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March 29, 2005

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: WC Docket No. 04-313
CC Docket No. 01-338

Dear Ms. Dortch:

The attached Petition for Reconsideration in the above-referenced proceedings filed by CTC Communications Corp.; Gilette Global Network, Inc. d/b/a Eureka Networks; GlobalCom, Inc.; Lightwave Communications, LLC; McLeodUSA, Inc.; Mpower Communications Corp.; PacWest Telecomm, Inc.; TDS Metrocom, LLC; and US LEC Corp. corrects a typographical error on page 12. In other respects, it is identical to the filing made yesterday.

Sincerely,

Patrick J. Donovan

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
	)	

PETITION FOR RECONSIDERATION
OF
CTC COMMUNICATIONS CORP.
GILLETTE GLOBAL NETWORK, INC. D/B/A EUREKA NETWORKS
GLOBALCOM, INC.
LIGHTWAVE COMMUNICATIONS, LLC
MCLEODUSA, INC.
MPOWER COMMUNICATIONS CORP.
PACWEST TELECOMM, INC.
TDS METROCOM, LLC
US LEC CORP.

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Their Attorneys

March 28, 2005

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SUMMARY

The Commission should reconsider the *Triennial Review Remand Order* in a number of respects. The proposed mergers of SBC with AT&T and Verizon with MCI create substantial new barriers to entry. The Commission must evaluate whether the alleged economies of scale as well as the concentration of ownership that these proposed mergers would produce, require a significantly increased scope of unbundled access to network elements. In addition, in light of the these proposed mergers, the Commission should clarify that AT&T and Verizon must be considered affiliates of SBC and Verizon, respectively, for purposes of counting unaffiliated collocators. At a minimum, the Commission should modify its rules so that ILECs have an obligation to update the classification of wire centers and expand the scope of unbundling of high capacity loops and transport where the Commission's proxies are no longer met because of changed circumstances.

The Commission should also rescind the current EEL eligibility criteria. The fact that SBC and Verizon will each own one of the two largest long distance providers and two largest purchasers of its access services, undermines the Commission's rationale for the EEL eligibility criteria, if they ever had any validity. If these criteria are not rescinded, the Commission at least should establish a carve-out from the EEL criteria for the provision of local data services.

The Commission should modify and clarify the methodology for counting business lines in an ILEC wire center. The Commission's definition of business line does not accurately capture the business opportunities available to CLECs in a wire center. For example, the use of voice grade equivalents vastly overstates the revenue associated with DS1 and DS3 services

described elsewhere in the order. The Commission also should prohibit BOCs from counting residential UNE-L lines as "business lines."

The Commission should further clarify aspects of its transition plan that ILECs have misconstrued. While the text of the *Triennial Review Remand Order* demonstrates that the Commission required the parties to implement the FCC's new rules using the processes established in Section 252 and parties' existing interconnection agreements, the ILECs claim that the Commission intended to supersede existing contractual arrangements. The Commission should reiterate that the new UNE rules must be implemented through the change of law process.

The Commission should also clarify that dedicated transport includes ILEC reverse collocations in any non-ILEC premises where an ILEC collocates equipment.

Before the
FEDERAL COMMUNICATIONS COMMISSION
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CTC Communications Corp.; Gilette Global Network, Inc. d/b/a Eureka Networks; GlobalCom, Inc.; Lightwave Communications, LLC; McLeodUSA, Inc.; Mpower Communications Corp.; PacWest Telecomm, Inc.; TDS Metrocom, LLC; and US LEC Corp. (collectively "Petitioners"), by their undersigned counsel, pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. Section 1.429, submit this petition for reconsideration of the *Triennial Review Remand Order*.[1] The Commission should promptly reconsider and/or clarify the *Triennial Review Remand Order* in a number of respects as described, and for the reasons stated, herein.

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[1] *Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313 and CC Docket No. 01-338, F.C.C. 04-290 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*").

I. THE SBC/AT&T AND VERIZON/MCI MERGERS REQUIRE A NEW IMPAIRMENT ANALYSIS

In the *Triennial Review Order*,[2] the Commission explained that scale economies, particularly when combined with sunk costs and first-mover advantages, can pose a powerful barrier to entry.[3] If new entrants are able to achieve only a smaller level of sales than the incumbent, which is the case, then ILEC scale economies imply that the new entrant's average costs will be higher than those of the ILEC, putting them at a significant cost disadvantage to the ILEC.[4] The Commission retained this approach to evaluating impairment in the *Triennial Review Remand Order* with the clarification that the Commission would analyze impairment with respect to a reasonably efficient competitor.[5]

The proposed mergers of AT&T with SBC and MCI with either Verizon or Qwest, however, create potential economies of scale vastly beyond those contemplated by the Commission in its impairment analysis. This change very likely fundamentally invalidates the Commission's previous conclusions that CLECs are not impaired in certain markets, even taking into account ILECs' economies of scale. While SBC and Verizon grossly overstate the possible benefits of the mergers, their central justification for the mergers is the increased efficiencies that they will

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[2] *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*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*").

[3] *Triennial Review Order* ¶ 87.

[4] *Id.*

[5] *Triennial Review Remand Order* ¶¶ 24-26.

allegedly produce.[6] SBC claims that its merger with AT&T will save $15 billion dollars.[7] It says that the merger involves the combination of "firms that are recognized leaders in both enterprise and mass market services" and that the "combined company will be better able to offer a portfolio of services suitable for any customer."[8] SBC asserts that the "combined company's increased scale also affords it considerably increased latitude to raise capital while maintaining any particular debt level."[9] Verizon makes similar claims and one would assume Qwest would as well. Assuming there is any merit to these claims at all, they require the Commission to reassess the extent to which CLECs, who maintain miniscule market share in comparison to the BOCs, will face substantial barriers to entry in light of the greatly increased post-merger scale economies that SBC and Verizon will realize.

Even a superficial examination of the mergers reveals that they constitute a serious threat to competition. The mergers of AT&T/SBC and MCI/Verizon (or MCI/Qwest) would combine the two largest purchasers of access services with two of the largest access providers. Moreover, these mergers combine the two largest providers of wholesale long distance service with two of the largest customers of it, transfer ownership of two dominant providers of Internet

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[6] Griff Witte & Yuki Noguchi, *End of the Line for Ma Bell, Mother of All Telecom Losing Independence,* Washington Post, at E01 (Feb. 1, 2005).

[7] Witte & Noguchi, at E01 (Feb. 1, 2005) ("Combining Operations should save the companies more than $15 billion, as they merge networks and personnel"); SBC Press Release, http://sbc.mergernews.com/materials/am.html.

[8] Merger of SBC Communications, Inc. and AT&T Corp., Description of the Transaction, Public Interest Showing, and Related Demonstrations, at 15 (filed Feb. 21, 2005) ("SBC Public Interest Showing").

[9] SBC Public Interest Showing, at 33.

backbone services to RBOCs, and substantially consolidate the interexchange market. In addition, the mergers would concentrate the in-region local exchange market.

Even Qwest, itself an RBOC, points out that "[n]othing in these pending transactions suggests either Verizon or SBC will be encouraged to compete" with each other.[10] It is also worth noting that since 1998 SBC has been fined "nearly $1.2 billion" for anti-competitive practices, [11] and these fines have had little impact on SBC's or any ILEC's behavior. Rather, the finds are simply a cost of doing business while negatively impacting the business of their competitors. As such, these mergers would serve only to increase SBC's and Verizon's market power and to provide additional incentives for them to engage in discriminatory and anti-competitive practices.

The proposed mergers profoundly alter the Commission's analysis of the competitive landscape, and undermine its analysis supporting the existing unbundling rules. Thus, these mergers are not in the public interest. In fact, many of the relevant structural barriers that the Commission employed to assess impairment, including economies of scale, first-mover advantages, absolute cost advantages, and barriers within control of the ILEC, are exacerbated by the overwhelming concentration of market power that will be wrought by these mergers.[12] Accordingly, the Commission must reevaluate its impairment analysis in light of the mergers, and establish a considerably wider scope of unbundling than that embodied in the new unbundling rules.

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[10] Seidenberg Rips Qwest's Proposal to Buy MCI, TR Daily, at 13, March 16, 2005.

[11] CLEC Group Launched to Counter Verizon, SBC Mergers, Communications Daily, at 5 (March 16, 2005).

[12] *See e.g. Triennial Review Order*, at ¶¶ 87-91; *Triennial Review Remand Order*, at ¶ 10.

II. THE MERGER AGREEMENTS MAKE AT&T AFFILIATED WITH SBC AND MCI AFFILIATED WITH VERIZON FOR THE PURPOSES OF IMPAIRMENT ANALYSIS

The Commission's new rules governing access to UNE loops and transport rely in part of the presence of *unaffiliated* fiber collocators in ILEC wire centers.[13] In light of the proposed mergers, the Commission should promptly clarify that any merger agreements would make AT&T and MCI affiliated with SBC and Verizon, respectively, for purposes of counting fiber collocators. Precedent shows agreements to merge create affiliation due to a change in equitable ownership.[14] A company that is about to be acquired has no economic incentive to compete vigorously with its acquirer. Further, even if this were not the case, as a practical matter these companies are already evidencing affiliation. Both AT&T and MCI are muting effectively their advocacy of pro-competitive positions. MCI has recently withdrawn its Petitions for Emergency Declaratory Relief regarding UNEs in many states[15] and AT&T has pulled back from its aggressive litigation posture with respect to its former rivals.

More broadly, the Commission cannot simply pretend that these watershed mergers have no impact on its loop and transport tests. In fact, the Commission has made predictive judgments regarding the evolution of the competitive marketplace and it would be unlawful, arbitrary and capricious to ignore an event with such a profound impact on the competitive landscape as these

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[13] *Triennial Review Remand Order*, at ¶¶ 96-102, 113, 118, 130.

[14] *See, e.g., Wolfe Organization, Inc. v. Oles,* 705 A.2d 40, 45 (1998) (a bona fide executory contract "vests equitable ownership of the property in the contract purchaser"); *York Rubing, Inc. v. Adcock,* 634 A.2d 39 (1993).

[15] *See, e.g.*, MCI Letter to Honorable Jaclyn Brilling, Case No. 04-C-0314, Petition of Verizon New York for Consolidated Arbitration to Implement Changes in Unbundled Network Element Provisions in Light of the Triennial Review Order, at 1 (March 10, 2005); James Laskey Letter to Ms. Kristi Izzo, Docket No. TO03090705, In the Matter of Implementation of the FCC's Triennial Review Order, at 1 (March 10, 2005).

two mergers.[16] The mergers must be considered in determining the number of fiber-based collocators in a wire center since the FCC rules state that collocators affiliated with the ILEC are not counted, and collocators affiliated with each other are counted as a single entity. The Commission should provide for rate true-ups insofar as SBC or Verizon have treated AT&T and MCI as unaffiliated when denying any CLEC orders for UNEs during the pendency of their respective mergers.

III. THE COMMISSION SHOULD REQUIRE RECLASSIFICATION OF WIRE CENTERS WHERE THE FACTS UNDERLYING ITS IMPAIRMENT ANALYSIS MATERIALLY CHANGE

The proposed mergers of SBC/AT&T and Verizon/MCI highlight the Commission's error in providing that wire centers may not be reclassified to restore unbundling obligations once thresholds have been met. The FCC's new UNE loop rules provide that once a wire center exceeds the specified thresholds, no future unbundling for the loop network element will be required from that wire center.[17] The transport rules likewise state that once a wire center meets the definition of a Tier 1 or 2, it may not later be reclassified to a lower threshold Tier.[18] By contrast, however, nothing in the rules prohibits reclassification of wire centers where this would result in a reduction in unbundling obligations.

Even if the Commission does not treat AT&T and MCI collocations as affiliated with their respective merger partners because of their merger agreements, they will clearly be affiliated once the mergers are completed. Nothing could be less justifiable than permitting

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[16] *Triennial Review Remand Order*, at ¶¶ 41-43.

[17] 47 C.F.R. § 51.319(a)(4)-(5).

[18] 47 C.F.R. § 51.319(e)(3).

some unbundling obligations to lapse from certain wire centers based on counting AT&T and MCI collocations as unaffiliated even though they will undeniably become affiliated if the mergers are approved.

Assuming that business line density and unaffiliated fiber collocators are valid proxies for when it is feasible for CLECs to construct or lease loops and transport, it is not reasonable to depart from that approach when economic conditions in a particular market change so that the Commission's proxy thresholds are no longer met. If business lines and/or fiber based collocators drop, the only reasonable conclusion is that it is no longer feasible to CLECs to construct or lease facilities for all the reasons that the Commission gave in the *Triennial Review Remand Order* for establishing the validity of the proxies in the first place.

In the particular case of ILEC acquisitions of competitors that could cause fiber-based collocators to become affiliates of an ILEC, such as the proposed RBOC mergers with AT&T and MCI, the Commission should presume that such acquisitions, insofar as they result in thresholds no longer being met, would make it unfeasible for CLECs to build or lease loop and transport facilities. The Commission must modify its rules so that BOCs have an obligation to update thresholds and expand the scope of their unbundling obligations where proxies are not longer met. In a related vein, the Commission should separately clarify that any mergers between unaffiliated fiber-based collocators will cause their collocations in one wire center to be counted as one collocation.

IV. THE COMMISSION SHOULD ABANDON EEL CRITERIA OR, AT A MINIMUM, ESTABLISH A CARVE-OUT FOR DATA SERVICES

A. EEL Criteria Should be Rescinded.

As noted elsewhere in these comments, the proposed mergers of SBC and AT&T and Verizon (or Qwest) with MCI require a fundamental reevaluation of the scope of unbundling established by the *Triennial Review Remand Order.* The mergers require a determination that CLECs are impaired in a far greater range of circumstances because CLECs will be unable to match the efficiencies and economies of scale and scope that the merger partners claim will be achieved by the mergers.

The impact of the mergers on the Commission's previous analysis is perhaps most acute in connection with its determination that UNEs may not be used exclusively for long distance service and its determination to retain EEL criteria.[19] In the *Triennial Review Remand Order*, the Commission determined that UNEs are not available where the requesting carrier seeks to provide service in a market that is sufficiently competitive without UNEs.[20] The Commission found that the long distance market was competitive, that competition had evolved in that market without UNEs, and that whatever benefits could be achieved by requiring unbundling exclusively for long distance service were outweighed by the costs, specifically the potential for lost switched access revenues by the ILEC attributable to the IXC's increased reliance on UNEs and EELs to bypass switched access.

The proposed mergers, however, abrogate the Commission's analysis, assuming it were otherwise valid. If approved, the mergers will mean that SBC and Verizon willown the two

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[19] *Triennial Review Remand Order* ¶¶ 29, 34-35.

[20] *Triennial Review Remand Order* ¶ 34.

largest long distance providers and each will own one of the two largest purchasers of its own access services. This alone eviscerates the Commission's concern, and the ILECs' fear (unfounded in any case), that IXCs would rush to convert special access to UNEs leading to a precipitous decline in access revenues. Given that access payments for these companies will be no more than intra-corporate family transfers, the concern about special access to UNE conversion is eliminated or substantially eliminated. The Commission should rescind the EEL restrictions for this reason alone.

Further, the Commission's one sentence cost/benefit analysis, such as it was, is fundamentally altered. While AT&T and MCI in theory might have had incentives to build their own innovative local exchange facilities in the absence of UNEs, they will not have any incentive to do so in competition with their parent ILEC. Nor is it likely that AT&T and MCI will build out-of-region because the experience with the previous SBC and Verizon mergers shows that these ILECs will not compete out-of-region.[21] More importantly, SBC and Verizon no longer face the same risk of lost revenue due to conversion of special access to UNEs, because they will each control one of their largest purchasers of their special access services.

Moreover, permitting UNEs to be used exclusively for long distance service is a necessary counterbalance to the proposed mergers and will likely be necessary to reestablish any significant level of competition in the long distance industry. Certainly, an environment in which the major IXCs are acquired by the RBOCs, who in their own right maintain significant long distance market share, is not a recipe for competition. Accordingly, on reconsideration, the

[21] *See, e.g., In re Application of GTE Corp. Transferor and Bell Atlantic Corp. For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations*, CC Docket No. 98-184, FCC 00-221, Memorandum Opinion and Order, at ¶ 319 (June 16, 200).

Commission should rescind its cost benefit analysis on this issue and permit UNEs to be used exclusively for long distance service and without any qualifying service standards for EELs.

The Commission should also rescind its determination that UNEs may not be used exclusively for long distance service and eliminate EEL criteria because that determination is inconsistent with *USTA II.* That decision correctly found that there was no statutory basis whatsoever for restricting, as established in the *Triennial Review Order*, use of UNEs to "qualifying services," *i.e.* those that compete with core ILEC services. Rather, as the Court found, the Act provides that UNEs may be used for all telecommunications services subject to the Section 251(d)(2) impairment test.[22] In other words, UNEs may be used to provide any telecommunications service, including exclusively long distance service, unless the requesting carrier is unimpaired.

The *Triennial Review Remand Order*, however, although purporting to abandon the qualifying services approach, effectively reestablishes it without any impairment analysis at all. Instead, in an unprecedented extension of its authority, the Commission relied exclusively on the "at a minimum" language of Section 251(d)(2) without any consideration of whether IXCs are impaired without access to UNEs. Although *USTA II* approved the Commission's use of "at a minimum" in the context of establishing broadband relief, in that case the Commission considered impairment in addition to its broadband goals. There is no basis for interpreting the Court's decision as simply permitting the Commission to deny access to UNEs solely on the basis of a cost benefit analysis, which in any event, has since been rendered invalid in light of the proposed SBC/AT&T and Verizon/MCI mergers. Therefore, in effect, the Commission has simply

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[22] *USTA II* at 591-592.

reestablished the previous and now unlawful qualifying services standard by a new unlawful means. Accordingly, the Commission must rescind its EEL qualifying standards and the determination that UNEs may not be used exclusively for long distance service.

B. If the EEL Criteria Are Retained, a Carve-Out for Local Data Services Is Necessary

The Commission's EEL eligibility criteria are overly broad and have the unintended effect of preventing competitive carriers that provide facilities-based local data services from using EELs unless they also provide local voice services. These rules are designed to ensure that local voice traffic is carried, but this precludes facilities-based CLECs from providing stand-alone local data services that are advanced services. Rather, the EEL eligibility rules, absent a carve-out for local data services, conflict with the goals of the Act of encouraging innovation and the deployment of advanced services.[23] The Commission should modify its eligibility criteria so that, as an alternative to the existing EEL criteria, a requesting carrier may access EELs if it certifies that it will use the EEL in part to provide local data service. Such a carve-out for local data services is entirely consistent with the Commission's conclusion that "the local services market," including the local data market, "does not share the competitive conditions" of the mobile wireless and long distance voice markets.[24]

V. THE COMMISSION SHOULD MODIFY AND CLARIFY THE METHODOLOGY FOR COUNTING BUSINESS LINES IN A WIRE CENTER

In the *Triennial Review Remand Order,* the Commission uses business line density as a "proxy for determining where significant revenues are available sufficient for competitors to

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[23] Preamble to the 1996 Act; 47 U.S.C. § 157 nt ("The Commission ... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.").

[24] *Triennial Review Remand Order*, at ¶ 38.

deploy transport facilities."[25] The Commission believed it had defined the term "business line" in a way that "fairly represents the business opportunities in a wire center." However, the Commission's definition of business line is not in fact rationally related to revenue opportunities. The *Triennial Review Remand Order*'s shortcomings in this regard are: 1) assuming that counting voice grade equivalents "fairly represents the business opportunities in a wire center"; 2) failing to prohibit BOCs from counting residential UNE-L lines as "business lines"; and 3) allowing different ILECs to determine UNE-P business lines using inconsistent methodologies.

Indeed, BellSouth filed a letter with the Commission on March 23, 2005 in which BellSouth states that the wire center data previously submitted to the Commission and the industry was flawed, and that a third party auditor had been hired to validate the data and the collection methodology. BellSouth's error not only delays the implementation of the new UNE rules but may also raise questions about the accuracy of data and methodology used by other ILECs.

A. The Commission's Definition of Business Line Erroneously Uses Voice Grade Equivalents

Even assuming that business line density is a valid proxy for revenue opportunities in the dedicated transport market, counting "business lines" based on the voice grade equivalents ("VGEs") of each CLEC UNE loop is seriously flawed.

In the *Triennial Review Remand Order*, the Commission explains the relationship between revenues CLECs typically obtain from DS1 services and revenue from DS3s. The Commission found that DS3 transport revenues typically fall between 8-11 times the revenue for a

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[25] *Triennial Review Remand Order* ¶ 103.

similarly configured DS1 transport link.[26] However, the Commission's business line definition assumes that every DS3 is worth 28 times the revenue available for a DS1, in stark contradiction to its own findings on the evidence. Thus, the Commission's intended correlation between business lines and "significant revenues ... available sufficient for competitors to deploy transport facilities" is unsupported and erroneously skewed to overstate revenue opportunities.

Nor is there any basis in the record for the Commission's assumption that each DS1 is 24 VGEs in terms of revenue opportunities. The record shows that the DS1 capacity is the new standard for provisioning service to business customers. CLECs do and are likely to continue to provide business customers with DS1 pipes that will provide integrated voice and data services. The rates for such services are declining rapidly and are approaching the rates for typical voice grade services available from the incumbents. Thus, on reconsideration, the Commission should find that for purposes of the unbundling rules, a DS1 counts as one (1) business line. This would allow the Commission to harmonize its definition of business line with the evidence and analyses in the *Triennial Review Remand Order* and amend the business line definition to count each DS3 as 10 business lines and each DS1 as one business line. Otherwise, the thresholds for non-impairment based on wire center business line density will bear no relationship to the "business opportunities in a wire center."

In fact, most CLECs do not use DS1s or DS3s to offer voice grade services exclusively and apportion such circuits to offer a mixture of voice and data services. On reconsideration, the Commission should establish a basis for counting DS1 and DS3s based on how CLECs actually

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[26] *Triennial Review Remand Order* ¶ 128 n. 358.

use these facilities, which would also provide a correlation (where none currently exists) between the definition of business line and the revenue opportunities available to competitors.

B. Failing to Prohibit BOCs from Counting Residential UNE-L lines As Business Lines

In the *Triennial Review Remand Order*, the Commission chose to use business lines as a proxy for revenue opportunities concluding, "business lines are a more accurate predictor than total lines because transport deployment largely has been driven by the high bandwidth and service demands of businesses, particularly in areas where business locations are highly concentrated."[27] Because the Commission chose to use business lines rather than residential lines or total lines in its transport impairment analysis, it is obvious that the Commission intended to exclude residential UNE-L lines from the definition of business line.

However, while the definition of business line in 47 C.F.R. § 51.5 specifically excludes UNE-P residential lines, the RBOCs contend that they may count all UNE-L lines, even those serving residential customers, as a "business line." The RBOCs' assertion is inconsistent with the Commission's conclusion to focus the impairment analysis on the relevant market—the business market.[28] There is no dispute that CLECs use UNE-L to serve residential customers, as the RBOCs claim that CLECs serve approximately 3 million customers using UNE-L.[29]

Because BOCs are choosing to flout the Commission's reliance on business lines, the Commission should on reconsideration prohibit inclusion of UNE-L arrangements used to serve

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[27] *Triennial Review Remand Order* ¶ 103.

[28] *See Triennial Review Remand Order* ¶ 103.

[29] RBOC UNE Fact Report at II-41 (attached to Letter from Evan T. Leo, Kellogg, Huber, Hansen, Todd, & Evans to Marlene H. Dortch, FCC, Oct. 4, 2004).

residential customers in business line counts. In this connection, the Commission should recall that as part of the conditions imposed on its approval of the SBC/Ameritech merger, it required those companies to provide a discount on UNE loops used to serve residential customers.[30] Therefore, BOCs may feasibly identify UNE loops used to serve residential customers.

C. The Commission Should Require ILECs to Employ a Uniform Methodology for Determining UNE-P Business Lines

While the Commission set forth in the *Triennial Review Remand Order* a definition of business line that it claims is based on objective criteria, there is at least one aspect of the definition that lacks that objective quality—the method ILECs should use to count UNE-P business lines. The lack of a clear and consistent methodology means that the ILECs are applying the Commission's rules unevenly, which creates additional uncertainty for CLECs that operate in the territories of multiple ILECs.

Qwest, for instance, derived its UNE-P business line estimate "based on the percentage of white page listings" that are business, rather than residential.[31] This methodology, in addition to being ripe for abuse and error, is inconsistent with the rationale for counting business lines. The *Triennial Review Remand Order* employs business line density as a proxy for the business opportunities for CLECs in particular wire center. Simply assuming a level of UNE-P business lines, rather than actually *counting* them, reflects neither the existing level of competitive entry nor the potential for further entry. Other ILECs apparently collect UNE-P data disaggregated by

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[30] *Application of Ameritech Corp and SBC Communications, Inc.*, Memorandum Opinion and Order, CC Docket No. 98-141, FCC 99-279, released October 8, 1999, ¶ 391.

[31] Ex Parte Letter from Gary R. Lytle, Qwest, to Jeffrey J. Carlisle, FCC, Feb. 18, 2005 at 2.

customer type,[32] and the Commission should make sure the ILECs are counting lines consistent with the Commission's rules.

VI. THE COMMISSION SHOULD CLARIFY ASPECTS OF ITS TRANSITION PLAN THAT ILECS HAVE MISCONSTRUED

Although the Commission prematurely eliminated CLEC access to some ILEC bottleneck facilities, it also sought to ensure an "orderly transition" that allowed sufficient time for CLECs and ILECs to "complete[] any change of law processes."[33] The text of the *Triennial Review Remand Order* demonstrates that the Commission required the parties to implement the FCC's new rules using the processes established in Section 252 and parties' existing interconnection agreements. Nonetheless, the ILECs have pressed their meritless claims that the Commission intended to supersede existing contractual arrangements and bind CLECs without the need to amend existing interconnection agreements. The Commission should not allow these gross mischaracterizations of the Commission's order, its intent and its legal authority to stand.

A. The Commission Must Clarify that the Transition Plan Does Not Preempt Existing Contractual Arrangements

The FCC should promptly clarify that its new rules do not govern ILEC UNE provisioning until the parties implement changes to their existing interconnection agreements consistent with the rules established in the *Triennial Review Remand Order*. The Commission should clarify that ILECs must continue to provide UNEs after March 11 in accordance with existing agreements and must provide true-ups back to March 11 for any UNE orders they refused to fill before amending those agreements to apply the Commission's new rules. ILECs and some state

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[32] *See* SBC Accessible Letter CLECALL 05-044, March 17, 2005 at 3, available at https://clec.sbc.com/clec/accletters/home.cfm.

[33] *Triennial Review Remand Order*, ¶ 143.

commissions have mistakenly interpreted the Commission's order as allowing immediate implementation of the Commission's rules, notwithstanding the existence of a bilateral mutually agreed contract that provides otherwise.

1. The *Triennial Review Remand Order* Shows that the Commission Did Not Intend to Supersede Existing Interconnection Agreements

The text of the *Triennial Review Remand Order* convincingly demonstrates that the Commission expects parties to implement the Commission's new rules under the interconnection agreement amendment process and that the *Triennial Review Remand Order* is not self-effectuating in any part. [34] The *Triennial Review Remand Order* explains the process by which carriers should implement its order in the marketplace:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.[35]

This is simply a logical extension of the Commission's explanation in the TRO that its "decisions ... will not be self executing.[36] Recognizing that "the unbundling provisions of section 251 are implemented ... through interconnection agreements between individual carriers," id., the

[34] Several state commissions have erroneously ruled that the *Triennial Review Remand Order* is self-executing. The Indiana Commission, for instance, concluded that that while parties may amend existing agreements to incorporate the new rules, the Commission's elimination of a particular UNE eliminates the availability of the UNE even under an existing agreement that specifically requires provision of that element. *Complaint of Indiana Bell Telephone Company d/b/a SBC Indiana For Expedited Review of a Dispute with Certain CLECs Regarding Adoption of an Amendment to Commission Approved Interconnection Agreements*, Cause No. 42749, Order, Mar. 9, 2005 at 6.

[35] *Triennial Review Remand Order*, ¶ 233.

[36] *Triennial Review Order*, ¶ 700.

Commission noted that its transition regime was a default process and that parties, under section 252(a)(1) were free to negotiate alternative transitional arrangements.[37]

Moreover, the Commission has explained that "voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252."[38] The Commission's decision in the *TRO* to "decline the request of several BOCs [to] override the section 252 process and unilaterally change all interconnection agreements," was unchallenged and unchanged in *USTA II* and remains valid law.[39]

Nonetheless, this clarity in the law has not prevented the RBOCs from urging upon state commissions a different interpretation. The RBOCs have brazenly claimed that the Commission in the *Triennial Review Remand Order* took the "extraordinary step of ... interfering with the contract process."[40] BellSouth, for instance, claims that the Commission:

> clearly intended the provisions of the *Triennial Review Remand Order* related to "new adds" to be self-effectuating. ... Consequently, in order to have any meaning, the *Triennial Review Remand Order*'s provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing interconnection agreements.[41]

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37 *See Triennial Review Remand Order*, ¶ 145.

38 *Triennial Review Order*, ¶ 701.

39 *Id.*

40 *Id.*

41 BellSouth Carrier Notification SN91085039, dated Feb. 11, 2005, at 2.

BellSouth thus argues that the Commission actually established two transition plans; one that requires amendment of the interconnection agreements and one that is self-executing.[42] But nowhere in the text of the *Triennial Review Remand Order* is there evidence of any intent to override existing agreements.[43]

2. The Commission Lacks Authority to Supersede Binding Interconnection Agreements

Even if the Commission had intended to create self-executing unbundling rules, despite its consistent refusal to do in the past, those rules would be invalid because it lacks the authority to "interfere" with existing interconnection agreements.

As a preliminary matter, to the extent the Commission were to reverse its interpretation of section 252, it would need to do explicitly and explain its departure from its earlier interpretations.[44] The Commission has not done so. There is no such explicit change of policy in the *Triennial Review Remand Order*. However, any such analysis would necessary fail, because the Commission lacks the authority under the Act to interfere with contracts negotiated and arbitrated under sections 251 and 252 of the Act.

In the *Triennial Review Order,* the Commission rejected the RBOC call to interfere with the parties' existing interconnection agreements. In reaching that decision, the Commission

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[42] Ex Parte Letter from Bennett L. Ross, BellSouth to Jeffrey J. Carlisle, FCC, at 2 (filed Feb. 24, 2005).

[43] SBC echoes BellSouth's bizarre construction of the *Triennial Review Remand Order*. *See* Ex Parte Letter from Gary L. Phillips, SBC to Jeffrey J. Carlisle, FCC, at 3-4 (filed March 4, 2005).

[44] *See e.g. Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 42, 103 S.Ct. 2856 (1983) (agency may not "chang[e] its course" as to the interpretation of a statute without explaining rationale for change and basing interpretation on record evidence.).

acknowledged the force of the argument that the Commission may not employ the *Mobile-Sierra* doctrine to negate terms of State commission-approved interconnection agreements.[45] Nonetheless, Bellsouth continues to assert that the *Mobile-Sierra* doctrine provides the Commission with legal authority to abrogate existing interconnection agreements.[46] BellSouth is wrong. The *Mobile Sierra* doctrine does *not* give the Commission "power to set aside any contract which it determines to be 'unjust, unreasonable, unduly discriminatory, or preferential.'"[47] Nor has the Commission attempted to do so.

The *Mobile Sierra* doctrine stands as an effective check on the ability of an agency to abrogate private contracts, and allowed such abrogation only in limited instances where the agency determined that the contractual *rate* was unlawful or contrary to the public interest.[48] Under the Act, the Commission has limited authority to override rates in contracts but only in those "filed with the FCC."[49] This doctrine does not authorize the Commission to dictate which services will or will not be offered under a contract, nor provide the Commission legal authority to abrogate existing contractual provisions that are the province of state commissions charged under the Act with the duty of approving such provisions.[50]

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45 *TRO*, ¶ 701 n. 2085.

46 *See* BellSouth Feb 24, 2005 ex parte at p. 3, n. 8, *citing Sierra* and *Mobile* cases.

47 *See id.*

48 *See Federal Power Comm'n v. Sierra Pacific Power Co.,* 350 U.S. 348, 353-55 (1956); *United Gas Pipe Line Co., v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956). (utilities could not impose new rates to supersede private contractual rate even where FPC approved new rate.)

49 *Cable & Wireless, P.L.C. v. F.C.C.*, 166 F.3d 1224, 1231-1232 (D.C. Cir. 1999).

50 *See* Ex Parte Letter from Christopher J. Wright, Counsel for Z-Tel, to Marlene H. Dortch, FCC, CC Docket 01-338 at 5-9, (filed Jan. 30, 2003).

Thus, the only reasonable interpretation of the *Triennial Review Remand Order* is that consistent with the Commission's intent and previous orders implementing Sections 251 and 252, namely that no part of *Triennial Review Remand Order* supersedes existing interconnection agreements and that implementation of the *Triennial Review Remand Order* must follow the terms set forth in those agreements. Apart from being required under Section 252, this interpretation is reasonable given that the Commission has not examined each interconnection agreement, each of which may have been individually negotiated and must be modified in accordance with its own terms and conditions.

B. The Commission Should Clarify That True-Ups Do Not Apply Except Where Specifically Required In Existing Change Of Law Provisions.

Because the Commission lacks the legal authority to abrogate existing contracts, as well as the language and structure of sections 251 and 252, it has consistently maintained that its unbundling rules are a default mechanism that leaves parties free to negotiate alternative arrangements in their interconnection agreements. The Commission therefore should disavow the *dictum* in the *Triennial Review Remand Order* suggesting that a true-up between UNE rates and transition period rates should apply in all instances.[51] Under the *Mobile-Sierra* doctrine, the only time true-ups should apply, even after the *Triennial Review Remand Order*, is when the parties' agreement specifically provides for it.

C. The Commission Should Clarify that the Transition Plan Allows CLECs to Continue Serving Existing Customers

While carriers negotiate amendments to their interconnection agreements implementing the *Triennial Review Remand Order*, the Commission should clarify that its transition plan

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[51] *See Triennial Review Remand Order*, ¶228 n.630.

allows CLECs to continue serving their existing customers using UNEs and UNE combinations to the extent those customers order additional lines at an existing location or new lines at a new location, including UNE-P.

The Commission's transition analysis is logically focused on avoiding disruption, recognizing that the relationships that CLECs have with their existing customers could be jeopardized by a flash cut from UNEs to other arrangements and that the resulting disruption to consumers' telecommunications services would be exponentially disruptive to the American economy.[52] The Commission thus adopted rules governing the transition that protected CLECs' customer relationships by ensuring a level of continuity for CLEC service to those customers. Thus, for dedicated transport, high capacity loops, and mass market switching, the Commission applied the transition to "the embedded customer base."[53] The Commission further explained that the transition rules did not allow CLECs to "add new customers" using UNEs.[54]

The Commission's focus on *customers* rather than facilities or UNE arrangements in the context of its transition rules is both significant and logically related to the purpose of the transition rules. Consistent with that focus, the Commission should clarify that CLECs can obtain additional UNEs, billed at the applicable transition rate, to serve existing customers at both existing and new locations. Because the UNE would be billed at the applicable transition rate it would be consistent with the Commission's treatment of existing UNEs serving the CLECs embedded customer base.

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52 *Triennial Review Remand Order*, ¶¶ 226, 228, 236.

53 *Id.* ¶ 5.

54 *Id.* ¶ 199.

VII. THE COMMISSION SHOULD ELIMINATE OR MODIFY THE 10 DS1 TRANSPORT CAP

The *Triennial Review Remand Order*, with little if any analysis, limits CLECs to 10 DS1 transport circuits on routes where there is no impairment for DS3 transport. In addition to lacking any basis in the record, this restriction makes little sense. Further, it complicates CLEC use of EELs. This cap effectively would limit CLECs using EELs to 10 DS1 UNE EELs per wire center, because an EEL is a combination of a loop and a transport element. If the CLEC cannot obtain more than 10 DS1 transport UNEs on a route terminating in a particular central office, it cannot combine those transport circuits with more than 10 DS1 loop UNEs serving customers anywhere in the wire center. This seems to contradict the rule permitting a CLEC to obtain up to 10 DS1 UNE Loops per building, as provided for in ¶ 181.

On reconsideration, the Commission should eliminate the cap, or at a minimum clarify that the 10 DS1 cap per transport route only applies when a CLEC is collocated on both ends of the route and not when a CLEC is using EELs. Unless the CLEC is collocated at both ends, it requires a loop-transport combination to serve customers. The Commission should eliminate the 10 DS1 transport cap to avoid frustrating the goals sought to be achieved by requiring ILECs to provide UNE combinations.

VIII. THE COMMISSION SHOULD CLARIFY THAT ILEC FACILITIES AT REVERSE COLLOCATIONS AT CLEC PREMISES ARE DEDICATED TRANSPORT, NOT ENTRANCE FACILITIES

The Commission should reiterate that ILEC transmission facilities that terminate at reverse collocations at *any* CLEC premises are dedicated interoffice transport eligible for UNE status, not entrance facilities. The Commission recognized in the *Triennial Review Order* that ILECs "may 'reverse collocate' in some instances by collocating equipment at a competing carrier's premises, or may place equipment in a common location, for purposes of interconnection."[55] The Commission expressly incorporated into the definition of "reverse collocation" all of the specific examples raised by SNiP LiNK in its comments[56] and found that these examples, among others, fell within the definition of dedicated transport that was eligible for unbundling. SNiP LiNK's examples included situations where "Verizon installed its own fiber to reach SNiP LiNK and activated OC-48 transmission electronics in SNiP LiNK's headquarters" on "a rack located in SNiP LiNK's switch room," and other interconnection methodologies, including methodologies not involving the collocation of an ILEC switch.[57] The Commission held that to the extent an ILEC has equipment "'reverse collocated' in a non-incumbent LEC premises, the transmission path from this point back to the incumbent LEC wire center shall be unbundled as transport between incumbent LEC switches or wire centers to the extent specified."[58]

The Commission should reaffirm its holding that ILEC transmission facilities that are reverse collocated at *any* CLEC premises are transport facilities, and must be unbundled unless the application of the tier classifications set forth in rule 51.319(e) establish that an exception to this general rule applies.[59] The *Triennial Review Remand Order* states that "wire center" includes any ILEC "switches with line-side functionality that terminate loops that are 'reverse collocated'

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[55] *Triennial Review Order*, at ¶ 369, n. 1126 (emphasis added).

[56] *Id.*, at ¶¶ 605, n. 1842 ("We recognize that the collocation must be within the incumbent LEC network ... a requesting carrier can satisfy this prong through reverse collocation. For the purposes of this test, we adopt SNiP LiNK's definition of all mutually-agreeable interconnection methodologies.").

[57] SNiP LiNK ex parte CC Docket Nos. 01-338, 96-98, 98-147, at 1-2 (Feb. 5, 2003); Triennial Review Order, at ¶¶ 369, n. 1126, 605, n. 1842.

[58] *Triennial Review Order*, at ¶ 369, n. 1126.

[59] 47 C.F.R. § 51.319(e).

in non-incumbent LEC collocation hotels."[60] This statement is being misconstrued by Verizon to *limit* the concept of reverse collocation to situations where the ILEC collocates local switching equipment in a collocation hotel. The Commission should clarify that for the purpose of defining dedicated transport, a reverse collocation can include "all mutually agreeable interconnection methodologies" in any non-ILEC premises regardless of whether a local switch or cage is present.

IX. CONCLUSION

Petitioners request that the Commission reconsider and clarify the *Triennial Review Remand Order*, in accordance with the recommendations herein, at the earliest possible date.

Respectfully submitted,

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[60] *Triennial Review Remand Order*, at ¶ 87, n. 251.