



December 8, 2004

VIA ELECTRONIC FILING

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Notice of Ex Parte Comments Regarding Unbundled Access to Network Elements WC Docket No. 04-313, Unbundled Access to Network Elements and CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

Dear Secretary Dortch:

On Monday, December 6, 2004, and Wednesday, December 8, 2004, the National Association of Regulatory Utility Commissioners (NARUC) made several oral presentations to FCC decisional personnel via conference calls, and face-to-face visits. NARUC respectfully requests any waivers needed to file the notice for the December 6 calls one day out of time.

- A. 10:00 Call with Jessica Rosenworcel, Office of Commissioner Copps. (12/6)
- B. 11:00 Call with Commissioner Martin and Dan Gonzales. (12/6)
- C. 03:00 Call with Matt Brill, Office of Commissioner Abernathy. (12/6)
- D. 03:00 Call with Commissioner Adelstein and Scott Bergmann. (12/8)

Commissioners present on each call:

Marilyn Showalter (WA) NARUC President [A, B, C]; Robert B. Nelson (MI) Chair, NARUC Committee on Telecommunications [A, B, D]; Thomas J. Dunleavy (NY) Vice Chair, NARUC Committee on Telecommunications [A,B,C,D]; Anthony T. Clark (ND) Vice Chair, NARUC Committee on Telecommunications [A]; Connie O. Hughes, Chair, NARUC Ad Hoc Committee on Critical Infrastructure [A, B, C, D]; Elliott G. Smith (IA), Chair, NARUC Task Force on Intercarrier Compensation; Joint Board on Universal Service Nominee; Judith G. Ripley, (ID), Joint Board on Separations; Telecommunications Committee [A, B, C, D]; Sarah Kyle (TN) Telecommunications Committee [A, B, C, D]; Loretta Lynch (CA) Telecommunications Committee [D]; Jorge L. Bauermeister (PR) Telecommunications Committee [A, B]; and Greg Jergeson (MT) Telecommunications Committee [B]

Staff present on the calls:

Art Stuenkel (AR) [A, B, D]; Tom Long (CA) [A, B, C, D]; Gretchen Dumas (CA) [A, B, C, D]; Connie Welde (DE) [A, B, C, D]; Pat Lee (FL) [A, D]; David Dowds [D]; Cindy Miller (FL) [B]; Greg Shaffer (FL) [B]; Rich Higgins (ID) [B]; Anthony Centrella (NJ); Gene Hand (NE) [A, B]; Robert Mayer (NY) [D]; Tracey Stokes (MD); Merwin R. Sands (MD); Orjiakor Isiogu (MI); Monica Tranel (MT); Andy Margeson (OR) [B]; Christine Aarnes, (KS) [B] and Brad Ramsay, NARUC General Counsel [A, B, C, D].

On each of these calls the same three basic arguments were presented by NARUC Commissioners:

(1) Access to DS-1 Loops: The FCC has already determined that the ability of CLECs to provide services is impaired on a nationwide basis unless ILECs are required to make available DS1 UNE loops. That impairment finding was based on evidence that (i) CLECs can not economically self-deploy DS1 loops because it requires the same significant sunk and fixed costs as higher-capacity loops used to serve the largest businesses, yet would result in much lower revenue opportunities, and (ii) there is little evidence of wholesale alternative DS1 loop capacity available to CLEC.

NARUC Commissioners urged the FCC to reaffirm that finding and to avoid limited tests that ignore market realities. They noted that small and medium-sized businesses - the customer group served by CLECs using DS1 UNE Loops - are vital to economic growth in the United States. Those businesses will be harmed by a loss of service or by price increases if unbundled DS1 UNE Loops become unavailable to CLECs.

In two of the calls, there was specific discussion of California's October 4, 2004 record submission on DS1 loop self provision (and related finding by the Michigan commission – both documents are attached to this ex parte). The October 4, 2004 filed "Staff Report on Investigation Concerning Competitive Local Carriers' Deployment of Facilities" at pages 95-110 discusses California's record on high capacity loop self provisioning. Several on the calls argued that triggers for a finding of non-impairment that were not building specific would not reflect real world problems. The discussion in the California comments gives a good flavor in some of the issues that arise in applying self-provisioning triggers (e.g., are ILECs including "carrier hotels" rather than customer premises actually served by competitors). In response to questions about the appropriateness of using the presence of one wholesale provider as a benchmark, several suggested a minimum of two such providers as the bare minimum for an appropriate analysis of impairment in a particular building. Others offered that a wire center based test is irrational because the economics of entry varies based on individual buildings, not the serving wire center. A particular building may have only a few potential customers or present unique challenges to facilities deployment.

Several on the call also suggested the States should play a significant role in these determinations. One suggestion was that the FCC reaffirm its nationwide impairment standard, left untouched by the D.C. Circuit, and specify that States can handle the related interconnection issues in the context of an arbitration pursuant to Section 252 of the Act. In such a proceeding, the ILEC would have the burden of demonstrating that in that particular instance, impairment is lacking.

(2) Transition Period – 18 months plus: In all the calls, there was substantial agreement by all the Commissioners that actually spoke on the issue: Six months is simply not long enough, even if it is extended on a case-by-case basis if a particular ILEC is unable to cut over the 17 million plus UNE-P customers within the stated time frame.

Whether or not the ILECs are able to complete all of the hot cuts in a specific time frame, Commissioners remain concerned that six months is inadequate on its face. It does not allow adequate time for competitors to revise their business plans and decide to deploy any needed infrastructure, generate needed capital for economically sound deployments, negotiate alternative arrangements, or withdraw from particular markets. Consumers will bear the brunt of a poorly constructed and unrealistically short transition.

A few commissioners pointed out also that the records filed by several of the States in this docket clearly demonstrating impairment in specific markets, suggests strongly in at least some cases, a transition might be premature.

In all offices, Commissioners on the call suggested 18 months as a starting point for discussions of an appropriate time frame, with the transition period suggested in the earlier orders as another possibility. One commissioner noted his state's comments started with 18 months as the minimum period but had suggested step price increases during the interim. Several Commissioners pointed out the need for State commissions to play a role in determining when batch hot cut procedures are adequate.¹

(3) Line Sharing: NARUC urged that Line Sharing be included in this proceeding if at all possible. The benefits of line sharing are clear and there are no arguments that access to legacy facilities will undermine investment in new facilities that are not subject to the same unbundling requirements.

¹ In its June 29, 2004 order in Case No. U-13891, the batch hot cut case, the MPSC stated: "The FCC indicated that the Commission should first establish the appropriate volume of loops that should be included in the "batch." In so doing, the Commission adopts SBC's proposal for including 100 loops in the batch, which was detailed in the testimony of SBC witness Chapman. The Commission is persuaded that this batch size is reasonable and appropriate for interim purposes." Order, p. 20. Subsequently, in asking for rehearing, Talk America asked the Commission to increase the maximum size of a batch as follows: "In order to convert its UNE-P customer base to its own switch in any meaningful time frame, Talk America will need to have SBC process as many as 500 lines per central office per day. Yet, the current interim process places a limit of "100 cutovers per CLEC per central office per day as well as a maximum limit of 200 cutovers per central office per day". The real world experience of Talk America in seeking to convert a substantial residential base from UNE-P to its own switch shows that this limitation in the interim process is far too restrictive. While Talk America has been able to negotiate to some degree with SBC for bulk project orders of up to 150 lines per day per central office, this is not a meaningful solution. The maximum size of the batch needs to be increased and the availability of the maximum size of the batch needs to be certain and not subject to a negotiated process. As the Commission's order has recognized, there has been a fundamental change in the regulatory environment. This change necessitates the need for UNE-P providers to swiftly transit their customer base to their own switches. For Talk America to transition its substantial residential customer base, it is imperative that the size of the batch be increased to 500 lines per CLEC per end office with up to 3,000 per end office aggregated among all CLECs." Talk America July 29, 2004 brief, p. 5.

If you have any questions about this filing, the attachments, or any other NARUC position, please do not hesitate to contact me at 202.898.2207 or jramsay@naruc.org.

Sincerely,

James Bradford Ramsay
NARUC General Counsel

cc: Chris Libertelli
Matt Brill
Jessica Rosenworcel
Daniel Gonzolaz
Scott Bergmann

Appendix A – NARUC Resolution Regarding Expedited Determination that CLECs are Impaired without DS1 UNE Loops

WHEREAS, On August 21, 2003, the Federal Communications Commission (“FCC”) issued its Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (the “Triennial Review Order”) that set forth rules regarding the unbundling of network elements by incumbent local exchange carriers (“ILECs”); *and*

WHEREAS, In the Triennial Review Order, the FCC unanimously found that Competitive Local Exchange Carriers (“CLECs”) are impaired in most instances without access to unbundled DS1 loops and that it is not economically feasible for CLECs to deploy their own DS1 loops, unless the ILEC can demonstrate that DS1 loop wholesale competitive alternatives are available at a particular customer’s location from a provider other than the ILEC or an ILEC affiliate; *and*

WHEREAS, Various parties appealed the FCC’s Triennial Review Order, and such appeals were consolidated in the United States Court of Appeals for the District of Columbia (D.C. Circuit); *and*

WHEREAS, On March 2, 2004, the D.C. Circuit issued a decision in *United States Telecom Association v. FCC* (“USTA II”), vacating and remanding several of the Triennial Review Order’s unbundling rules back to the FCC, and on June 16, 2004, the mandate for the USTA II decision issued; *and*

WHEREAS, On August 20, 2004, the FCC issued an Order and Notice of Proposed Rulemaking seeking comments on alternative unbundling rules that will implement the obligations of Section 251(c)(3) of the Communications Act of 1934, as amended, in a manner consistent with the D.C. Circuit Court’s decision in USTA II; *and*

WHEREAS, On September 29, 2004, XO Communications, Inc., filed with the FCC a Petition requesting the FCC to bifurcate its consideration of DS1 loops in CC Docket 01-338 and immediately affirm its prior determination that the ability of CLECs to provide services is impaired on a nationwide basis unless ILECs are required to make available DS1 UNE loops; *and*

WHEREAS, The FCC has found that it is economically infeasible for CLECs to self-deploy DS1 loops, as such deployment would require the same significant sunk and fixed costs as higher-capacity loops used to serve the largest businesses, yet would result in much lower revenue opportunities; *and*

WHEREAS, The FCC has found that there is little evidence of wholesale alternative DS1 loop capacity available to CLEC; however, the FCC found that evidence of alternative providers at the DS3 and higher capacity levels suggests that there may be specific locations where competitive carriers have deployed fiber and could offer excess capacity at the DS1 loop level; *and*

WHEREAS, Small and medium-sized businesses - the customer group served by CLECs using DS1 UNE Loops - are vital to economic growth in the United States; *and*

WHEREAS, Small and medium-sized businesses have benefited from the availability of competitively-provided services provisioned over DS1 UNE Loops, including access to low-cost high-speed Internet access and advanced voice services; *and*

WHEREAS, Small and medium-sized businesses will be harmed by a loss of service or by price increases if unbundled DS1 UNE Loops become unavailable to CLECs, and such harm to these businesses would be damaging to the nation's economy; *now therefore be it*

RESOLVED, That the National Association of Regulatory Utility Commissioners (“NARUC”), convened in its November 2004 National Convention in Nashville, Tennessee, supports the request for the FCC to reaffirm its prior determination that the ability of CLECs to provide services is impaired on a nationwide basis unless ILECs are required to make available DS1 UNE loops at cost-based rates, unless the ILEC can demonstrate that DS1 loop wholesale alternatives are available at a particular customer location from a provider other than the ILEC or an ILEC affiliate; *and be it further*

RESOLVED, That NARUC’s General Counsel is directed to file in support of this position and take any appropriate actions to further the intent of this resolution.

Sponsored by the Committee on Telecommunications
Adopted by NARUC November 17, 2004

Appendix B - MICHIGAN PUBLIC SERVICE COMMISSION. ALJ Regis “Notice of Proposal for Decision,” In the matter, on the Commission’s Own Motion to facilitate the implementation of the Federal Communications Commission’s Triennial Review determinations in Michigan. Case No. U-13796

NOTICE OF PROPOSAL FOR DECISION - The attached Proposal for Decision is being issued and served on all parties of record in the above matter on May 10, 2004. Exceptions, if any, must be filed with the Michigan Public Service Commission, P.O. Box 30221, 6545 Mercantile Way, Lansing, Michigan 48909, and served on all other parties of record on or before May 21, 2004, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before June 1, 2004. An original and four paper copies and an electronic copy in the portable document format (PDF) of either document are necessary to meet proper filing requirements, as well as proof of service on all other parties of record. At the expiration of the period for filing of exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before they are due. MICHIGAN PUBLIC SERVICE COMMISSION James N. Rigas Administrative Law Judge May 10, 2004 Lansing, Michigan

PROPOSAL FOR DECISION This proceeding arises out of the Federal Communication Commission’s (FCC) Triennial Review Order (TRO)¹ and Orders dated May 28, August 26 and September 30, 2003, of the Michigan Public Service Commission (Commission) implementing the TRO. Notices of Intent to Participate have been submitted on behalf of the following: AARP; ACN Communications, Inc. (ACN); Allegiance Telecom, Inc. (Allegiance); AT&T Communications of Michigan, Inc. (AT&T); Attorney General; Brooks Fiber Communications of Michigan, Inc (Brooks); Bullseye Telecom, Inc. (Bullseye); CenturyTel Midwest-Michigan, Inc., CenturyTel of Northern Michigan, Inc., and CenturyTel of Upper Michigan, Inc. (collectively CenturyTel); Climax Telephone Company (Climax); CMC Telecom, Inc. (CMC) ;Competitive Local Exchange Carriers Association of Michigan (CLECA) Covad Communications Company (Covad); Focal Communications Corporation of Michigan (Focal); grid4 Communication, Inc. (grid4); KMC Telecom III, LLC (KMC); LDMI Telecommunications, Inc. (LDMI); MCImetro Access Transmission Services LLC, MCI WorldCom Communications,; Inc. (collectively MCI) ; McLeodUSA Telecommunications Services, Inc. (McLeod); Michigan Bell Telephone Company d/b/a/ SBC Michigan (SBC); Michigan Public Service Commission Staff (Staff); Quick Communications, Inc. (Quick); Sage Telecom, Inc. (Sage); Save American Free Enterprise in Telecommunications (SAFE-T) Coalition; Sprint Communications Company L.P. (Sprint) Superior Spectrum, Inc. (Superior); Talk America Inc. (Talk America); TCG Detroit (TCG) TDS Metrocom, LLC (TDS); TelNet Worldwide, Inc. (TelNet); Verizon North Inc. and Contel of the South, Inc. d/b/a Verizon North Systems (Verizon); Winn Telephone Company (Winn); XO Michigan, Inc. (XO);Zenk Group Ltd., d/b/a Planet Access (Planet Access); Z-Tel Communications (Z-Tel); Sage and Winn subsequently withdrew from the proceeding.

¹ See 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), corrected by Errata, 18 FCC Rcd 19020 (2003) (collectively “TRO”), reversed and remanded, United States Telecom Ass’n v. FCC, D.C. Cir. No. 00-1012 (and consolidated cases) (decided Mar. 2, 2004).

The schedule established for the proceeding provide for the filing of Direct, Reply and Response testimony and exhibits. Hearings in this matter took place on October 13 and December 4, 2003; and March 15 through 19, 2004. In all the testimony of 36 witnesses was bound into the record.

Briefs have been filed by AARP, ACN, AT&T, the Attorney General, Bullseye, Covad, MCI, the Michigan Based CLEC Coalition (CLEC Coalition), SBC,² Talk America, TCG, and Z-Tel. Reply Briefs have been filed by ACN, AT&T, the Attorney

² SBC filed separate Briefs and Reply Briefs addressing Mass Market Switching, High-Capacity Loops and Dedicated Transport. AT&T, TCG, MCI, Brooks, Covad, TDS, XO, Focal and KMC jointly filed a separate Brief addressing High-Capacity Loops and Dedicated Transport. With the exception of TDS, these same parties jointly filed a Reply Brief addressing High-Capacity Loops and Dedicated Transport. TDS filed a separate Reply Brief addressing Dedicated Transport.

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General, Bullseye, MCI, the Michigan Based CLEC Coalition (CLEC Coalition), SBC, Staff, Talk America, TCG, and Z-Tel.

MASS MARKET SWITCHING - In the TRO, the FCC established specific rules for states to apply to determine whether and where the FCC's provisional national finding of impairment with respect to local switching to serve mass market customers does not apply. The FCC held that there is no impairment in those geographic markets where any one of three tests is met. In this case SBC has limited its presentation to one of the three tests, the self-provisioning trigger test. Under the self-provisioning trigger test, the Commission is required to find non-impairment where "three or more competing providers not affiliated with each other or the incumbent LEC, including intermodal providers of service comparable in quality to that of the incumbent LEC, each are serving mass market customers in the particular market with the use of their own local switches."³

The Geographic Market

The first issue presented in this mass market switching case is to determine the geographic area of the markets to be analyzed. SBC takes the position that the appropriate geographic market for analyzing mass market switching impairment is SBC's service territory within the Metropolitan Statistical Area (MSA). The federal Office of Management and Budget defines an MSA as a county or group of counties with (1) a city of population 50,000 or more or (2) an urbanized area (as defined by the

³ 47 C.F.R. § 51.319(d)(2)(iii)(A)(1).

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Census Bureau) of population at least 50,000, consisting of one or more counties. SBC states an MSA is a county or group of counties having a large clustered population, including adjacent areas having a high degree of community of interest with the core population center. SBC represents the MSA satisfies the FCC's criteria⁴ for defining the geographic market and also comport with the FCC's directive that the markets not be defined "so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market."⁵ In support of its position, SBC maintains that MSAs best account for the locations of mass market customers already served by competitors, reflect the variation in factors affecting competitors' ability to serve customers, and demonstrate competitors' ability to target and serve specific markets profitably and efficiently. In addition, SBC asserts the service territory within each MSA reflects the economic markets in which competitors serve customers using their own switches, in light of the efficiencies of scale and scope available from serving markets of that geographic scope. AT&T and Bullseye recommend that the Commission use LATA boundaries for defining

geographic markets. These parties contend that LATAs provide a comprehensive market definition with every area in Michigan assigned to a market. AT&T and Bullseye state that wire center boundaries conform to LATA boundaries, eliminate the need to arbitrarily assign wire centers that straddle the border into/out-of an MSA, and avoid the orphaned market issue. The requirement that the “locations of mass market customers actually being served (if any) by competitors” is thereby satisfied. Finally, AT&T and Bullseye state LATA boundaries are well understood in the

4 Id., § 51.319(d)(2)(i)
5 TRO, ¶ 495.

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industry and were originally designed as a best estimate of the geographic boundary of the exchange market. AARP and the Attorney General propose that the Commission define the geographic market for the Lansing MSA based on certain wire center “clusters” identified by AARP witness Dr. Ben Johnson. These parties state data for wire centers in the Lansing area was analyzed in order to identify homogeneous geographic markets. A multi-step process followed, starting with quantitative data for each wire center in the Lansing MSA. Each wire center was ranked with respect to the following factors: total number of lines, the ratio of enterprise lines to total lines, the number of lines per square mile (density), and the number of carriers collocated at the wire center. These rankings were combined by giving them equal weight in the form of an index value. These index values were then used, in conjunction with information concerning airline distances, UNE rate zones, and other factors, in identifying contiguous groups of wire centers with reasonably homogeneous characteristics. Exhibit I-198, Map 4, shows the groups of wire centers that AARP and the Attorney General are recommending be identified as separate markets. MCI, ACN, Talk America, and Staff take the position that the Commission should define each individual SBC wire center as a separate geographic market. It is asserted that this approach best satisfies the various “must” and “should” factors established by the FCC in the TRO. These parties maintain the geographic market specifications set forth in the TRO are designed to identify areas where actual deployment of competitive facilities has occurred to serve mass market customers. It is asserted a wire center approach to market definition is perfectly tied to the locations of customers actually

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being served by competitors. The CLECs and Staff maintain that self-provision switches have an addressable market that matches the SBC wire centers in which they have collocated, regardless of the ultimate capacity of a switch. Consumer choice similarly varies by wire center, and many CLECs market services at or below the wire center level (e.g., NPA-NXX code, residential only, business only). In addition, for CLECs that utilize self-provisioned switches, the operational and economic impairment faced by carriers with regard to mass market switching varies by wire center. The FCC did not adopt a particular market definition in making its determinations with respect to mass market switching. Instead, the FCC codified the principles the Commission must apply in defining the geographic market for mass market switching in its rules: Market definition. A state commission shall define the markets in which it will evaluate impairment by determining the relevant geographic area to include in each market. In defining markets, a state commission shall take into consideration the locations of mass market customers actually being served (if any) by competitors, the variation in factors affecting competitors’ ability to serve each group of customers, and competitors’ ability to target and serve specific markets profitably and efficiently using currently available technologies. A state commission shall not define the relevant geographic area as the entire state.⁶

The TRO enumerates a series of “must” and “should” factors for State Commissions to consider in defining markets for the TRO impairment analysis. The TRO provides at ¶ 495 the following: [S]tate commissions must define each market on a granular level, and in doing so they must take into consideration

the locations of customers actually being served (if any) by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets economically and efficiently using currently available technologies. While a more granular analysis is generally preferable, states should not define the market so

6 47 C.F.R. § 51.319(d)(2)(i).

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narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market. State Commissions should consider how competitors' ability to use self-provisioned switches or switches provided by a third-party wholesaler to serve various groups of customers varies geographically and should attempt to distinguish among markets where different impairments are likely.

Based upon the record presented the Administrative Law Judge recommends that the Commission adopt the proposal of MCI, the Joint CLECs and Staff and define the geographic market in Michigan for determining non-impairment for unbundled local switching at the wire center level. Of the various proposals under consideration, the writer is persuaded the wire center level analysis presented in this case is the most appropriate and most closely follows the patterns of expansion and competitive development reflected in the record. This analysis also gives appropriate consideration to the economics and marketing involved in the various carriers' deployment and expansion of their competitive networks. The record shows that the MSA and LATA proposals are less desirable. This finding is the result of the inability to show that competitors have been able to serve mass market customers across wire center boundaries. The evidence shows only the incidental serving of DS0 loops across MSAs or LATAs. Other problems have also been demonstrated. If SBC is correct in its assertion that the trigger analysis is purely a counting exercise, then there could be large areas of actual impairment in a MSA or LATA that would be deemed unimpaired. Such a result is inapposite with the goal of the TRO to identify genuine areas of non-impairment. If, on the other hand, ATT and Bullseye are correct that the trigger analysis is not purely a counting exercise and that significant activity needs to be shown, then a finding of

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non-impairment might not occur until long after much of the area encompassed by the MSA or LATA is actually non-impaired. The Administrative Law Judge finds that these are the basic flaws in the MSA and LATA proposals.

In addition, the Administrative Law Judge finds that the use of the MSA presents additional problems. MSAs do not include all wire centers within the state. AT&T has shown that MSAs exclude 124 of the 336 wire centers in which CLECs offer competitive services. Evidence offered by the Attorney General demonstrates that MSAs improperly lump together potentially disparate groups. The record reflects there are significant disparities between economic and demographic conditions in counties within an MSA and between the various MSAs. It has been noted that even SBC, with all its existing embedded facilities, brand name awareness, market power, and economies of scale and scope at its disposal, does not serve the entirety of all thirteen of the MSAs in Michigan where it has a presence. It seems unlikely then that competitors would do what SBC cannot or does not desire to do. The Administrative Law Judge is persuaded that the use of the wire center as the geographic market avoids these flaws. Establishing the wire center as a geographic market for purposes of an impairment analysis will allow the Commission to make a determination of non-impairment when it is appropriate while at the same time preventing the application of the non-impairment decision to areas where impairment continues to exist.

Finally, the Administrative Law Judge finds the evidence demonstrates the current technology does not allow for the use of a competitive switch to provide mass market analog service in any ILEC wire center in which a CLEC is not collocated.

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Customers are being served based on the location of competitive collocation arrangements and not based upon the location of the CLEC switch. From an operational standpoint then, the wire center is directly tied to the “location of customers actually being served,” and accordingly supports the decision that the wire center is the proper geographic area for the mass market switching analysis. It has been shown that there are operational and economic impairments that do in fact vary by wire center. Giving then consideration to the variety of factors specified by the FCC for the Commission to utilize in defining the geographic market, the evidence taken as a whole shows that of the proposals offered, the wire center best satisfies those factors.

The DS0 Cut-off

The FCC has defined mass market customers as “analog voice customers that purchase only a limited number of POTS lines, and can only be economically served via DS0 lines.”⁷ Mass market customers are typically residential and small business customers that rely on traditional POTS for their telecommunications needs. Enterprise customers require a level of service and capacity, particularly for data services, that exceeds that of mass market customers. Enterprise customers typically need service that exceeds the capabilities of the POTS (and DS0 lines) provided to mass market customers. The FCC stated: “DS1 enterprise customers are characterized by relatively intense, often data centric, demand for telecommunications services sufficient to justify service via high-capacity loops at the DS1 capacity and above.”⁸ The FCC, however, includes in the enterprise market those customers for whom “it is economically feasible for a competitive carrier to provide voice service with

7 TRO, ¶ 497.

8 Id., ¶ 451.

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its own switch using a DS1 or above loop.”⁹ Enterprise customers therefore include both “customers that are served by the competing carrier using a DS1 or above loop and multi-line customers for whom “it makes economic sense . . . to be served via a DS1 loop.”¹⁰

The FCC has delegated to the Commission the task of determining the maximum number of DS0 lines a customer may use before it “makes economic sense” to use a DS1 line (thereby rendering it an enterprise customer). This “DS0 cut-off” – i.e., the cross-over point – thus establishes the “upper bound” of the mass market. The parties have presented a wide range of cross-over points. SBC has determined the cross-over point to be 4 DS0 lines (anything over 3 lines). AT&T and AARP propose a minimum of 12 DS0 lines. The CLEC Coalition proposes a cross-over of at least 22 DS0 lines, with a 20% contingency factor. The remaining parties believe the Commission should set a cross-over point that is determined by what the customer orders. If the customer is a single-location customer with only DS0 lines, then the customer is a mass market customer no matter how many DS0 lines they have. If the customer has any DS1 lines, then the customer is an enterprise customer. This “customer determinative” position was adopted by MCI, the Attorney General and Bullseye.

ACN takes the position a cross-over determination is only required when a potential deployment case is being presented. Since SBC has stated it is only presenting a trigger analysis, ACN asserts a cross-over determination is not required. Bullseye has endorsed ACN's position.

9 Id., ¶ 421, n.1296.
10 Id.

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Staff recommends that if the Commission adopts a cross-over point, it adopt the position taken by MCI in these proceedings. Staff notes that MCI's proposal was initially presented by Verizon in California and then revised: Verizon's recommendation presumes that each CLEC has made a rational decision as to whether to serve its end-user customer via an analog, voice-grade loop or a DS-1 (or higher capacity) loop, given the specific circumstances for each customer. Hence, Verizon does not attempt to perform its own crossover analysis to replicate the decision analysis of the CLEC. Instead, it merely counts every instance in which a CLEC obtains an analog loop to provide voice-grade service as a mass-market loop. (Murray Response Testimony, p 56, Tr. 2105).

Refining that recommendation, MCI added the condition that any DS1 or higher customer that might also have a DS0 line should be classified as an enterprise customer. (Id.) The parties have expended considerable effort in both supporting the proposals they endorse and critiquing those they oppose. These analyses will not be repeated here for the reason that the Administrative Law Judge agrees with the position put forward by ACN that the Commission is not required to determine a DS0 cut-off in a trigger proceeding. The FCC has found that on a national basis CLECs are impaired without access to unbundled switching. The FCC specified the granular analysis that must be performed by the Commission in order to find that in a specific geographic market CLECs are not impaired without access to unbundled local circuit switching.

The FCC provided:

(iii) State commission analysis. To determine whether requesting telecommunication carriers are impaired without access to local circuit switching on an unbundled basis, a state commission shall perform the inquiry set forth in paragraphs (d)(2)(iii)(A) through (d)(2)(iii)(C) of this section:

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(A) Local switching triggers. A state commission shall find that a requesting telecommunications carrier is not impaired without access to local circuit switching on an unbundled basis in a particular market where either the self-provisioning trigger set forth in paragraph (d)(2)(iii)(A)(1) of this section or the competitive wholesale facilities trigger set forth in paragraph (d)(2)(iii)(A)(2) of this section is satisfied.

(1) Local switching self-provisioning trigger. To satisfy this trigger, a state commission must find that three or more competing providers not affiliated with each other or the incumbent LEC, including intermodal providers of service comparable in quality to that of the incumbent LEC, each are serving mass market customers in the particular market with the use of their own local switches.

(2) Local switching competitive wholesale facilities trigger. To satisfy this trigger, a state commission must find that two or more competing providers not affiliated with each other or the incumbent LEC, including intermodal providers of service comparable in quality to that of the incumbent LEC, each offer wholesale local switching to customers serving DS0 capacity loops in that market using their own switches.

(B) Additional state authority. If neither of the triggers in paragraph (d)(2)(iii)(A) of this section has been satisfied, the state commission shall find that requesting telecommunications carriers are not impaired without access to unbundled local circuit switching in a particular market where the state commission determines that self-provisioning of local switching is economic based on the following criteria:

* * *

(3) Economic barriers. The state commission shall also examine the role of potential economic barriers in determining whether to find “no impairment” in a given market. Specifically, the state commission shall examine whether the costs of migrating incumbent LEC loops to requesting telecommunications carriers’ switches or the costs of backhauling voice circuits to requesting telecommunications carriers’ switches from the end offices serving their end users render entry uneconomic for requesting telecommunications carriers.

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(4) Multi-line DS0 end-users. As part of the economic analysis set forth in paragraph(d)(2)(iii)(B)(3) of this section, the state commission shall establish a maximum number of DS0 loops for each geographic market that requesting telecommunications carriers can serve through unbundled switching when serving multiline end-users at a single location. Specifically, in establishing this “cut-off,” the state commission shall take into account the point at which the increased revenue opportunity at a single location is sufficient to overcome impairment and the point at which multiline end-users could be served in an economic fashion by higher capacity loops and a carrier’s own switching and thus be considered part of the DS1 enterprise market.¹¹ SBC is requesting relief in this proceeding under the provisions of the self-provisioning trigger outlined in 47 C.F.R. § 51.319(d)(2)(iii)(A). SBC has not requested relief under the potential deployment provisions. The Administrative Law Judge finds that the clear language of the FCC’s rule requires the Commission to establish the DS0 cut-off as a part of “the economic analysis set forth in paragraph (d)(2)(iii)(B)(3) of this section.” In addition, the TRO provides that, “as part of the economic and operational analysis discussed below, a state must determine the appropriate cut-off for multi-line DS0 customers as part of its more granular review.”¹² SBC grounds its position on the fact that it has submitted evidence pertaining to the DS0 cut-off and as a result the Commission is obligated to apply the DS0 cut-off analysis to that evidence. In this regard SBC relies on the FCC’s statement that state commissions have “an affirmative obligation to review the relevant evidence associated with any market submitted by an interested party, and to apply the trigger and any other analysis specified in this Part to such evidence.”¹³ SBC argues further that the paragraph in the TRO where the FCC explains its DS0 cut-off rule (¶ 497) is one of

11 47 C.F.R. § 51.319(d)(2)(iii).

12 TRO, ¶ 497.

13 Id., ¶ 527, n.1612.

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three paragraphs under the heading “Defining the Market.” The Commission must therefore define the DS0 cut-off in order to establish the geographic markets and apply the trigger test. Finally, SBC maintains that the Commission is required by 47 C.F.R. § 51.319(d)(2)(iii) to perform the inquiry set forth in paragraph (d)(2)(iii)(A) through (d)(2)(iii)(C) and the DS0 cut-off rule is a part this inquiry. The writer finds this analysis strained and unpersuasive in light of the clear statement by the FCC that the establishment of the DS0 cut-off should be performed as a part of an economic analysis. The issue of the appropriate DS0 cut-off is therefore not within the required scope of the relief requested in this case by SBC. In this case then the Commission may address the DS0 cut-off, but is not required to do so. The Administrative Law Judge does not believe, however, the analysis need be done in light of the findings below that the FCC’s self-provisioning trigger is not satisfied in any geographic area.

The Self-provisioning Trigger

SBC takes the position the FCC’s self-provisioning trigger test is objective and straightforward. The FCC’s mass market switching rule provides [a] state commission shall find that a requesting telecommunications carrier is not impaired without access to local circuit switching on an unbundled basis in a particular market where . . . the self-provisioning trigger . . . is satisfied.¹⁴

The self-provisioning trigger rule provides: [t]o satisfy this trigger, a state commission must find that three or more competing providers not affiliated with each other or the incumbent LEC, including intermodal providers of service comparable in quality to that of

14 47 C.F.R. § 51.319(d)(2)(iii)(A).

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the incumbent LEC, each are serving mass market customers in the particular market with the use of their own local switches.¹⁵ SBC maintains the requirements of the trigger rule are made plain and its purpose is to avoid a complicated, theoretical and subjective impairment analysis of operational and economic barriers. SBC states the purpose of the self-provisioning trigger is to provide the Commission with an “objective,” “bright-line” rule for assessing whether CLECs are impaired without access to unbundled mass market switching, not to assess whether each and every mass market customer currently has a choice of at least three switch-based competitive providers. SBC asserts it has shown the self-provisioning trigger is satisfied in the seven MSAs it has identified. Seven non-affiliated competing providers are serving mass market customers with their own local switches in the Ann Arbor MSA, three in the Battle Creek MSA, nine in the Detroit MSA, four in the Grand Rapids MSA, four in the Holland MSA, three in the Kalamazoo MSA, and four in the Lansing MSA. See Ex. A-115 (Lube Ex. JPL-12)¹⁶. To identify self-provisioners in each geographic market, SBC relied on two sources of data: its own UNE-loop data (for CLECs purchasing unbundled loops) and E911 data (for cable telephony providers). SBC contends the various CLECs in this proceeding have sought to add a number of additional criteria to the trigger rule in an attempt to make it impossible to satisfy. In response to the CLECs, SBC asserts the trigger rule only requires that a carrier currently serve mass market customers, not all different types of mass market customers (residential and small business).

15 Id. § 51.319(d)(2)(iii)(A)(1).

16 Exhibit A-117 provides a “summary” of SBC’s trigger case, lists of the MSAs where SBC seeks relief, and identifies each of SBC’s trigger candidates in each MSA. Exhibit A-118 (Confidential) lists the number of purported trigger candidates by MSA by central office.

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In addition, SBC states carriers count toward satisfying the trigger that serve mass market customers using their own switches, not mass market switches. SBC contends it is irrelevant if a carrier uses the same switch to serve enterprise customers. SBC maintains the trigger rule does not require that a carrier serve any particular number of mass market customers, mass market customers in the particular market or customers located ubiquitously throughout the market. SBC contends the trigger rule does not require an operational or economic impairment analysis to determine whether a self-provisioner is “actively providing” and “likely to continue” providing service using its switch.

SBC asserts the trigger rule explicitly counts intermodal providers that self-provision switching, and does not require that a carrier purchase UNE-loops from SBC. Finally, SBC contends the trigger rule requires that a carrier be non-affiliated with the ILEC whose service territory is under consideration, not with all ILECs. After a thorough review of the positions presented by all parties, the Administrative Law Judge is persuaded that the TRO requires the reasonable examination of local conditions and local markets in applying the trigger analysis. A simple counting exercise that only determines if a CLEC has a switch and UNE-loops in a particular geographic area is not sufficient. Support for this view is found in the TRO. There the FCC stated: We find that giving the state this role [in reviewing triggers and other impairment issues] is most appropriate where, in our judgment, the record before us does not contain sufficiently granular information and the states are better positioned than we are to gather and assess the necessary information.¹⁷

17 TRO, ¶ 188.

The writer agrees with the Staff and the CLECs that the trigger rule seeks to ascertain whether there are areas in which actual switched-based competition for mass market customers has developed to the extent that the Commission can reasonably find that CLECs have overcome impairment. The FCC stated the purpose of its trigger analysis is to consider whether “actual marketplace evidence shows whether new entrants, as a practical matter, have surmounted barriers to entry in the relevant market,” 18 so that “it is feasible to provide service without relying on the incumbent LEC.”¹⁹

The question has been raised whether the use of the CLEC switch should be considered in applying the trigger rule. The Administrative Law Judge finds that the use of the CLEC switch is relevant to the trigger analysis. If the mass market trigger test is to determine whether a CLEC, in a given market, is providing service to mass market customers with its own switch it is reasonable to ascertain whether the CLEC’s switch is in fact providing service to mass market customers. The FCC held that “switches serving the enterprise market do not qualify for the triggers” applicable to mass market switching.²⁰ If an enterprise customer requires a package of services that includes some analog voice lines, this does not tend to show that the switch serves the mass market. The writer finds, therefore, that it is inappropriate to count as “mass market switch triggers” carriers that fundamentally operate “enterprise switches” – i.e., switches that are intended to and that are being used to serve the enterprise market. SBC has designated the switches used in Michigan by AT&T, MCI, KMC and XO as triggers. The Administrative Law Judge agrees with Staff and the CLECs that these

18 Id., ¶ 99.
19 Id., ¶ 93.
20 Id., ¶ 508.

are all instances of enterprise – and not mass market – switches and thus they do not qualify as triggers. The TRO provides that the CLEC “should be actively providing voice service to mass market customers,”²¹ “and are likely to continue to do so.”²² SBC has taken the position that these provisions of the TRO do not allow for the examination of a trigger candidate’s marketing efforts, business plans or recent customer additions. In this regard SBC relies upon TRO, ¶ 520 n.1588 which provides the FCC’s “impairment analysis does not entail assessing individual business plans,” and “[t]his same analysis applies in the switching section...of this Order.” SBC maintains the additional criteria proposed by the CLECs are the sort of factors that might be examined to determine the “financial stability or well-being” or “difficulty in serving the mass market” as a part of the potential deployment analysis. SBC asserts such an endeavor is not part of the self-provisioning trigger analysis. The issue to be addressed is whether the qualifications of the trigger candidates support the conclusion that impairment has been eliminated or that it can be overcome. The Administrative Law Judge is persuaded that it would be unreasonable to count CLECs that have legacy loops from a failed business plan for purposes of demonstrating that no barriers exist in a market. The FCC stated: “If the triggers are satisfied, the states need not undertake any further inquiry, because no impairment should exist in that market.²³ It has been shown that some carriers continue to serve a small number of analog loops connected to the switches that they use almost exclusively to serve enterprise

21 Id., ¶ 499
22 Id., ¶ 500
23 Id., ¶ 494

customers. For example, LDMI serves mass market customers via UNE-L only because the loops served by those customers were still attached to some equipment it purchased from a bankrupt switch-based carrier (Mpower Michigan). LDMI does not seek to grow its mass market UNE-L business. Similarly, AT&T, Choice One, Comcast and CTS provided evidence that they have retreated from prior business plans that relied upon UNE-L to serve the mass market customer. In addition, evidence was presented examining the types of loops provisioned to a CLEC switch in the last six month period. What has been shown is that even those CLECs that may have had a historic interest in analog service have essentially shifted to an enterprise mode. Analog activity is in decline, while the lease of high-speed digital facilities is increasing rapidly.²⁴ The writer finds that these carriers do not provide support for a determination that they are “actively” serving the mass market using UNE-L and are likely to continue to do so. The term “actively” must be given some effect. A CLEC is not “actively” providing switch-based service simply because it is “currently providing” service. Finally, a CLEC on the verge of exiting the mass market (or that has already left it) is not “likely to continue” providing POTS services to mass market customers. The Administrative Law Judge concludes that these CLECs are not trigger candidates for the self-provisioning mass market switch trigger because each is currently “actively providing” enterprise, rather than mass market, services. It has been argued that a self-provisioner should not count toward the trigger unless it serves a substantial number of both residential customers and those small business customers that are part of the mass market. SBC takes a contrary view and

24 Tr. 2484

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asserts the trigger rule only requires that the CLEC serve mass market customers and not all different types of mass market customers. In support of this position SBC maintains the FCC’s Errata to the TRO expressly deleted the language in ¶ 499 of the TRO that stated a trigger candidate “should be capable of economically serving the entire market, as that market is defined by the state commission.” The FCC also deleted the requirement that a self-provisioner “be operationally ready and willing to provide service to all customers in the designated market.” See Errata at 2. SBC asserts these corrections make clear that state commissions are not allowed to segment the mass market into various sub-classifications when applying the trigger. In further support, SBC cites TRO, ¶ 497 n.1546 and states the FCC held that carriers that use their own switches to serve business customers count toward the trigger, as long as those customers fall below the DS0 cut-off. In response to the assertion that the Commission should ignore any self-provisioners that do not currently serve some minimum number of mass market lines, SBC states there is nothing in the FCC’s self-provisioning trigger rule or in the text of the TRO discussing the FCC’s trigger rule to support this proposal. SBC contends that while the FCC concluded that a 3% market share was insufficient to warrant a nationwide finding of non-impairment with respect to mass market switching, the FCC did not include any market share requirement in its self-provisioning trigger rule. The FCC has included both residential and small business customers in the mass market.²⁵ The record shows that region-wide, nearly 70% of the switched voice access lines are purchased by residential customers. In Michigan, the number is even higher. See Exhibit I-124 (Confidential). The Administrative Law Judge agrees with

25 TRO, ¶ 127, n. 432.

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Staff and the CLECs that a potential trigger candidate cannot qualify as providing mass market service if it does not even offer service to residential customers in that market. Furthermore, the Administrative Law Judge is persuaded that it would be unreasonable to qualify a self-provisioning trigger candidate who serves so few customers using its own facilities that, under the FCC’s own analysis, it would not support the conclusion that impairment in the local exchange has been overcome. The number of UNE-L lines attributed

to CLECs in the MSAs designated by SBC in this case amounts to less than 2% of the market. The FCC in the TRO found greater levels of facilities-based competition inconsequential and proceeded to reach a national finding of impairment. Given that the FCC refused to find insignificant levels of competitive entry sufficient to support a finding of no impairment, the writer does not believe it would be reasonable for the Commission to arrive at a contrary finding based on the facts in this record. SBC has taken the position that intermodal carriers count in the trigger analysis in the same manner as other CLECs. SBC states the FCC's self-provisioning trigger rule makes clear that a trigger carrier need not use UNE-loops and expressly counts "intermodal providers of service comparable in quality to that of the incumbent LEC." 47 C.F.R. § 51.319(d)(2)(iii)(A)(1). SBC also cites TRO, ¶ 501 n.1560 and asserts the FCC's self-provisioning trigger expressly includes self-provisioners that, like cable telephone providers, use both their own switches and their own loops to provide service to mass market customers. The CLECs have taken the position that an intermodal carrier like Comcast should be excluded from the trigger analysis in this case. These parties argue that

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because the trigger test is an impairment analysis that seeks to ascertain whether CLECs are impaired without access to the ILEC switches and the loops connected to them, a carrier that does not need access to the ILEC switches or loops to provide service does not, therefore, address the issue of whether such impairment has been overcome. Staff supports this view. The Administrative Law Judge finds that intermodal providers should be included in a Commission's trigger analysis. The question that must be addressed is what weight to give the presence of such a provider. The FCC stated: Whether this competitor is using the incumbent's loops or its own loops should bear on how much weight to assign this factor, at least until such time as incumbent loops are no longer required to be unbundled. 26 In considering an intermodal alternative, the Commission can only deem the provider a trigger CLEC if its service is "comparable in cost, quality, and maturity to ILEC services." 27 The record shows that Comcast, the intermodal provider at issue in this case, does not offer service to all or nearly all of the market. Furthermore, Comcast does not offer service that is comparable in "cost, quality and maturity" to the incumbent's switched mass-market voice services. Comcast has indicated that it has no plans to expand its current services. The Administrative Law Judge finds this demonstrates that in this case cable telephone is not a mature alternative to ILEC services. Finally, Comcast fails to serve the "crucial function" of affording access to the incumbent's loops, 28 and as a result "provides no evidence that competitors have successfully self-deployed switches as a means to access the incumbents' local loops,

26 Id., ¶ 510, n. 1572.

27 Id., ¶ 499, n.1549.

28 Id., ¶ 439.

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and have overcome the difficulties inherent in the hot cut process." 29 The Administrative Law Judge therefore finds that Comcast does not qualify as a trigger candidate. Several CLECs have argued that two of the competing trigger carriers currently providing service to mass market customers with their own switches in SBC's service territory (TDS and CTS) cannot count toward the trigger because they are affiliated with other ILECs operating outside of SBC's service territory. These parties maintain ILEC affiliates have advantages unavailable to even efficient CLECs, such as name recognition as local carriers, as well as switches, transport facilities, and OSS. This is contrary to the FCC requirement 30 which prevents ILECs from "gaming" the trigger criteria. It is asserted the Commission must carefully review any CLEC affiliate of an ILEC serving a territory near Michigan to ensure that it does not enjoy benefits from its affiliation with an incumbent that are not available to other CLECs. This CLEC position does not comport with the language of the TRO and the FCC rule. The FCC's rule states that the self-provisioning trigger is satisfied where "three

or more competing providers not affiliated with each other or the incumbent LEC . . . each are serving mass market customers in the particular market with the use of their own local switches.”³¹ The language of the TRO is identical. The Administrative Law Judge finds that the FCC’s choice of language indicates that the relevant issue is whether the competing provider is affiliated with “the” incumbent LEC “in the particular market” under consideration. In this case, that ILEC is SBC. As a result, although CTS and TDS are affiliated with other ILECs, they are not disqualified by this relationship to be considered in the trigger analysis in this case.

29 Id., ¶ 440.

30 Id., ¶ 499.

31 47 C.F.R. § 51.319(d)(2)(iii)(A)(1).

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SBC employed a strict interpretation and a simple count in applying the provisions of the TRO in its trigger analysis. The Administrative Law Judge is persuaded that the CLECs and Staff have presented a more reasonable interpretation and an analysis that reflects the overall directives of the FCC. As a result and based upon the preceding discussion and findings, the Administrative Law Judge concludes that SBC has failed to demonstrate that the trigger has been satisfied in any geographic area. Consequently a finding of non-impairment in any geographic area is not merited at this time. HIGH-CAPACITY LOOPS The TRO uses the term “high-capacity” loop to refer to loops with transmission capacities greater than the basic DS0. The TRO also describes such loops as “enterprise market” loops, because they are typically used to serve “enterprise customers” - medium and large business or government customers. A DS1 loop has capacity equivalent to 24 DS0 voice-grade circuits; a DS3 loop, in turn, has capacity equivalent to 28 DS1 circuits. High-capacity loops, the DS3 and dark fiber loops that comprise the bulk of loops at issue here, are generally provided via fiber optic facilities. A strand of fiber optic cable has virtually unlimited capacity to carry information. A telecommunications carrier attaches optronic equipment at each end of the cable to transmit information in the form of light-wave pulses between the customer location and the central office or analogous facility. A fiber strand or cable that has been activated by optronic equipment to enable transmission is described as “lit” fiber.

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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: the “OC” stands for “Optical Carrier,” and the “n” serves as a placeholder for the applicable transmission level, expressed as a multiple of the DS3 level. Hence, an OC3 fiber optic facility has the capacity equivalent to three DS3’s, an OC48 is equivalent to 48 DS3’s, and so on. Each OC_n facility can be channelized to carry separate DS1 or DS3 channels simultaneously by adjusting the optronic equipment attached to the fiber³². Channelizing does not physically divide the fiber optic cable; it simply allocates part of the facility’s transmission capacity to a particular customer or purpose³³. Dark fiber is “unused fiber within an existing fiber optic cable that has not yet been activated” by attaching optronic equipment “to render it capable of carrying communications services.”³⁴ Dark fiber exists because carriers typically place fiber strands in excess of their immediate needs to serve a particular customer location.³⁵ The primary costs of fiber placement are those associated with physically installing or laying the fiber: for example, the costs of obtaining a right-of-way from local authorities to lay the cable, and the construction costs involved.³⁶ The FCC determined that ILECs are required to provide CLECs with access to unbundled loops at the DS1, DS3 capacity levels and dark fiber.³⁷ Acknowledging that there may be individual customer locations where competing loops have been deployed

32 Direct Testimony of SBC witness Scott J. Alexander.

33 TRO, ¶ 372.

34 Id., ¶ 311.

35 Id., ¶ 312.
36 Id.
37 Id., ¶¶ 202, 311, 320, 324.

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to such a level that CLECs could be deemed to be non-impaired, the FCC provided in the TRO three methods for assessing impairment. The first two methods involve a trigger analysis: a self-provisioning trigger, 47 C.F.R. § 51.319(a)(5)(i)(A), or competitive wholesale facilities trigger, 47 C.F.R. § 51.319(a)(5)(i)(B). The third method provides for a potential deployment analysis, 47 C.F.R. §§ 51.319(a)(5)(ii) and 51.319(a)(6)(ii).

SBC maintains it has demonstrated (i) that the self-provisioning trigger has been satisfied for 39 locations, (ii) that the wholesale trigger has been satisfied for 19 locations, and (iii) that the potential deployment analysis has been satisfied for 186 locations situated within narrow 300-foot bands in two dense urban wire centers where carriers have already deployed their own fiber.

The CLECs agree that 3 locations meet the DS3 self provisioning trigger. See Exhibit I-63, Locations 1, 18, and 43 (Confidential). The CLECs dispute SBC's claim of non-impairment for the other 36 DS3 locations. The CLECs also dispute any claimed finding of non-impairment for dark fiber.

The Self-Provisioning Trigger

The self-provisioning trigger applies to only DS3 and dark fiber loops at specific locations. Because little evidence exists regarding the competitive deployment of DS1 facilities, the TRO excludes DS1 loops from the self-provisioning trigger analysis.³⁸ To satisfy the trigger it must be shown that there are two or more competing providers that have deployed their own facilities at the DS3 level and:

- Are not affiliated with each other or SBC;

38 Id., ¶ 334.

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- Use their own facilities and not facilities owned or controlled by another competitive provider or SBC; and
- Are serving customers using their own facilities at that location over the relevant capacity level.³⁹ As noted above, SBC maintains it has demonstrated that 39 locations satisfy this trigger based upon the CLEC's discovery responses. SBC states that for each of the 39 locations⁴⁰ at least two competing providers have deployed OCn facilities. OCn facilities, SBC states, can be channelized into DS3 loops. It is SBC's position that a carrier that has deployed DS3 facilities counts towards the trigger regardless of how many DS3 facilities it has deployed. In response to the CLEC position that a competing provider counts toward the trigger only if it has deployed only one or two DS3 loops, SBC argues this is not supported by a reading of the FCC rule inasmuch as the rule does not specify any number of DS3 facilities. SBC contends the CLEC interpretation would lead to absurd results by excluding consideration of locations with the most demand for high-capacity loops and large-scale CLEC deployment. The Administrative Law Judge is persuaded that the CLECs and Staff have presented the more reasonable interpretation of the self-provisioning trigger in this case. CLEC's cannot purchase UNEs to provide more than two DS3s of total demand at a location. The smallest capacity OCn facility serves three DS3s of demand. Thus, if OCn loop facilities are deployed and used to serve that (or a higher) amount of capacity at a location, this is not probative of the question of whether carriers that qualify for UNEs could afford to construct their own facilities.

39 47 C.F.R. § 51.319(a)(5)(i)(A).

40 Exhibit A-38.

The self-provisioning trigger should be applied to determine whether CLECs have deployed their own loop facilities at the levels that would otherwise be available as UNEs. Otherwise, it would allow evidence of what is no impairment (i.e., evidence of carriers that provide three or more DS3s of total demand at a location) to eliminate access to UNEs in cases where the FCC has found that there is impairment (i.e., for carriers that need only one or two DS3s of total capacity). This determination is supported by the TRO. The TRO selected the two DS3 cap because at the three DS3 level of demand, evidence showed that it is generally “economically feasible” for a CLEC to build its own facilities.⁴¹ The economic decision to build facilities to serve 10 DS3s is therefore different than the economic decision to build facilities to serve just 1 or 2 DS3s of demand because greater demand generally yields greater revenue. Consequently, one CLEC facility that serves three or more DS3s of demand is not a reliable indicator of whether other CLECs could deploy facilities to serve one or two DS3s of demand. In addition, the FCC was aware that OCn level facilities can be channelized.⁴² If, as SBC asserts, the ability to channelize were critical, then the FCC’s decision to exclude DS1 loops from the self-provisioning trigger would be unwarranted. Finally, in its discussion of DS1 loops the FCC noted that there was evidence that CLECs had self-deployed DS1 loops. The FCC discounted that evidence because “this evidence of self-provisioning has been possible where that same carrier is already self-provisioning OCn or a 3 DS3 level of loop capacity to that same customer location. Thus, this

41 TRO, ¶ 298 and nn. 860 and 861.

42 Id., ¶¶ 289, 372, & nn. 633-34.

evidence does not support the ability to self-deploy stand-alone DS1 capacity loops nor does it impact our DS1 impairment finding.”⁴³ Based upon the foregoing, the Administrative Law Judge finds that the high-capacity loop self-provisioning trigger analysis allows consideration of CLEC-provisioned loop facilities that are used to serve two or fewer DS3s of total demand at a location. SBC counts all OCn level loop facilities deployed by CLECs toward the self-provisioning trigger regardless of the level of demand being served. As a result then of the 36 disputed locations none satisfy the DS3 self-provisioning trigger. For purposes of assessing dark fiber loops, the self-provisioning trigger is satisfied “where two or more competing providers not affiliated with each other or with the incumbent LEC, have deployed their own dark fiber facilities at that specific customer location.”⁴⁴ SBC is seeking a finding of non-impairment for dark fiber loops at the same 39 locations for which it seeks a finding of non-impairment for DS3 loops. SBC states that the two carriers that comprise the majority of its self-provisioning analysis have both confirmed their deployment of dark fiber through discovery.⁴⁵ Carriers A and X have stated that their standard practice is to deploy at least 24 strands of fiber in each cable at a customer location. See Exhibits A-91 and A-92. Only four strands are “lit” to provide service. SBC states that as a result, the bulk of the CLEC fiber at these locations is dark fiber. SBC states further that Carrier Y has confirmed its deployment

43 Id., ¶ 325 n. 957.

44 47 C.F.R. § 51.319(a)(6)(i).

45 During the hearing and in an effort to maintain a public record, the parties referred to confidential information in a manner that would not identify the provider of the information. As a result carriers were labeled by letter names (e.g., Carrier A, Carrier B, and so on). The parties continued this practice in their Briefs and Reply Briefs. A key for these codes is attached as a Confidential Attachment to the Briefs of both SBC and AT&T.

of dark fiber. See Exhibit A-88 at 18 (No. 1.17). SBC argues this result is consistent with industry practice, and with the FCC's acknowledgment that when carriers deploy lit fiber, they "take advantage of the fact that they are already incurring substantial fixed costs to obtain the rights-of way, dig up the streets, and trench the cable, to lay more fiber than they immediately need."⁴⁶ The CLECs take the position SBC's claim that every CLEC should be assumed to have dark fiber at every location at which they have deployed a loop is unwarranted. The CLECs state that many carriers (for example, Carriers A and X) have specifically denied that they have dark fiber available. As a result there are no two CLECs that have deployed dark fiber at any location and consequently SBC has not satisfied the dark fiber self-provisioning loop trigger at any location. Staff concurs with the CLEC position. The Administrative Law Judge finds that this record does not support the conclusion that because there are extra fiber optic strands in most CLEC loops, every CLEC should be assumed to have dark fiber at every location at which they have deployed a loop. Carrier X stated in data request responses that it does not self-provision dark fiber as that term is used in the TRO and any spare capacity it has built is allocated for future use by existing customers. See Exhibit I-67 (Confidential). Carrier X stated further that spare fibers do not terminate at its switch or collocation. Thus, these spare fibers fail to create a "loop" that would satisfy the dark fiber loop trigger. Carrier A stated that it does not provision dark fiber. See Exhibit I-72, Answer to Request 17 (Confidential). The writer finds that SBC's analysis ignores the data the CLECs presented about their own networks. The Administrative Law Judge finds

46 TRO, ¶ 312.

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therefore that there are no locations that satisfy the self-provisioning trigger for dark fiber.

The Wholesale Trigger

The wholesale trigger applies to DS1 and DS3 loops. It requires that two or more competing providers be present at a particular location. The wholesale trigger for DS1 loops is satisfied where each provider (1) "has deployed its own DS1 facilities," (2) offers a DS1 loop over its own facilities on a widely available wholesale basis to other carriers desiring to serve customers at that location, and (3) "has access to the entire customer location, including each individual unit within that location."⁴⁷ The wholesale trigger for DS3 loops is virtually identical.⁴⁸ SBC limited its application of the wholesale trigger to DS1 loops inasmuch as it believes every location identified for DS3 loops under the trigger also satisfies the wholesale trigger. Accordingly, SBC relied on the application of the wholesale trigger for DS1 loops, which are not covered under the trigger. SBC has identified 19 locations that it maintains satisfy the wholesale trigger. See Exhibit A-40. SBC states that for each location, at least two competing providers have confirmed in discovery that they have deployed fiber optic facilities and have access to the entire customer location. There are three carriers that SBC identified as wholesalers of DS1 and DS3 loops: Carrier X, Carrier A, and Carrier Y. The CLECs state that Carrier X, both in discovery responses and testimony, stated that it does not sell wholesale loops to other CLECs. See Exhibit I-67 (Confidential). These parties state further that despite various

47 47 C.F.R. § 51.319(a)(4)(ii). 48 Id. § 51.319(a)(5)(i)(B).

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statements from its website, the website information cannot be dispositive. The CLECs assert none of the references from the website specifically say that Carrier X is willing to provide loops at wholesale to other CLECs. The CLECs argue SBC has also misapplied the information provided by Carrier A. Carrier A admitted that it provides loops at wholesale at some of the locations identified by SBC, but not at others. See Exhibit I-72 (Confidential). SBC, however, counted Carrier A as a triggering carrier at every location where

it had loops, despite Carrier A's location specific information. Finally, the CLECs contend SBC's treatment of Carrier Y is likewise inappropriate. These parties maintain it is impossible at this time to place any reliance on Carrier Y's discovery responses. In response to the Staff's discovery, served in December 2003, Carrier Y did not indicate that it offered any of its loops at wholesale. Carrier X subsequently served discovery on Carrier Y asking it to identify the locations where it offers loops at wholesale. On Friday, March 5, 2004 Carrier Y responded that it did not provide loops at wholesale at any location where it had loop facilities. See Exhibit I-76 (Confidential). However, one business day later on Monday, March 8, 2004, Carrier Y served an amended response to the same discovery in which it stated that it offered loops at wholesale at every location where it had loop facilities. See Exhibit A-88. The CLECs conclude that when all the data is considered, no locations satisfy the wholesale trigger. See Exhibit I-65 (Confidential). The wholesale trigger is satisfied when it is shown that DS1 loops are being offered by two competing providers on a widely available wholesale basis at a particular location. In this case, Carrier X has represented in both discovery responses and

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testimony that it does not provide wholesale loops at any location. The writer finds this more persuasive than what may be inferred from website information and dated press releases. The record shows Carrier A provides wholesale loops in only certain locations. Carrier A may not then be counted, as SBC has, as a trigger carrier at every location. Carrier Y may, or may not, count as a trigger CLEC. The record in this regard is limited to discovery responses that are clearly contradictory and not merely amended. In light of the irreversibility of a non-impairment finding, the Administrative Law Judge believes it would be unreasonable to count Carrier Y toward the wholesale trigger at this time. Carrier Y's activities can be reexamined in a future proceeding. As a result it has not been shown that two competing providers currently provide on a widely available wholesale basis loops at the DS1 or DS3 capacity level to other carriers at any single location. The wholesale trigger has therefore not been satisfied. The Potential Deployment Test The FCC's potential deployment analysis applies "[w]here neither trigger . . . is satisfied" and it states the "state commission shall consider whether other evidence shows that a requesting telecommunications carrier is not impaired without access to an unbundled DS3 loop [or dark fiber loop] at a specific customer location." See 47 C.F.R. § 51.319(a)(5)(ii) (analysis for DS3), (a)(6)(ii) (analysis for dark fiber). The potential deployment test requires that evidence be presented addressing the following nine factors for each location:

- Evidence of alternative loop deployment at that particular customer location;
- Local engineering costs of building and utilizing transmission facilities;

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- The cost of underground or aerial laying of fiber or copper;
- The cost of equipment needed for transmission;
- Installation and other necessary costs involved in setting up service;
- Local topography such as hills and rivers;
- Availability of reasonable access to rights-of-way;
- Building access restrictions/costs; and
- Availability/feasibility of similar quality/reliability alternative transmission technologies at that particular location.⁴⁹

SBC takes the position it has shown that a requesting carrier would not be impaired without unbundled access to DS3 or dark fiber loops at 186 locations. See Exhibit A-42 (Confidential). SBC states all of these locations are situated within two narrow geographic bands; one in Southfield's business district, the other in the heart of downtown Detroit. SBC states further all of these locations are within 300 feet of at least one competing provider's fiber "backbone" and each location has an estimated annual telecommunications revenue opportunity of at least \$50,000. Because of the short distance from the competing provider's fiber

and the evidence of alternative deployment in place, SBC maintains the topographical factors identified by the FCC do not preclude deployment. SBC relies upon the “Cambridge” study of CLEC loop deployment estimates to develop a \$130,000 cost of extending a 500-foot DS3 loop. SBC represents this cost study has been shown to be conservative after having been reviewed by an experienced Michigan engineer, compared with the Commission approved Michigan cost study and with the CLEC’s own cost estimates. With regard to the revenue side of the analysis, SBC relied upon data from TNS Telecoms, a nationwide database used by

49 TRO, ¶ 335.

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carriers to evaluate revenue opportunities. SBC states TNS has compiled a comprehensive database of U.S. businesses and their telecommunications spending habits. SBC contends its \$50,000 revenue threshold is also conservative since many of the building locations selected have estimated revenues far greater than \$50,000. In response to the CLEC position that the analysis requires a showing of more than one potential deployer, SBC argues the objective of the impairment analysis is to determine whether “a requesting carrier” would be “impaired” without unbundled access. SBC states it followed the FCC’s plain language and its potential deployment analysis considers whether the “potential revenues” from entering each building would exceed the costs of deployment for a single “requesting carrier.” SBC contends the rule does not require a showing that multiple suppliers serve the same building. The CLECs argue the most that can be derived from SBC’s potential deployment analysis is that there is a single potential deployer. These parties maintain the purpose of the potential deployment test is to determine whether there are, or could be, multiple competitive suppliers. The CLECs argue further that SBC did not identify the specific costs of deploying facilities to a single one of the 186 locations on its potential deployment list. SBC instead assumed that the Cambridge study’s cost assessments were applicable to each of the 186 buildings. The CLECs assert SBC also failed to consider the engineering and construction factors at each of the 186 locations. It is argued that the typical steps in deploying a loop would necessarily differ to some degree from building to building. The CLECs state further SBC ignored the requirement to consider the costs of obtaining building access in evaluating potential deployment claims.

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Finally, the CLECs contend SBC’s use of a \$50,000 total building telecommunications spending figure as a means to identify buildings for the potential deployment analysis is flawed. The CLECs assert the total telecom spending in a building is a virtually meaningless figure for determining where potential deployment is possible for several reasons. First, large portions of such revenues are routinely committed to existing contracts and thus are not currently available to competing providers at any given location. Second the number of customers at each location and their individual spending must be identified in order for the analysis to be meaningful. The CLECs conclude that the use of an aggregate revenue figure is meaningless and fails to identify potential deployment locations. The Staff has lent its support to the CLEC position. The FCC’s potential deployment rule directs the Commission to consider other evidence of non-impairment where neither trigger has been satisfied using the factors proscribed. Whether it must be shown that one or more providers can be identified is not specifically indicated. The rule merely states the Commission “shall consider whether other evidence shows that a requesting telecommunications carrier is not impaired without access to an unbundled DS3 loop at a specific customer location.”⁵⁰ The argument that the use of the singular requesting telecommunications carrier somehow requires a showing of multiple providers to satisfy the potential deployment test has no merit. As the rule is written, the reference to a requesting carrier is to that carrier requesting unbundled access to DS3 or dark fiber loops. The writer finds that it does not in any way define the parameters of the potential deployment analysis and/or

50 47 C.F.R. § 51.319(a)(5)(ii).

the number of carriers that must be qualified in assessing “evidence of alternative loop deployment.”⁵¹ The Administrative Law Judge finds that the potential deployment analysis presented by SBC in this case is insufficient. The CLECs and Staff have shown that there are a number of flaws in the analysis that compromises its reliability. First, the analysis is not location specific. Both the TRO and the FCC rule require the Commission consider “various factors” “at that particular customer location.”⁵² In addition, the offered analysis does not take into consideration variations in engineering and construction factors, the availability of building access and its cost. There has been no showing that the 186 locations would have similar deployment costs. The writer is also persuaded that SBC’s use of a \$50,000 telecommunications spend to identify buildings in the analysis is problematic. As presented, the revenue parameter does not account for the number of potential customers at a location or their current needs. SBC has attempted in its potential deployment analysis to show evidence of alternative loop deployment in two 300-foot corridors located in dense urban wire centers through the use of cost and revenue assumptions that are not location specific. The Administrative Law Judge is persuaded that the FCC required more granular information on a location specific basis than was presented in this case. This is evidenced by the FCC’s requirement that nine factors be considered. Accordingly, the Administrative Law Judge finds the requirements of the potential deployment test have not been satisfied for either DS3 or dark fiber loops and there have been no locations identified as non-impaired.

51 Id.

52 TRO, ¶ 335.

DEDICATED TRANSPORT

As with high-capacity loops, the FCC performed separate impairment analyses for OCn, dark fiber, DS3, and DS1 transport. The FCC found that requesting carriers are impaired on a national level without access to unbundled DS1, DS3 and dark fiber transport.⁵³ The FCC found that there is no impairment for OCn level transport.⁵⁴ The FCC identified the following methods by which ILECs could demonstrate to state commissions that CLECs are not impaired without access to transport on particular routes: (a) a self-provisioning trigger, (b) a wholesale trigger, and (c) a potential-deployment test.

The Self-Provisioning Trigger

The FCC’s self-provisioning trigger test applies only to DS3 and dark fiber dedicated transport and is not applicable to DS1 dedicated transport.⁵⁵ The FCC’s self-provisioning trigger for DS3 transport is satisfied where “three or more competing providers not affiliated with each other or with the incumbent LEC” satisfy the following conditions:

- each “competing provider has deployed its own transport facilities” along the route in question;
- each provider “is operationally ready to use those transport facilities to provide dedicated DS3 transport” along that route; and
- each provider’s facilities “terminate at a collocation arrangement at each end of the transport route that is located at an incumbent LEC premises.”⁵⁶

53 Id., ¶ 359.

54 Id.

55 TRO, ¶ 409.

56 47 C.F.R. § 51.319(e)(2)(1)(A).

The trigger for dark fiber transport is similar, except that it omits requirement (2), that of operational readiness.⁵⁷ SBC takes the position the self-provisioning trigger has been satisfied for 27 routes. SBC states it used two primary sources of information to identify carriers that have deployed transport facilities: (i) its own records of competing carriers that have collocated and deployed fiber transport facilities at SBC central offices, and (ii) information that the competing providers furnished in discovery about their own transport facilities. Exhibit A-18 (Confidential) summarizes the results of SBC's analysis. It shows the central offices on each end of the transport routes identified by SBC, and the competing providers that have deployed transport facilities along those routes. With regard to dark fiber, SBC represents the standard industry practice is to deploy spare dark fiber when fiber optic cables are installed. SBC states the evidence presented shows Carrier A confirmed that its own fiber optic facilities include spare unlit fiber capacity; Carrier Y confirmed its deployment of dark fiber; and Carrier X confirmed that it deploys 24 strands of fiber (well in excess of the 2 to 4 strands that would be "lit" to provide service) at its "on-net" (on their network) collocations. This, SBC contends, is consistent with industry practice. SBC asserts it has shown (1) that several competitive providers have collocated at each end of the transport routes identified; (2) that those providers have installed active fiber facilities at those central offices and placed those offices on net; and (3) that at least some of those providers admit to currently providing or being able to provide

57 Id. § 51.319(e)(3)(1)(A).

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transport on the routes. SBC maintains this supports the conclusion that each competing carrier has deployed transport facilities on these routes. In response to the CLEC position that what has been identified is switched transport and not dedicated transport, SBC asserts the deployment of a switch somewhere along a route is irrelevant. SBC states the first paragraph of the rule on dedicated transport provides that a transport "route between two points (e.g., wire center or switch 'A' and wire center or switch 'Z') may pass through one or more intermediate wire centers or switches (e.g., wire center or switch 'X')," and 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."⁵⁸ With regard to the assertion that transport facilities must be deployed at or below the capacity of 12 DS3 circuits, SBC contends the FCC rule does not have such a requirement. SBC argues the rule only requires that each competing provider has deployed transport facilities and be operationally ready to provide dedicated DS3 transport.

The CLECs take the position that SBC has not satisfied the self-provisioning trigger for the 27 routes at issue. The CLECs contend that SBC wrongly assumes that a dedicated transport route exists between every one of a CLEC's on-net fiber collocations, even where the CLEC does not provide functioning service between the two collocations. This has been referred to by the parties as the connect the dots approach. The CLECs also dispute SBC's assertion that all OCn facilities should be counted in the trigger analysis. Staff supports the CLECs in this regard.

58 Id. § 51.319(e).

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The Administrative Law Judge is persuaded that the CLECs and Staff have offered the better reasoned analysis of the self-provisioning trigger test. SBC has relied upon the definition of a route to qualify any transport path even if it passes through intermediate wire centers or switches. The writer has determined that what must be considered in applying the self-provisioning trigger is dedicated transport.⁵⁹ Dedicated transport is not switched transport. The record shows that SBC acknowledged this in testimony submitted in Illinois, in which SBC's witness stated that dedicated transport means "that there is no switching interposed

along the transport route.” See Exhibit I-62 (Direct Testimony of J. Gary Smith on Behalf of SBC Illinois). Further support is found in the fact that the dedicated transport UNE that SBC must make available does not include switching. As a result it would be improper to count as dedicated transport routes those routes that contain switching when the purpose of the analysis here is to determine where SBC no longer need provide the UNE. The FCC’s dedicated transport impairment findings were capacity-specific. The FCC determined there was no impairment in the deployment of OCn transport, while at the same time finding that CLECs are impaired on a national basis without access to DS3 dedicated transport. The FCC also capped the number of DS3s available as a dedicated transport UNE at 12 DS3s. The Administrative Law Judge finds therefore that the self-provisioning trigger analysis should address specific capacities. SBC argues that OCn transport can be channelized into smaller units of transport, including DS3 transport, and therefore should count toward satisfying the trigger. The writer disagrees. As with high-capacity loops, the self-provisioning trigger should be applied

59 TRO, ¶ 365.

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to determine whether CLECs have deployed their own transport facilities at the levels that would otherwise be available as UNEs. Otherwise, it would allow evidence of what is no impairment to eliminate access to UNEs in cases where the FCC has found that there is impairment.

In addition, the testimony offered by various CLECs demonstrates that their networks are not designed to provide this type of dedicated transport. They are instead designed to provide switched transport. As a result, SBC’s assumption that all CLECs with on-net collocations are operationally ready to deploy dedicated transport is not justified.

Furthermore the data responses and testimony offered by a number of CLECs fails to show that they are operationally ready to provide dedicated transport. It has been shown that Carrier A cannot be treated as a self-provider of dedicated transport along any routes other than the ones Carrier A specifically listed. See Exh. I-73, Responses to Requests 8 and 9. Carrier C does not provide dedicated transport anywhere in Michigan. As noted above in the discussion of high-capacity loops, the record in this case is not sufficient to qualify Carrier Y under the self-provisioning trigger test.

Exhibit I-64 (Confidential) accounts for the CLECs data responses and applies the self-provisioning trigger. This exhibit shows that while there are certain transport routes along which one or two carriers have self-provided DS3 transport, there is no route along which three carriers have self-deployed facilities and are using them to service less than 12 DS3s of demand.

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Based upon the foregoing, the Administrative Law Judge finds that the self-provisioning trigger for DS3 and dark fiber dedicated transport has not been satisfied on any route identified by SBC.

The Wholesale Trigger

The FCC also provided for a competitive wholesale trigger for dedicated transport, which applies to DS1, DS3, and dark fiber transport. In order to establish non-impairment using the wholesale trigger for dedicated transport, it must be shown that:

- Two or more competing providers not affiliated with each other or with SBC are present on the route;
- Each provider has deployed its own transport facilities “and is operationally ready to use those facilities to provide dedicated . . . transport along the particular route;”

- Each provider “is willing immediately to provide, on a widely available basis,” dedicated transport to other carriers on that route;
- Each provider’s “facilities terminate in a collocation arrangement at each end of the transport route that is located at an incumbent LEC premises and in a similar arrangement at each end of the transport route that is not located at an incumbent LEC premises;” and
- Requesting telecommunications carriers are able to obtain reasonable and nondiscriminatory access to the competing provider’s facilities through a cross-connect to the competing provider’s collocation arrangement.⁶⁰ SBC states it has identified 49 routes that satisfy the wholesale trigger, based on the presence of at least two unaffiliated alternative wholesale providers. See Exhibit A-18. SBC began its analysis by reviewing its collocation records to identify those central offices where competing carriers had extended their fiber transport facilities into their collocation arrangements. SBC states the vast majority of the collocation

⁶⁰ 47 CFR § 531.319(e)(1)(ii) [DS1 transport], 51.319(e)(2)(i)(B) [DS3 transport], 51.319(e)(3)(i)(B) [dark fiber transport].

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arrangements identified were subsequently confirmed by discovery. SBC represents there is no dispute as to collocation or the availability of cross-connects. The principal disputed issue is the “willingness” of each wholesale carrier to provide dedicated transport on a widely available basis to other carriers. SBC states the principal wholesale providers are AT&T, MCI, McLeod, US Signal, and XO. The only provider to dispute its wholesale status is AT&T. SBC asserts AT&T does provide some wholesale services – including some that involve transport of traffic on a dedicated, point-to-point basis that appear indistinguishable from dedicated transport. SBC notes the AT&T website boasts a comprehensive portfolio of services offered to other carriers. See Exhibits A-9, A-49, A-50 and A-51. SBC states further that carriers in other states have revealed that they obtain wholesale transport from AT&T. Finally, SBC points out that in the FCC proceedings that led to the TRO, Allegiance listed AT&T among the “competitive access providers” from which it obtains interoffice transport. See Exhibit A-55. The CLECs take issue with SBC’s position and state that the FCC specifically provided that the wholesale transport trigger should be applied to “avoid counting alternative transport facilities owned by competitive carriers not willing to offer capacity on their network on a wholesale basis.”⁶¹ The CLECs state some carriers in Michigan confirmed SBC’s assumptions that they had deployed dedicated transport between SBC wire centers and were willing to offer such transport on a widely available wholesale basis. But others offered evidence that contradicted SBC’s assumptions, stating that they do not offer wholesale dedicated transport. The CLECs assert the Commission should accept the testimony from CLECs about the use and functionality of their own

⁶¹ TRO, ¶ 414.

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networks and reject SBC’s own surmise about how CLECs use their networks. The CLEC evaluation of the evidence presented is set forth in Exhibit I-66 (Confidential) and shows that the wholesale trigger is not satisfied on any of the routes identified by SBC. The Administrative Law Judge finds that SBC has improperly ignored the data provided by the CLECs concerning how their networks are designed and used. The evidence presented shows that Carrier A offers wholesale dedicated transport on a limited basis, and only along four specific routes. AT&T provided testimony that it does not offer wholesale dedicated transport. The testimony shows that AT&T provides transport in order to backhaul traffic from an SBC collocation to an AT&T switch. The FCC has excluded this type of transport from the definition of “dedicated transport.”⁶² The writer finds SBC’s reliance on website information and statements in other jurisdictions unpersuasive. First, the website does not specifically state that AT&T offers dedicated transport between SBC wire centers. Second, the Allegiance filing before the FCC provided that it applies to markets outside of Michigan. Finally, the writer finds that the contrary representations of Carrier Y are not

sufficiently reliable to support a finding of non-impairment. The willingness of each of the identified carriers to provide dedicated transport on a widely available basis has not been shown. The FCC directed that carriers unwilling to offer capacity on a wholesale basis should not be counted towards the wholesale trigger.⁶³ The writer is persuaded that the CLEC evaluation of the evidence reflects the proper application of the wholesale trigger. Based upon this analysis, the Administrative

62 Id. ¶¶ 365-67.

63 TRO, ¶ 414.

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Law Judge finds that the dedicated transport wholesale trigger has not been satisfied for any of the 49 routes identified by SBC.

Potential Deployment

The FCC's rule on potential deployment states that if neither trigger is satisfied on a given route, "a state commission shall consider whether other evidence shows that a requesting telecommunications carrier is not impaired without access to dedicated [DS3 or dark fiber] transport along a particular route."⁶⁴ The factors that the Commission must evaluate are similar to those for high-capacity loops and include the following:

- Local engineering costs of buildings and utilizing transmission facilities;
- The cost of underground or aerial laying of fiber;
- The cost of equipment needed for transmission;
- Installation and other necessary costs involved in setting up service;
- Local topography such as hills and rivers;
- Availability of reasonable access to rights-of-way;
- The availability or feasibility of alternative transmission technologies with similar quality and reliability;
- Customer density or addressable market; and
- Existing facilities-based competition.⁶⁵

SBC seeks a finding of non-impairment based on potential deployment for the 49 routes already identified under the self-provisioning and wholesale triggers. SBC states it has identified at least two competing providers along all of the routes. SBC asserts

64 47 C.F.R. § 51.319(a)(5)(ii). 65 TRO, ¶ 410.

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the evidence shows the competing providers have already obtained the necessary rights of way, deployed fiber optic facilities, collocated in the applicable central offices, considered the appropriate customer density and market factors, made a decision to deploy fiber along the routes, and carried out that decision. SBC contends no further showing is required to satisfy the potential deployment analysis. The CLECs take the position that SBC has failed to present a reviewable potential deployment case for dedicated transport. The CLECs assert that none of the FCC's specific factors have been addressed. The TRO provides the criteria the Commission is required to apply in considering whether the potential deployment test has been satisfied. Nine separate factors are to be evaluated. In this case SBC has failed to provide evidence directly addressing these requirements. There has been considerable disagreement among the parties with respect to the CLECs network architecture and its capabilities. As a result, SBC's failure to specifically present evidence addressing the potential deployment criteria make it impossible to weigh the merits of SBC's potential deployment case. The Administrative Law Judge therefore finds that this record is insufficient to find that the potential deployment test has been satisfied on any particular transport route.

CONCLUSION

The parties to this proceeding have expended great effort in placing before the Commission an enormous amount of information relative to the TRO and the FCC's analysis of mass market switching, high-capacity loops and dedicated transport. Time constraints did not permit the writer to thoroughly review in this Proposal for Decision all that has been presented. The Administrative Law Judge has, however, given careful, thorough and complete consideration to all of the expressed testimony, exhibits and arguments. All significant matters have been specifically addressed. Based upon the foregoing discussion and findings, the Administrative Law Judge recommends that the Commission issue its order adopting the findings and conclusions set forth above. MICHIGAN PUBLIC SERVICE COMMISSION

James N. Rigas Administrative Law Judge May 10, 2004 Lansing, Michigan