixed and sunk costs of line deployment and related entry barriers with the limited revenue opportunity from DS1 level services impairs carriers' ability to provision DS1 loops. *TRO* ¶ 325. The Commission in fact found that carriers cannot economically self-provision at the DS1 level. *Id.* ¶¶ 325-327. The Commission further found that wholesale alternatives are scant, but held open the possibility that a wholesale market may develop and established a mechanism for *customer-specific* assessments. *Id.* ¶ 327. Although *USTA II* rejected the Commission's specific mechanism for identifying wholesale alternatives, the underlying reasoning is sound and fully confirmed by the record in this proceeding.

The record in this proceeding confirms the findings of the *TRO* that there is no ability to self-deploy DS1 loops,<sup>7/</sup> and that the availability of competitive wholesale DS1 services remains very limited. Many carriers have submitted sworn statements that they have sought DS1 wholesale loop service from carriers other than the incumbent LECs and have been unable to obtain such service at any location within their operating area.<sup>8/</sup>

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<sup>6/</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*TRO*"), corrected by Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), vacated and remanded in part, affirmed in part by *USTA II*.

<sup>7/</sup> As explained below, for the same reasons that carriers cannot economically self-deploy DS1 loops, carriers also cannot self-deploy DS1 EELs.

<sup>8/</sup> See e.g., WC Docket No. 04-313 and CC Docket No. 01-338, ALTS *et al.* Comments, Declaration of Richard Batelaan, Cbeyond Communications, LLC, ¶ 6 (dated October 4, 2004) (stating that Cbeyond has not been able to find a single non-ILEC wholesale provider of DS-1 loops in the four markets in which it operates.) ("*Batelaan Declaration*"); WC Docket No. 04-313 and CC Docket No. 01-338, ALTS *et al.* Comments, Declaration of Brad E. Evans, Cavalier Telephone, LLC, ¶¶ 14-18 (dated October 4, 2004) (noting that the no real alternatives to Verizon exist for DS1 loops) ("*Evans Declaration*"); WC

The general inability to obtain wholesale DS1 service is consistent with sworn statement by carriers that have deployed fiber that they do not generally provide wholesale services, especially at the DS1 level.<sup>9/</sup> Finally, evidence from the state *TRO* proceedings confirm that wholesale DS1 service is available in only a handful of locations.<sup>10/</sup>

The Bell Companies have been unable to point to any evidence in the record that DS1 services are available above de-minimis levels. For example, a recent *ex parte* filed by BellSouth that purportedly points to CLEC “admissions” that they obtain high capacity services from non-ILEC sources actually demonstrate how limited alternative access actually is in the marketplace. In its November 18, 2004 *Ex Parte* submission purporting to summarize record evidence of high-capacity facilities deployment, BellSouth points to three statements in the record where carriers “admit” that high-capacity loops are available.

BellSouth first cites to an Advanced Telecom statement that it obtains 10% of its DS1 loops in Washington from other CLECs. BellSouth Nov. 18 *Ex Parte* at 14 (citing WC Docket No. 04-313 and CC Docket No. 01-338, Loop and Transport CLEC Coalition Comments, Declaration of Dan J. Wigger, Advanced Telcom Inc., ¶¶ 45, 48 (dated Oct. 1, 2004) (“Wigger Declaration”). The Wigger Declaration makes clear, however, that the vast majority of Advanced Telecom’s DS1 loops are obtained from ILECs, Wigger Declaration ¶ 11, and that “Advanced Telecom rarely, if ever, has been able to purchase DS-1 loop facilities from other CLECs or CAPs.” *Id.* at ¶ 24. Only in one market in the

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Docket No. 04-313 and CC Docket No. 01-338, ATX Communications, Inc. *et al.* Comments, Declaration of Mark A. Jenn, TDS Metrocom, LLC, ¶ 9 (dated October 4, 2004) (stating that “a wholesale market for alternative wireline loop facilities does not exist.”) (“Jenn Declaration”); WC Docket No. 04-313 and CC Docket No. 01-338, ATX Communications, Inc. *et al.* Comments, Declaration of Brent L. Johnson, ¶ 5 (dated October 4, 2004) (OneEighty has found no evidence of any carriers offering wholesale access to loops facilities in out markets other than Qwest.”) (“Johnson Declaration”).

<sup>9/</sup> See e.g., Jenn Declaration ¶ 11 (“[A]t locations where the TDS CLECs have overbuilt local loops at extremely high capacity levels, the TDS CLECs do not offer wholesale access to those facilities. The costs of developing the systems and processes necessary to facilitate the wholesale product are prohibitive when viewed in relation to the small number of locations where overbuilding has occurred.”); WC Docket No. 04-313 and CC Docket No. 01-338, Loop and Transport CLEC Coalition Comments, Declaration of Mike Duke, KMC Telecom Holdings, Inc., ¶¶ 21-25 (noting that “[a]s a practical matter, KMC is not operationally ready to provide wholesale loops to other carriers.”) (“Duke Declaration.”).

<sup>10/</sup> See Pennsylvania PUC Docket No. I-00030099, Direct Testimony of Harold E. West, III and Carlo Michael Peduto, II, Verizon Pennsylvania Inc. and Verizon North Inc., at 22, (December 19, 2002) (affirming that only 3 customer locations in Pennsylvania meet the FCC’s DS1 wholesale trigger); Proceeding by the Department on Its Own Motion to Implement the Requirements of the Federal Communications Commission Triennial Review decision Regarding Switching for Mass Market Customers, Rebuttal Panel Testimony of Rebecca Sommi, Robert Bailey, Valerie Cardwell and Christopher Winkelmann, D.T.E. 03-60, at 25-34 (February 6, 2004); Gary Ball, August H. Ankum and Warren R. Fischer, QSI Consulting, Inc., Analysis of State Specific Loop and Transport Data, at 2, 9-15 (finding two or more wholesalers offering DS1 wholesale loops in only 36 building in the 12 states reviewed, including New York, California and Illinois).

four states in which Advanced Telecom operates has it been able to find non-ILEC alternatives and these represents only 10% of the more than 900 DS1 loops in one state, or about 90 wholesale loops. Wigger Declaration ¶ 24. BellSouth also cites XO's statement that it obtains non-ILEC DS3 or DS1 loops in 5% of the buildings it serves. BellSouth Nov. 18 *Ex Parte* at 14 (citing WC Docket No. 04-313 and CC Docket No. 01-338, Loop and Transport CLEC Coalition Comments, Declaration of Wil Tirado on behalf of XO Communications, ¶¶ 20-21 (dated Oct. 1, 2004) ("Tirado Declaration")). In point of fact, XO, like other competitive carriers, has made clear that in the "vast majority of cases" it must use ILEC facilities to serve its customer base, *id.* ¶ 9, and that without continued access its unbundled DS1 loops its business would be jeopardized. *Id.* ¶ 11. Furthermore, it is unclear from this data as to how many of these supposed non-ILEC alternatives are actually CLECs reselling ILEC services. In today's environment, by way of illustration, there are products sold by XO to other carriers which may give the appearance that XO is providing alternatives to ILEC services, but, in fact, in nearly all XO DS1 circuits, there is an ILEC-provided loop facility. Finally, BellSouth points to Sprint's purported identification of 30,000 buildings in which alternative loop facilities are available. BellSouth Nov. 18 *Ex Parte* at 14 (citing WC Docket No. 04-313 and CC Docket No. 01-338, Sprint Comments, at 45 (filed Oct. 4, 2004). In a recent *ex parte* submission, however, Sprint thoroughly refuted BellSouth's mischaracterization of Sprint's comments.<sup>11/</sup> Sprint notes that these numbers do not attempt to identify non-ILEC facilities, but potential non-ILEC providers, "[a] large but unknown percentage" of which use ILEC leased facilities. Additionally, Sprint notes that its database significantly overcounts facilities and overstates the availability of non-ILEC high capacity loops. Sprint Nov. 24, 2004 *Ex Parte* at 1-2. There clearly is no basis to conclude from this sparse evidence -- apparently the best BellSouth can muster from the record -- that DS1 wholesale loops are significantly deployed on a competitive basis and that DS1 loops can be broadly eliminated without substantial impairment.

Contrary to all the evidence in the record, the Bell Companies nevertheless insist that evidence of fiber deployment demonstrates that there are both actual and potential wholesale alternatives for DS1 services. The Bell Companies' assumption that fiber deployment equates to DS1 wholesale service is incorrect and is not supported by the record. The Bell Companies have submitted maps purporting to depict fiber routes in major metropolitan areas. The presence of fiber in the street, however, provides no information on fiber availability in any particular building, especially since the cost to build a lateral from the street to a building is *not* trivial. XO has previously stated on the record that the cost of extending fiber into a building is \$141,000, on average, excluding the cost of the necessary electronics to provide services. Even in buildings where fiber has been deployed, the electronic costs average \$79,000. Tirado Declaration ¶ 17. All evidence indicates that despite the deployment of fiber rings in downtown areas,

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<sup>11/</sup> Letter from John E. Benedict to Ms. Marlene H. Dortch, WC Docket No. 04-313, CC Docket No. 01-338, filed November 24, 2004. ("Sprint Nov. 24, 2004 *Ex Parte*")

relatively few buildings are actually “lit,” and that the extension of a fiber lateral into a building requires customer commitment of services far in excess of DS1 capacity.<sup>12/</sup> Furthermore, even in the instances where customer demand may warrant the associated expense of accessing the building, the time intervals required to complete the build may undermine the ability to address customer requirements through extension of a fiber lateral. Even fiber extended to a building does not demonstrate the availability of wholesale services at DS1 levels within the building. The fiber carrier may not desire or have the capability to wholesale or may face barriers in serving customers in specific locations in the building.<sup>13/</sup> As further detailed below, evidence in the record reflects that entry barriers continue to exist that hinder building access and even access to customers located in the same building.<sup>14/</sup> Past history of fiber deployment does not serve as a valid predictor of future fiber deployment because most CLEC fiber deployments occurred during the telecommunications “boom era” (1997-2001) when CLEC’s were expected by their investors to build networks to demonstrate “fiber miles” without regard to the cost benefit. It is highly unlikely that the telecom industry will see that rate of growth again. Early during this period, XO, for example, recognized the inherent flaw in overbuilding fiber and adjusted its growth and spend patterns to obtain greater customer penetration utilizing ILEC facilities. For instance, XO built or leased capacity to ILEC Central offices and obtained the necessary collocation space to offer ILEC UNE DS1 capacity. The benefit of this model is exemplified in the following example: In New York City, arguably the most competitive marketplace in the US, XO built fiber to 3 buildings in the Verizon West Street Central Office Service Area. Assuming that XO could serve 100% of the tenants in those buildings (which it cannot for the reasons mentioned throughout this document), the XO on-net buildings would only account for 3.4% of the business served by that Central Office.

The evidence recounted above serves as a substantial basis for the rule proposed herein. It demonstrates first and foremost that a determination that carriers are not

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<sup>12/</sup> See Tirado Declaration ¶¶ 20-21 (submitting evidence that demonstrates the high cost of building laterals and the lack of financial justifications for such builds until at least three DS-3s of capacity are under contract.); Wigger Declaration ¶ 23 (“Advanced Telcom has made the decision that any direct commercial building addition through the use of a Fiber Lateral is an absolute exception and would only be warranted in the event of a minimum DS-3 level bandwidth requirements . . . coupled with a long-term contract by an enterprise-level customer. One thing can be said for sure, it would never make sense to construct a lateral to add a building to the Advanced TelCom network simply to add customers with DS-1 level demand.”); WC Docket No. 04-313 and CC Docket No. 01-338, Loop and Transport CLEC Coalition Comments, Declaration of David A. Kunde, Eschelon Telecom, Inc., ¶ 17 (noting that a single T-1 or even DS-3 order from a customer could not justify loop deployment by a CLEC.) (“Kunde Declaration”).

<sup>13/</sup> As evidence of the inaccuracy of the perceived notion that fiber to a building provides alternative competitive DS1 access to the ILEC, XO, for example, offers the following: XO notes that it has 144 buildings with fiber and no electronics. Furthermore, there are various dark fiber providers or companies like AboveNet that used to be dark fiber providers with dark fiber presence in or near buildings but are unable or unwilling to provide DS1 services to other carriers.

<sup>14/</sup> See *Attachment A* (appended hereto).

impaired without unbundled DS1 loops or EELs must be made on building-by-building basis. Moreover, it supports the conclusion that the presence of fiber in or near a building cannot serve as a proxy for actual availability of alternative DS1 supply. Finally, by demonstrating the limited availability of DS1 alternatives, the evidence supports the obligation to provide DS1 loops pending the identification of actual wholesale alternatives.

**3. Any Possible Overbreadth Caused by Requiring Unbundling Pending Final Identification of Locations With Wholesalers Would Not Violate *USTA***

As noted above, a critical aspect of the proposed rule is that carriers must continue to have DS1 access pending the identification of locations where wholesale providers are available. That there may be some buildings that may be identified as having the requisite number of wholesalers does not preclude an unbundling obligation in the interim. *USTA II* recognizes that any unbundling rule will inevitably result “in *some* over – and under - inclusiveness.” 359 F.3d at 570. All that is required is that the Commission explore more nuanced alternatives and reasonably reject them. (As explained herein, the Commission may reasonably reject alternative impairment tests for DS1 capacity elements proposed by the Bell Companies). Moreover, even if the requirement of unbundling pending the identification of buildings is in some sense “impermissibly overbroad,” (because some number of locations may ultimately satisfy the wholesale test) the proposed rule is a rational response to the impairment identified in the record and results in the least number of errors. That locations may be identified subsequently does not preclude adoption of the rule in the first instance. As noted in *USTA II*, “a rational rule that would otherwise be impermissibly broad can be saved by a ‘safety valve’ or exception procedures.”

It is also critical to note that any “harm” from requiring unbundling during the identification process will be substantially mitigated by the existence of the two-DS3 per location cap on unbundling. As pointed out in the record, this cap actually favors the Bell Companies because it denies unbundling to locations even where it may not be economical to self-deploy. Moreover, the cap constrains unbundling to that market segment most dependent on CLEC competition – the small and medium-sized business market.

#### **4. Alternative Proposals Are Not Rationally Related to Impairment Criteria**

BellSouth and others Bell companies have proposed denying access to DS1 loops in wire centers that exceed specified numbers of business lines.<sup>15/</sup> The apparent theory behind the proposals is that the number of business lines indicates an addressable market and correlates to fiber deployment. Business line density, however, provides no useful information concerning the ability of carriers to overcome the substantial barriers to line construction at the revenue generated by small business customers using DS1-based services. *See TRO* ¶ 325. Moreover, even if business line density does correlate in some sense to fiber deployment,<sup>16/</sup> such deployment to building locations is limited and, as explained herein, does not demonstrate the availability of wholesale alternatives even at buildings to which it is deployed. Thus, the vast majority of locations within a wire center, even with highest business line counts, have no alternative facilities at all. Thus, any DS1 loop test based on wire center line counts would result in a substantial number of false negatives, far more than would be the case with a location specific analysis.

Nor are line counts indicative of where DS1 elements could become available. As explained by a number of carriers and substantiated by the statements of private investors in the telecommunication industry, future deployment is highly speculative and, to the extent it does occur (for example, extension of new laterals from existing fiber rings), will only occur at capacity levels far in excess of DS1 level capacity.

#### **5. The Proposed Rule Reasonably Applies to Determine Impairment for DS1 Transport when Used as a Component of a DS1 EEL**

The Commission should utilize the same wholesale availability test to determine impairment without access to DS1 EELs. A DS1 EEL is a combination of a DS1 loop and DS1 transport directly connecting an end user customer with a requesting carrier collocation arrangement in an ILEC wire center. Although technically a combination of two network elements, the DS1 EEL is an end-to-end circuit that carries the traffic of a single end-user customer, just as a DS1 loop carries the traffic of a single end-user customer. As its name implies, an Enhanced Extended Link is simply a longer loop.

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<sup>15/</sup> *See, e.g.*, WC Docket No. 04-313 and CC Docket No. 01-338, BellSouth Corp. Comments, at 39-50 (filed Oct. 4, 2004) (“BellSouth Comments”) (5,000 business lines); WC Docket No. 04-313 and CC Docket No. 01-338, SBC Communications, Inc. Comments, 89 (filed Oct. 4, 2004) (“SBC Comments”) (15,000 business lines and one “lit” building).

<sup>16/</sup> As shown in the record, the correlation is very weak especially at the low line counts suggested by the Bell Companies. *See, e.g.*, WC Docket No. 04-313 and CC Docket No. 01-338, AT&T Corp. Reply Comments, at 40-44 (filed Oct. 19, 2004); WC Docket No. 04-313 and CC Docket No. 01-338, Loop and Transport CLEC Coalition Reply Comments at 29-34 (filed Oct. 19, 2004) (“Loop and Transport Reply Comments”).

EELs are critically important in the development of competition to the small business market. As the Commission has noted, EELs enable competitive carriers to expand their footprint and reach beyond the wire centers in which they are collocated.<sup>17/</sup> They facilitate market entry by allowing carriers to establish and grow a customer base that eventually will justify economically the establishment of additional collocations. The Commission has recognized the pro-competitive benefits of EELs, pointing out that they facilitate the development of alternative transport and promote innovation.<sup>18/</sup> Carriers have, in fact, relied on EELs to bring competitive choice to more small businesses than would otherwise be available.<sup>19/</sup>

In assessing impairment for DS1 transport when used as a component of a DS1 EEL, it is appropriate to use the same analytical framework that is used for DS1 loops. The Commission's impairment criteria appropriately focuses on the ability of carriers to overcome entry barriers based on the revenue generating capability of the network element. DS1 circuits, whether stand-alone loops or EELs, are sold to small business customers that generate only between \$500 to \$700 per month.<sup>20/</sup> Thus, carriers can no more self-deploy EELs than they can DS1 stand-alone loops. In fact, EELs are more costly to deploy as they cover greater distances. When used in an EEL configuration, the transport component of the DS1 EEL does not aggregate traffic as do stand-alone transport elements. There is thus no ability to spread the transport cost across multiple end users, which has been a decisive factor in the Commission's prior impairment analysis for transport. *See TRO* ¶ 370.

DS1 EELs currently are ordered and provisioned by a single carrier as a single end-to-end circuit with the A and Z locations identified as the carriers' collocation site and the end-user customer premises. To constitute a reasonable alternative to the ILECs' EEL, a competing carrier must also be able to provide an end-to-end connection between the customer's location and the requesting carrier's access point. Otherwise, what is logically and practically a single circuit will be "broken" into pieces, each piece provisioned by a different carrier. This piece-parting, or daisy-chaining, imposes substantial economic, technical and operational burdens as explained in the comments and as previously recognized by the Commission.<sup>21/</sup> *See TRO* ¶ 402 (finding that linking together multiple providers to complete a single circuit "almost inevitably would raise

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<sup>17/</sup> *See TRO* ¶ 576.

<sup>18/</sup> *Id.*

<sup>19/</sup> NuVox, for example, has stated that, through the use of EELs, its market expands from the roughly 280 wire centers in which it currently has collocations to more than 1500 wire centers. EELs represent 45% of NuVox's end-user circuits. WC Docket No. 04-313 and CC Docket No. 01-338, NuVox Comments, Declaration of Jennings, ¶ 7 (dated October 4, 2004) ("Jennings Declaration").

<sup>20/</sup> *See, e.g.,* Jennings Declaration ¶ 4 (average revenues of \$500 to \$700).

<sup>21/</sup> *See e.g.,* WC Docket No. 04-313 and CC Docket No. 01-338, NuVox Comments, Declaration of Coker, ¶¶ 8-13 (October 4, 2004) (discussing economic, technical and operational impediments to using multiple carriers to replace ILEC EELs) ("Coker Declaration").

costs, increase provisioning intervals, and make repair and maintenance more difficult.”). Indeed, the daisy-chain problem would be particularly acute in the context of DS1 EELs because, for companies serving the small and medium-sized business markets, the number of DS1 circuits in operation in the last-mile are far greater than are DS3 or OCn level circuits.

The burdens imposed by daisy-chaining potentially occur when different tests or standards are applied to the loop portion and the transport portion of EELs. For example, the UNE loop may be available because the requisite wholesaling capability does not exist at the customer location. However, DS1 transport may not be available as a UNE between the customer-serving wire center and the wire center in which the CLEC is collocated, for example, because a transport test is triggered.<sup>22/</sup> The practical result of this situation is that the carrier would be forced either inefficiently to use multiple carriers or use the ILEC’s high-priced special access services for the transport portion of the circuit.<sup>23/</sup> The latter is problematic because the greatest discrepancy between UNE rates and special access rates is in the interoffice mileage component.<sup>24/</sup>

These issues can be avoided by applying the DS1 loop test to DS1 EELs. Under this approach, when a CLEC orders a circuit to a customer location that may include interoffice mileage, the relevant inquiry will be whether there are two or more wholesalers at the customer location rather than also determining whether DS1 transport is available between the relevant wire centers. By using the DS1 loop test for DS1 EELs, the impairment inquiry answers the right question -- is there an alternative that can replace the ILEC’s end-to-end circuit? The wholesale loop test answers this question because it identifies carriers offering and capable of providing DS1 service between the customer location and the requesting carrier access point, either at an ILEC wire center where the CLEC is collocated, or at a common access point such as a carrier hotel that may bypass the ILEC interoffice network.

The determination that utilizing for DS1 EELs the same impairment test used for DS1 loops in order to avoid the burdens imposed by breaking a single circuit into

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<sup>22/</sup> At a minimum, the Commission must adopt a stringent DS1 transport test that ensures that transport is practically available *at the DS1 level* between the requisite wire centers. A test that simply focuses on one end of the circuit runs a considerable risk that transport will not be available. This is particularly the case for EELs, which are often used to reach customers subtending smaller wire centers from larger wire centers where the competitive carrier is collocated.

<sup>23/</sup> Based on the evidence in the record, there is little wholesaling of DS1 interoffice transport, even where fiber has been deployed. This is not surprising given the small amount of revenue available from selling DS1 circuits over relatively short distances used in EEL configurations. This evidence indicates that false negatives are likely to occur with any DS1 transport test that is based on proxies such as number of business lines or the mere presence of fiber. False negatives (a finding of no impairment where impairment exists) will result in carriers having to use the ILECs’ special access services since alternatives really are not available.

<sup>24/</sup> See, e.g., NuVox Comments at 33-34.

multiple pieces is one that is well within this Commission's expert judgment and is readily sustainable on the record. Finally, to reiterate and clarify, the DS1 loop wholesale test would apply only to DS1 transport used in and ordered as part of an EEL arrangement. It does not apply to stand-alone DS1 transport used to aggregate traffic from multiple end users.

## **THE COMMISSION SHOULD REJECT A SELF-PROVISIONING TEST FOR DS1 LOOPS**

*In Iowa Utilities*, the Supreme Court stated that the Commission must consider the possibility of self-deployment the network element. The Commission thus cannot ignore the possibility of self-provisioning. At the same time, it would not be reasonable to impose a test to identify either where carriers have self-provisioned or could self-provision as the evidence in the record is clear that self-provisioning has not occurred and cannot economically occur for the element in question. That is the case for DS1 capacity. The Commission fully assessed carriers' ability to self-deploy DS1 loops in the *TRO* and found no reasonable basis to assume such deployment. As previously noted, nothing in this record overturns that finding.

There is no meaningful support for establishing and applying a self-provisioning trigger test of the form that if "X" number of CLECs connect to a building with their own fiber, then there is no impairment in the provision of DS1 or DS3 loops to that building. Such a test presupposes several conditions which experience does *not* bear out, namely, that if one CLEC self-provisions loops to a building with fiber at any capacity level, then (1) it may provide loops to *any* tenant in the building at *any* capacity level to itself or to other CLECs and (2) other CLECs may do so as well. To the contrary, experience demonstrates that there is no basis for concluding that just because a CLEC self-provides fiber to a customer in a building that that CLEC or any other CLEC can self-provision loops at any capacity to any tenant in the building. Thus, a self-provisioning trigger to assess impairment to specific buildings would be inappropriate and yield many false negatives. Because the use of a self-provisioning trigger is itself fundamentally flawed, any debate about the correct "X" numbers or other details of a potential trigger test are beside the point.

### **1. There Is No Credible Evidence in the Record that CLECs Are Self-Provisioning DS1 or DS3 Loops to a Significant Number of Buildings**

The genesis for the proposal that a self-provisioning trigger might be appropriate is evidence placed into the record that CLECs self-provision their own fiber to a large number of buildings. Notably, the principal source of that evidence, Sprint, has stated repeatedly that the information it provided regarding the buildings to which CLECs are self-providing fiber is not in any sense a measure of either the buildings to which CLECs have access to all tenants in buildings, the degree to which CLECs are self-provisioning

DS3 or DS1 loops to buildings as opposed to OCn facilities, the extent to which CLECs are capable of operating as wholesale providers in these buildings, or the degree to which other facilities-based CLECs could self-provide access to the tenants in these buildings. Sprint itself explains that this information *should not be used in impairment analysis*, and was derived by Sprint solely as a tool to enable the company's further investigation of potential loop facility availability. Indeed, Sprint's comments to the FCC state that "these figures actually *overstate* the availability of [Alternative Access Vendor] alternatives, particularly for high capacity loops."<sup>25/</sup> Sprint goes on to explain that many of the buildings it studied are served by a CLEC *only in part* — perhaps "only a single customer in the building."<sup>26/</sup> In addition, Sprint recognizes that although a CLEC may be present in a building, its "facilities will often be unsuitable to meet a competitor's needs."<sup>27/</sup> Sprint underscored these arguments in a recent *ex parte* filing with the FCC, and added that its building database may well "double-count" buildings because it does not account for CLECs that themselves rely on ILEC facilities and/or because often one building has multiple addresses, and each address creates a separate record.<sup>28/</sup> Sprint also demonstrates in detail that, despite the presence of CLECs in buildings, the relevant market still would not pass muster under the FCC's "wholesale triggers" developed in the *TRO*. That is, few buildings are served by either (1) two or more distinct CLECs over their own loops, or (2) two or more distinct CLECs offering loop facilities on a wholesale basis.<sup>29/</sup> Again, the ILECs' reliance on such "market data" to prove lack of impairment is misplaced and unsound.

Likewise, the information which the RBOCs earlier put in the record in the form of maps showing buildings in which CLECs are self-provisioning fiber gives no indication of the capacity levels – OCn, DS3, or DS1 – at which the CLECs are self-provisioning or the number or percentages of tenants in the buildings which the CLECs are capable of servicing.<sup>30/</sup> As such, the data submitted by the RBOCs cannot in any way be used to determine at which buildings there is no impairment, if any. Indeed, in the record in this matter, there is very little evidence that CLECs are self-provisioning to

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<sup>25/</sup> See WC Docket No. 04-313, CC Docket No. 01-338, Sprint Corp. Comments, at 45 (redacted version) (October 4, 2004) (emphasis in original) ("Sprint Comments").

<sup>26/</sup> *Id.* at 45.

<sup>27/</sup> *Id.* at 46.

<sup>28/</sup> WC Docket No. 04-313, CC Docket No. 01-338, Letter from John E. Benedict, Senior Attorney, Sprint, to Marlene H. Dortch, Secretary, FCC (Nov. 23, 2004).

<sup>29/</sup> *Id.* ¶ 329.

<sup>30/</sup> See WC Docket No. 04-313, CC Docket No. 01-338, Comments of AT&T Corp., at 58-59 (October 4, 2004) ("The Bells' maps offer no insight at all as to the capacity of service provided over the identified competitive facilities") ("AT&T Comments"); WC Docket No. 04-313, CC Docket No. 01-338, Comments of ATX Communications, Inc. *et al.*, at 15 (October 4, 2004) (noting that conspicuously missing from the ILECs' maps is information regarding the nature and type of facilities offered).

buildings except for very large customers at OCn capacities, not at DS1 or DS3 capacities.<sup>31/</sup>

In fact, it is also noteworthy that in the *TRO*, the Commission itself recognized that self-provisioning of DS3 and DS1 to buildings was a rare phenomenon and that DS3 was in a nascent stage at best.<sup>32/</sup> The FCC itself recognized in the *TRO* that only 3% to 5% of commercial buildings are served by “competitor-owned fiber loops.”<sup>33/</sup> And in fact, even if the *Huber Report*’s 32,000 figure were plausible, it represents only 4% of the 739,000 commercial buildings that Sprint approximates.<sup>34/</sup> It would not be reasonable to conclude from this meager data that CLECs are not impaired without unbundled, cost-based access to high-capacity loops. Further, according to the FCC’s data, CLECs rely on ILEC facilities to serve 61% of loops nationwide.<sup>35/</sup> CLEC self-deployment, by comparison, is minimal: only 3.6 million voice-grade equivalent (“VGE”) lines are CLEC-owned, or 1.98% of the nation’s VGEs.<sup>36/</sup> This evidence makes clear that CLEC self-deployment of loops has not even approached a level that would render UNE loops unnecessary. Thus, absent a record that persuasively shows that the situation has changed materially since the *TRO*, there is little reason to believe there is a significant level of relevant DS3 and DS1 self-provisioning by CLECs today.

**2. The Fact that a CLEC Self-Provisions Loops to a Building To Serve Certain Customers within a Building Is Not Evidence that It Could Readily Serve *Any Customer* in the Building at *Any Capacity***

The notion that self-provisioning of fiber to a building by a CLEC is material evidence regarding non-impairment to that building regarding DS3 and DS1 loops, is unfounded. The simple fact that a CLEC self-provisions to a building to serve certain customers within a building is not evidence that it could self-provision to serve *any customer* in the building *at any capacity*. As an initial matter, if a carrier is serving a building at an OCn level, it could not simply turn around and begin providing service at a

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<sup>31/</sup> See WC Docket No. 04-313, CC Docket No. 01-338, Loop and Transport CLEC Coalition Comments, Declaration of James C. Falvey, Xspedius Communications, LLC, ¶¶ 4, 13, 25-26 (dated October 1, 2004) (“[I]t simply is not economic for Xspedius to build its own DS-1 loop facilities. Similarly, construction of DS-3 facilities is almost never justified below the OCn (3 DS-3s) level.”) (dated October 1, 2004) (“Falvey Declaration”). See also Tirado Declaration ¶¶ 9, 20; Jenn Declaration ¶ 11 (“It is important to note that TDS CLECs have never self-provisioned loops facilities at a DS1 or single DS3 level and only in rare cases has self-provisioning been justified at a multiple DS3 level.”); Johnson Declaration ¶ 5.

<sup>32/</sup> See *TRO* at ¶¶ 320-21, 325; see also WC Docket No. 04-313, CC Docket No. 01-338, Comments of the Association for Local Telecommunications Service *et al.*, at 54, 60 (filed October 4, 2004) (“ALTS Comments”).

<sup>33/</sup> *TRO* at FN. 856.

<sup>34/</sup> Sprint Comments at 44.

<sup>35/</sup> Local Competition Report, Table 3.

<sup>36/</sup> See *November 12 Ex Parte* at 3.

DS3 or DS1 level to customers in the building. Significant facilities modifications would be required.<sup>37/</sup> Similarly, even in those limited cases where a carrier might be serving a customer in the building at a DS3 level (or DS1 level), modifications and additional investments would be needed before it could begin to serve a customer at a DS1 (or DS3) level. For instance, XO has lit several buildings in order to provide high capacity wavelength services. To support these offerings, XO has installed electronics specific to delivering that product and which are technically incapable of delivering DS1 services. In order to deliver DS1 services to these building, at the very least, XO would have to deploy additional electronics, if not additional fiber and/or obtain the necessary rights and build in building distribution.

Above and beyond the problem that providing fiber to a building does not necessarily, and in most cases today for CLECs does *not*, translate into the capability of providing DS3 or DS1 level capacity to that building, a CLEC that serves one customer within a building does not typically have the right to serve every tenant within the building. The extent to which a carrier can serve tenants within a building is controlled by the building owner. In most cases, ILECs, because of their dominant position in the local market that persists today almost always have access to the *entire* building, often at very little or at no cost.<sup>38/</sup> Competitors, on the other hand, will most commonly be granted access by building owners only to particular customers on particular floors, often at exorbitant rates.<sup>39/</sup> If a competing provider then wants to serve additional tenants or floors within the building, it must reenter negotiations with the buildings owners for additional rights of access, resulting in additional fees and charges.<sup>40/</sup> Often, negotiations with building owners lead to lengthy delays in being able to serve a customer and the customer may be lost even before the negotiations with the building owner have been

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<sup>37/</sup> See, e.g., WC Docket No. 04-313, CC Docket No. 01-338, Loop and Transport CLEC Coalition Comments, Declaration of Warren Brassel, Talk America Inc. (dated October 1, 2004) (explaining that in order to offer a wholesale DS-3 service to other CLECs, “a carrier must first purchase, install and operate the additional equipment (*i.e.*, multiplexers and de-multiplexers) required to channelize a DS-3 circuit within a larger OCn circuit, and deliver it on the DS-3 interface.”) (“Brassel Declaration”).

<sup>38/</sup> See WC Docket No. 04-313, CC Docket No. 01-338, Reply Declaration of Ben F. Wilson, MCI, Inc., ¶¶ 3, 11 (“Wilson Reply Declaration”); WC Docket No. 04-313, CC Docket No. 01-338, Declaration of Wil Tirado, XO Communications, ¶ 2 (November 18, 2004) (“Tirado November 2004 Declaration”).

<sup>39/</sup> See WC Docket No. 04-313, CC Docket No. 01-338, Declaration of Anthony Fea and Anthony Giovannucci, AT&T Corp., ¶¶ 27-29, 42 (October 4, 2004) (“Fea/Giovannucci Declaration”), ALTS Comments at 63 (discussing “fiber-to-floor” arrangements); Sprint Comments at 45-46 (noting that many of the vendors in Sprint’s database are able to serve only a single customer in a building); Tirado November 2004 Declaration, ¶ 7. In other situations, a building owner may demand that a CLEC serve the entire building or a complex of buildings when the business case to complete such a build-out is not present. See, e.g., Wilson Reply Declaration, ¶ 9.

<sup>40/</sup> See WC Docket No. 04-313, CC Docket Nos. 01-338, 96-98 and 98-147, *Ex Parte* Letter from Smart Buildings Policy Project, at 3 (dated November 19, 2004); Tirado November 2004 Declaration ¶ 6

completed, rendering them futile.<sup>41/</sup> Because building owners are not constrained by the reasonableness and anti-discrimination provisions in the Communications Act, they are free to extract significant amounts from competitors for access to tenants within their buildings.<sup>42/</sup> As a result, competitors typically will only serve tenants in the building for which they can make the appropriate business case.<sup>43/</sup> For this reason, evidence that a CLEC is serving a building has no correlation with an ability to serve every tenant within a building, or even any additional tenants. On this basis alone, the adoption of a self-provisioning trigger for DS3 and DS1 loops is unfounded.

### **3. The Fact that a CLEC Self-Provisions Fiber Loops to a Building Does Not Mean that It Is Capable of Acting as a Wholesaler of DS3 or DS1 Loops**

A self-provisioning trigger for loops is also inappropriate because the fact that a CLEC self-provisions loops to serve certain customers within a building is not evidence that it could provide loop alternatives to other CLECs to serve customers in the building. There is, in the first instance, the continuing problem, as discussed above, that the CLEC that is self-provisioning may have no capability to provide DS3 or DS1 loops even to itself, let alone other carriers. In addition, even assuming *arguendo* that it had the ability to provide DS3 or DS1 loops to the building, there is the likely scenario, also discussed above, that it will have access only to certain tenants, floors, or spaces, which may not be the locations within the building that the other CLEC would like to serve. Assuming for the sake of argument, however, that these two obstacles have been overcome significant problems remain.

First, there is no reason to presume that the self-provisioning CLEC is equipped to provide wholesale service to other CLECs. Operation as a wholesale provider of loops requires a different business model than retail and significant additional investments that

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<sup>41/</sup> See Wilson Reply Declaration ¶¶ 13-15; WC Docket No. 04-313, CC Docket No. 01-338, Reply Declaration of Anthony Giovannucci, AT&T Corp., ¶¶ 5-6, and 9-11 (dated October 18, 2004) (“Giovannucci Reply Declaration”); Tirado November 2004 Declaration ¶¶ 3, 5, and 8.

<sup>42/</sup> See Giovannucci Reply Declaration ¶ 10-12; Tirado November 2004 Declaration ¶ 9; Wilson Reply Declaration ¶¶ 3-9. See also *In the Matter of Competitive Networks in Local Telecommunications Markets, Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.400 of the Commission’s Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas designed to Provide Fixed Wireless Services*, WT Docket No. 99-217, CC Docket Nos. 96-98 and 88-57, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, 22992 (2000).

<sup>43/</sup> See e.g., WC Docket No. 04-313, CC Docket No. 01-338, AT&T Corp. Comments, Declaration of John D’Apolito and Milford Stanley, AT&T Corp., ¶ 25 (October 4, 2004) (“[T]he high sensitivity of business cases to the length and cost of outside plant highlights the incumbents’ enormous advantages that result from their widely deployed fiber facilities. . . . [E]xperience shows that CLEC construction is often either uneconomic (*i.e.*, cannot be cost-justified) or impractical (*i.e.*, is barred because of building access or customer refusals to roll existing circuits.”).

many CLECs have not made in the form of backroom capabilities, OSS systems, multiplexing, marketing, product development, and wholesale customer support.<sup>44/</sup> The Commission should not assume that every CLEC that self-provisions fiber to one or more of its own retail customers in a building intends to enter into this new line of business as a wholesaler. KMC, for example, in designing its network, did not contemplate a wholesale loop service offering and is not operationally ready to provide wholesale loops to other carriers.<sup>45/</sup> Second, because the record evidence demonstrates that the ILECs have locked up so much of the special access market through long-term contracts, the provision of wholesale service by CLECs may not be economic so as to justify the investments needed to become a wholesaler. Third, loops are not end-to-end services, and it is not clear that CLECs have any obligations to provide loops to other carriers for resale purposes. Fourth, a CLEC's self-provisioned loops may simply tie into its fiber network rather than into a nearby ILEC central office or convenient carrier hotel, which competitive carriers would require of a wholesaler. Accordingly, if a CLEC wanted to access another CLEC's loop facilities, it might have to build its own links or entrance facilities to the CLEC wholesaler. Alternatively, it may be necessary for the CLECs to be collocated in the same ILEC central office and to establish cross-connects, which may not be cost-justified on the account of one or a small number of customers in a building. The need to establish such cross-connects within the ILEC space may also lead to delays and obstacles which result in lost customers.<sup>46/</sup> Given the many and numerous obstacles to a CLEC serving as a wholesaler, the Commission should not use the simple fact that a CLEC self-provides some fiber to a building as evidence that a wholesaler exists within that building for other CLECs to use as an alternative to ILEC-provided loops. Rather, the Commission should use the definition and criteria for finding that a wholesaler exists as set forth above.

#### **4. The Fact that a CLEC Is Self-Providing Loops to a Building Does Not Mean that Other CLECs Could Do So.**

As noted above, the fact that a CLEC is self-provisioning fiber loops to a building does not mean that it could self-provision DS3 or DS1 loops to any tenant in the building, either for the offering of its own services or for the purposes of offering wholesale DS3

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<sup>44/</sup> Indeed, Mike Duke of KMC notes that in order for KMC to offer wholesale loops to other carriers, "it would require the redesign and upgrade of the existing transport network. As with other operational requirements necessary to upgrade KMC's network to a wholesale interoffice transport network, deployment of a wholesale loop offering would also require increased capacity requirements on both nodes on each ring and expansion of space and power to accommodate additional electronics in the ILEC central office collocations, or at a customer building." Duke Declaration ¶ 23. *See also id.* ¶¶ 23-25 (noting that the provision of wholesale loops would encounter space and support constraints and would require expanded (and costly) network support systems including customer collocations, provisioning and billing systems and new processes and systems).

<sup>45/</sup> *See id.* ¶ 21.

<sup>46/</sup> *See* Fea/Giovannucci Declaration ¶ 22.

or DS1 services to other CLECs. By the same token, the fact that one CLEC self-provides OCn, or even DS3 and DS1, loops to some customers in a building is no evidence that another CLEC could economically self-provide DS3 or DS1 loops to that building with its own facilities. Many obstacles stand in the way of the second CLEC self-provisioning to customers within the building. As an initial matter, the second CLEC would have to negotiate with the building owner access rights within the building to the customers it wishes to serve which the building owner has no obligation to agree to, or may agree to only subject to onerous fees or other conditions. In addition, the second CLEC would have to negotiate terms to bring its facilities to the building with both private and municipal rights-of-way owners.<sup>47/</sup> These negotiations may lead to long delays, may not be successful – there may simply be no available conduit or pole space available – or may result in or extraneous additional uneconomic burdens.<sup>48/</sup> Further, in comparison with the first CLEC, the network architecture of the second CLEC, *e.g.*, the location of its access points or its switching facilities, may be such that self-provisioning to the building may not be cost-justified for the second CLEC<sup>49/</sup> The additional costs and delays associated with self-provisioning mandate that there be a strong business case to do so, typically supported by a geographic concentration of customers. The potential revenues from a single or small number of DS1 or DS3 level of customers typically does not justify the expenditures related to the build-out.<sup>50/</sup> This is especially true for DS1 services, given that DS1 customers, as a whole, have demonstrated a greater tendency to switch providers making the stream of revenue from self-provisioning more uncertain and risky.<sup>51/</sup> In the absence of conditions supporting a strong business case, for self-

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<sup>47/</sup> See Tirado Declaration ¶ 8 (noting that “CLECs have no absolute right to build into the complexes at which its customers reside. [CLECs] must negotiate private Rights-of-Way (“ROW”) licenses and building access agreements, which may or may not be available at economic prices and depending on the location of the building.”); WC Docket No. 04-313, Loop and Transport CLEC Coalition Comments, Declaration of Anthony Abate, SNiP LiNK, LLC (dated October 1, 2004) (noting that a principal barrier to constructing a fiber ring is the need to obtain rights-of-way and pole attachments from three separate governmental entities, a requirement from which Verizon is exempt.).

<sup>48/</sup> See ALTS Comments at 65 (citing the Bates-White Report) (“The costs of deploying fiber varies significantly depending on whether a firm must deploy new underground installations, use poles or use existing conduits); WC Docket No. 04-313, CC Docket No. 01-338, Batelaan Declaration ¶ 5 (noting that intransigent landlords commonly demand high fees or restrict the extent of fiber deployment within a building); Sprint Comments at 43-44 (noting that “[i]n addition to the time necessary to build [facilities], competing carriers face delays securing ROW access and obtaining permits, as well as delays stemming from municipal “franchise” conditions, construction moratoriums, preservation constraints, even endangered species issues.”).

<sup>49/</sup> See Fea/Giovanucci Declaration ¶ 32 (“For any given carrier, whether deployment is economic depends entirely on how much traffic that specific carrier has on the point-to-point route in question, how close together the two points are (*i.e.*, how much new outside plant is required) and what alternatives exist to construction on that route. The fact that another carrier has built a facility to a given LSO has nothing whatsoever to do with whether AT&T can economically build a transmission facility between the same points.”).

<sup>50/</sup> See Johnson Declaration ¶ 7; WC Docket No. 04-313, ATX *et al.* Comments, Declaration of Steven A. Wengert, BayRing Communications, ¶ 10 (dated October 4, 2004).

<sup>51/</sup> See *Triennial Review Order* at ¶ 325; Johnson Declaration ¶ 7; Sprint Comments at 43.

provisioning DS1 and DS3 loops, the only economic alternative is relying upon the ILECs or, if they exist, wholesalers.

## 5. Local Telecommunications Duopolies Are Not Sufficient, Competitive Markets

Finally, as a matter of policy, and assuming *arguendo* that the ILECs' data credibly establishes the presence of one CLEC in a commercially reasonable number of buildings, abolishing loop UNEs where one CLEC has deployed would not be a sound decision by the FCC. It is unwise to adopt unbundling rules that allow for, at best, a wireline duopoly comprised of an ILEC and one CLEC.

The Commission itself has found that duopolies do not provide a sufficient competitive effect. For example, the FCC held in place the prohibition on cross-ownership of CMRS companies in large MSAs through 2001 due to concerns surrounding "cellular duopoly conditions."<sup>52/</sup> The Commission had retained that rule for 10 years "[i]n order to guarantee the competitive nature of the cellular industry and to foster the development of competing systems."<sup>53/</sup> For similar reasons, the FCC rejected the proposed Hughes-EchoStar merger, noting that "courts have generally condemned mergers that result in duopoly."<sup>54/</sup> More recently, the FCC re-affirmed its local ownership rule for radio stations, finding that "both economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms" adequately ensures a competitive market.<sup>55/</sup>

This reasoning applies equally to local wireline telecommunications competition. The presence of one CLEC in a building — even if the CLEC serves the entire building — at most provides a duopoly for its tenants. This environment does not sufficiently ensure that tenants have a meaningful choice of service, nor does it place adequate price pressure on the resident ILEC. Thus, leaving aside the serious flaws in the ILEC loop deployment data, the unbundling regime that the Commission shortly will create cannot be premised on the notion that self-deployment by one CLEC in a building defeats the need for ILEC high-capacity loops to that building. Regardless of the credence afforded to the ILECs' presentations, they are insufficient to demonstrate that CLECs are not impaired without unbundled, cost-based access to loops.

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<sup>52/</sup> 2000 Biennial Regulatory Review, *Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, 16 FCC Rcd. 22, 668 ¶ 6 (2001).

<sup>53/</sup> *Id.* ¶ 16 (quoting *Cellular First Report and Order*, 6 FCC Rcd. 6185, 6628 ¶ 103 (1991)).

<sup>54/</sup> *Application of EchoStar Commun. Corp. et al., Transferors, and EchoStar Commun. Corp., Transferee*, CS Docket No. 01-348, Hearing Designation Order, FCC 02-284 ¶ 100 (rel. Oct. 18, 2002).

<sup>55/</sup> 2002 Biennial Regulatory Review – *Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620, 13731 ¶ 289 (2003), *aff'd in part, rev'd in part, Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

In sum, therefore, the Commission should not establish a self-provisioning trigger. The fact that a CLEC may be serving a building with fiber to a building is extremely unreliable evidence that there is no impairment in providing DS3 or DS1 loops to that building. Instead, in assessing levels of impairment in the provision of DS3 and DS1 loops, the Commission should determine that CLECs are impaired nationwide without access to unbundled DS1 and DS3 loops. At most, the Commission could reasonably consider supplying a two-wholesaler test as we described in our submission to the FCC.

Respectably submitted

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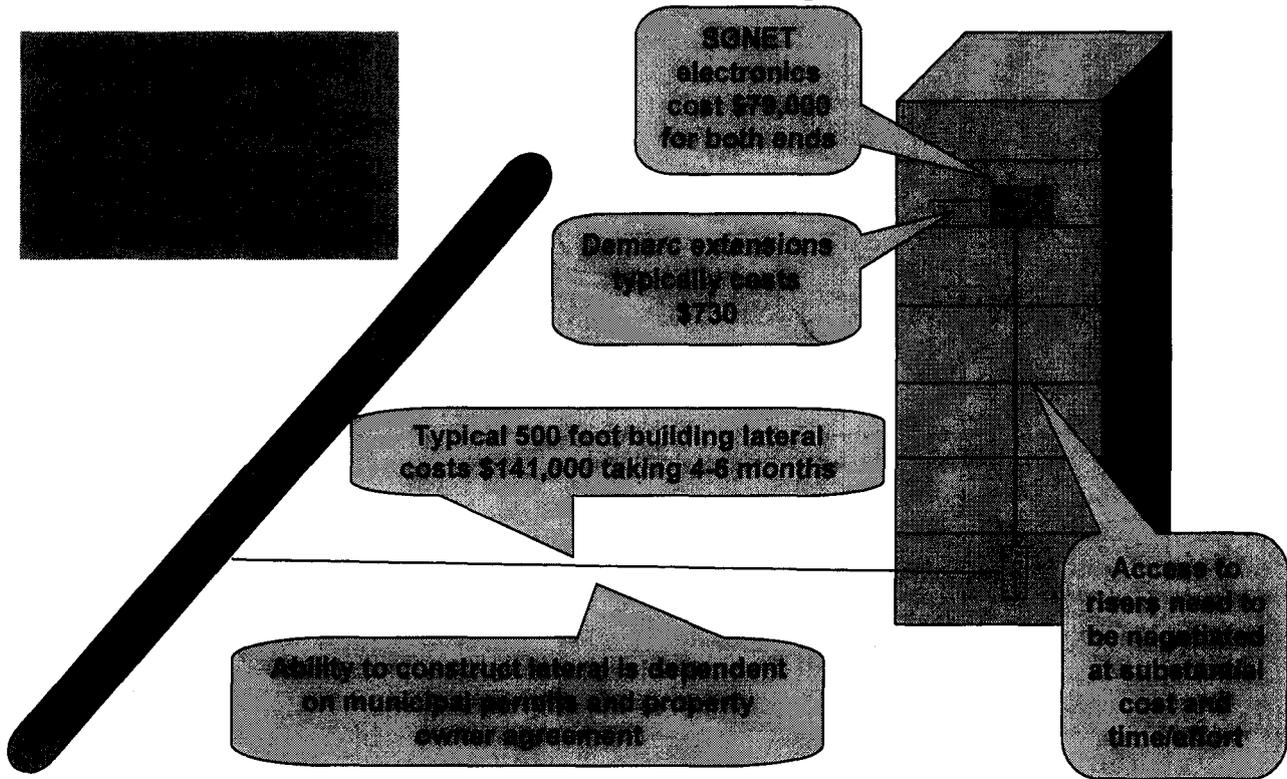
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# **ATTACHMENT A**

**Attachment A**

**What Does it Take to Add a Building to XO's fiber backbone?**



**Carriers cannot afford to build to customer premises [\$141,000 (fiber build)], even in building where fiber is present [\$79,000 (electronics) + \$730 (demarc)]**