

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**COMMENTS OF MCI ON PETITIONS FOR RECONSIDERATION AND/OR  
CLARIFICATION**

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## Introduction and Executive Summary

MCI submits these Comments in support of aspects of the Petitions for Reconsideration filed by a number of CLECs and in opposition to the Petition filed by Iowa Telecom. In the Comments, MCI takes the following positions:

- The Commission should clarify that the cap on DS1 transport does not apply where CLECs cannot economically deploy DS3 transport.
- The Commission should not rely on business line density alone to find non-impairment for transport.
- The Commission should eliminate the EELs architectural criteria.
- The Commission should clarify that it did not abrogate change of law provisions in interconnection agreements.
- The Commission should reject the proposal by Iowa Telecom to create an additional basis for finding non-impairment for transport.

*The Commission should clarify that the cap on DS1 transport does not apply where CLECs are impaired with respect to DS3 transport.* The Commission explained in its Order, but did not make clear in its rules, that the cap on the number of DS1 transport facilities CLECs can lease applies only on routes where CLECs can economically deploy DS3 transport. The Commission should now reiterate the conclusion reached in its Order. On routes where CLECs are impaired with respect to DS3 transport, CLECs cannot substitute their own DS3 transport for leased DS1s even when they have reached the cap and need more than 10 DS1s worth of transport. Limiting use of DS1s thus has no competitive benefit. It serves only to reduce the competition created through use of DS1s.

*The Commission should not rely on business line density alone to find non-impairment for transport.* The Commission should alter its rule permitting a finding of non-impairment for transport solely based on the number of business lines in the respective wire centers. It should

establish that the existence of fiber-based collocators is a prerequisite for a finding of non-impairment. Nine years after passage of the Telecommunications Act, the absence of any fiber-based collocation in a wire center with a high number of business lines suggests the *existence* of impairment, not its absence. The Commission's contrary conclusion will lead to a finding of non-impairment in many instances in which CLECs are impaired.

*The Commission should eliminate the EELs architectural criteria.* The EELs architectural criteria limit the use of EELs for purposes the Commission has concluded are *pro-competitive*. They effectively limit the use of EELs to provide access services, for example, as well as certain local services. The Commission should eliminate these criteria. The criteria are not necessary for the purpose for which the Commission intended them -- to prevent CLECs from using EELs to provide long distance services. The Commission explicitly precluded CLECs from using UNEs to provide long distance services. As a result, there is no need for the EELs architectural criteria to serve that same role.

*The Commission should clarify that it did not abrogate change of law provisions in interconnection agreements.* Where the Commission reduced unbundling requirements, it should clarify its rules related to the transition. It should explain that it did not take the extraordinary step of abrogating interconnection agreements that specify how such rule changes are to be implemented. The uncertainty on this issue has led to extensive litigation, and some state commissions and courts have concluded that the Commission did abrogate the agreements. The result is that ILECs believe they are entitled immediately to stop processing new UNE orders (for those UNEs that have been eliminated), regardless of what their voluntarily negotiated change of law provisions say. This has given the ILECs an extensive and unwarranted advantage when they are negotiating alternative arrangements with CLECs. And

the ILECs have reached this conclusion while simultaneously refusing to implement the rules permitting commingling, enacted *in the TRO*,<sup>1</sup> on the basis that the change of law process is not complete. Thus, the ILEC position is that changes favoring them must be implemented immediately, but changes favoring competitors can continue to be delayed. The Commission should make clear that this is not so.

*The Commission should reject the proposal by Iowa Telecom to create an additional basis for finding non-impairment for transport.* Alone among the ILECs, Iowa Telecom asks the Commission to create a new basis for finding non-impairment with respect to transport that is entirely distinct from those the Commission has already established. Iowa Telecom proposes that the Commission find impairment based on the existence of CLEC fiber that does not run between ILEC wire centers. But the Commission already considered and correctly rejected the very arguments Iowa Telecom makes to support its proposal.

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<sup>1</sup> *Triennial Review Order*, 18 F.C.C.R. 16,978 (2003) (“*TRO*”).

**I. The Commission Should Clarify or Modify Its Rules Related to Impairment Findings for Loops and Transport**

**A. The Commission Should Clarify that the DS1 Transport Cap Does Not Apply Where CLECs Cannot Economically Deploy DS3 Transport**

Where the Commission found that CLECs would be impaired without access to DS1 transport, it mandated such access but capped the number of DS1 transport facilities that CLECs can lease at 10 on particular routes.<sup>2</sup> The Commission should clarify that the cap on DS1 transport does not apply on routes on which CLECs cannot economically deploy their own DS3 transport, that is routes on which CLECs are impaired with respect to DS3 transport. The Commission made this clear in its Order, but not in its rules. The Commission should clarify that the explanation articulated in its Order controls, as *Birch et. al.* explain.<sup>3</sup>

The Commission understood that the cap on DS1 transport should not apply on routes where it is uneconomic for CLECs to deploy DS3 transport. It established that the DS1 cap applies only on routes where it *is* economic for CLECs to deploy their own DS3s -- “[o]n routes for which we determine that there is no unbundling obligation for DS3 transport.”<sup>4</sup> But, as *Birch et. al.* point out, some ILECs are nonetheless contending that the DS1 cap applies on all routes.<sup>5</sup> The Commission should reiterate the directive articulated in its Order that this is not so.

The justification the Commission gave for the DS1 transport cap is that it is “consistent with the pricing efficiencies of aggregating traffic.”<sup>6</sup> In other words, once a CLEC needs more than 10 DS1s, a CLEC can use a DS3 instead. That rationale would be nonsensical if it were applied to routes on which CLECs cannot economically deploy DS3 transport. The Commission’s conclusion that a CLEC that needs more than 11 DS1s on a transport route can

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<sup>2</sup> *TRRO* ¶ 128.

<sup>3</sup> *Birch Pet.* at 2-5.

<sup>4</sup> *TRRO* ¶ 128.

<sup>5</sup> *Birch Pet.* at 2-3.

<sup>6</sup> *TRRO* ¶ 128.

efficiently deploy (or lease from other CLECs) a DS3 necessarily depends on the conclusion that it would be economic for CLECs to deploy a DS3 on the route in question. If the route is one on which CLECs are impaired with respect to the construction of DS3s as well as DS1s, such that the revenue potential and location of the wire centers at the ends of the route do not justify collocation and deployment of DS3 fiber at all, the fact that a CLEC has more than 10 DS1s will not suddenly make it economic for the CLEC to deploy a DS3.

The only effect of applying the DS1 transport cap on these routes would be either to (1) limit the transport facilities a CLEC uses so that the CLEC stops serving customers after reaching the 10 DS1 threshold, or (2) force the CLEC to lease DS3 UNE transport rather than DS1 transport (if it is economically feasible for it to do so, which will not always be the case).<sup>7</sup> There is no reason that the Commission should prefer that CLECs lease DS3 UNE transport rather than DS1 UNE transport when their own economic analysis shows they are better off with DS1s. The CLECs are better able than the Commission to determine whether use of DS1 or DS3 UNEs is more efficient in particular circumstances.

**B. The Commission Should Not Rely on Business Line Density Alone to Find Non-Impairment**

The Commission adopted a test requiring findings of non-impairment for dedicated transport based on either a certain number of business lines *or* a certain number of fiber based collocators. Birch *et. al.* argue that the Commission should have required a conjunctive test, requiring both the presence of a minimum number of business lines and a minimum number of fiber-based collocators, as the Commission did with respect to loops.<sup>8</sup>

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<sup>7</sup> In theory, the CLEC might also be able to use special access, but the Commission correctly concluded that this is an alternative that does not obviate impairment.

<sup>8</sup> Birch Pet. at 17-22.

MCI agrees that finding non-impairment based solely on the presence of a particular number of business lines does not adequately take into account all of the relevant economic factors associated with facilities deployment decisions within given wire centers. At a minimum, the Commission should have required the presence of sufficient fiber-based collocators as a prerequisite to a finding of non-impairment for transport. Indeed, in its Comments and Reply Comments, MCI proposed a test based on fiber-based collocation but proposed use of four fiber-based collocators, and proposed that each of these collocators should be present at both ends of the route. The Commission diminished the vitality of this test by reducing the number of fiber-based collocators required for Tier 2 wire centers and permitting CLECs to be counted even when collocated only at one end of the route. As a result of these changes, it made sense that the Commission would *also* require the presence of a certain number of business lines before reaching a conclusion of non-impairment. But there is no basis for concluding that business lines alone are a sufficient basis for such a finding.

The Commission relied on the number of business lines in the wire centers at each end of a route as a sufficient basis for finding non-impairment for transport because it concluded that this number was correlated with the potential for CLECs to deploy their own transport on the route. But the fact that CLECs have deployed transport between other wire centers with a comparable number of business lines shows very little about those routes where CLECS have *not* deployed transport. The Commission recognized “that there are likely many complex factors that impact an individual carrier’s decisions to deploy transport,”<sup>9</sup> but it performed no analysis to evaluate whether there was any difference between wire centers with the requisite number of business lines where CLECs had deployed transport and those where they had not. It did not

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<sup>9</sup> *TRRO* ¶ 109.

evaluate, for example, the distance of the wire centers from other wire centers or from CLECs' networks. This is so despite the fact that, in evaluating impairment for loops, the Commission indicated that "the presence of a high number of business lines in the absence of a correspondingly high number of fiber-based collocations might indicate a location that offers high revenue opportunities but that is not close to existing fiber facilities or not suitable for fiber ring deployment for other reasons."<sup>10</sup> A similar analysis applies to transport, but the Commission did not evaluate it. Nor did it evaluate any other factors that affect deployment.

Nine years after passage of the Telecommunications Act, it is likely that the wire centers where no fiber-based collocators exist are materially different from those with a similar number of business lines where transport has been deployed. Building of transport facilities has been extensive over the past nine years. If CLECs have not built any fiber-based collocations in a wire center despite the high number of business lines in the wire center, this suggests that it is uneconomic to do so.

Elimination of the business line test as an independent test of non-impairment would not mean that the Commission is ignoring potential deployment. The fiber-based collocator test already captures potential deployment. Since fiber-based collocators do not necessarily have dedicated transport to the wire center at the other end of the route, where they may not even be collocated, and may have to modify their network to provide transport, a fiber-based collocator test is measuring potential deployment, not actual deployment. Even if such a test misses some potential deployment, the error costs associated with a business line test more than offset this risk. In the absence of fiber-based collocation, there is no reasonable basis to conclude that deployment would be economic.

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<sup>10</sup> *TRRO* ¶ 168.

### C. The Commission Should Eliminate Architectural Criteria for EELs

MCI strongly supports the position of Birch *et. al.* that the Commission should eliminate the EEL architectural criteria.<sup>11</sup> These criteria are remnants of a prior regime that no longer serve any useful purpose, and to the contrary, undermine competition.

The Commission initially established restrictions on use of EELs as a transitional measure during the phase-out of implicit universal service subsidies from interstate access charges. Because universal service was funded through above-cost access charges, the interim restrictions were adopted to prevent any carrier – CLEC or IXC – from using cost-based EELs as a substitute for special access.<sup>12</sup>

By the time of the *TRO*, the Commission no longer relied on this rationale and in fact concluded that CLECs *should* be able to use UNEs, including EELs, as a substitute for access services in those instances where CLECs would be impaired without use of the UNEs. It further concluded that such use would be pro-competitive.<sup>13</sup> But it also determined that CLECs should not be able to use EELs to provide long distance services, because it found that the long distance services are not “qualifying services.” It therefore concluded that IXCs should not be permitted to use EELs to “self-provision” the exchange access component of a long distance service,<sup>14</sup> and it adopted the EELs architectural criteria to prevent them from doing so. Relying on a somewhat different rationale (that the long distance market is a competitive one),<sup>15</sup> the Commission reached the same conclusion in the *TRRO*, reaffirming the restrictions adopted in the *TRO*.<sup>16</sup>

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<sup>11</sup> Birch Pet. at 7-10.

<sup>12</sup> *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 9587 (2000).

<sup>13</sup> *TRRO* ¶¶ 139, 575-76.

<sup>14</sup> *TRO* ¶ 153.

<sup>15</sup> *TRRO* ¶ 36.

<sup>16</sup> *TRRO* nn. 244, 644.

But the restrictions the Commission adopted do not serve its purpose, and instead serve only to hinder use of EELs to provide a genuine alternative in the markets where the Commission found they would be pro-competitive. EELs are not used to provide the long distance component of long distance service. They are used to provide access to the long distance network in instances where the Commission has found that CLECs would be impaired without the loop and transport facilities that make up the EELs. The Commission therefore permits CLECs to use EELs to provide access service when a different company is providing the long distance service. Indeed, the Commission seems to accept that an IXC should be able to use EELs to provide access services, so long as those services are tariffed separately from the long distance product.<sup>17</sup> But nothing changes in the rare case when an IXC offers a bundled product that includes both access services and long distance. In that case, too, use of EELs to provide access promotes competition.

In any case, since IXCs almost always offer separate access and long distance products to business customers, the Commission's concern about IXCs self-providing access using EELs as a component of a bundled product is vastly overblown. Moreover, the Commission explicitly banned competitors from using UNEs to provide long distance services.<sup>18</sup> This direct prohibition eliminates any risk of the "problem" with which the Commission was concerned.

The additional restrictions merely serve to prevent competitors from using EELs for purposes the Commission has concluded are legitimate. By requiring CLECs to provide local service with certain characteristics in order to use EELs (among other restrictions), the Commission effectively precluded competitors from using EELs for the access services it has found they are entitled to provide. It also limits their ability to use EELs to provide local data,

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<sup>17</sup> *TRO* ¶ 153.

<sup>18</sup> *TRRO* ¶ 36.

local private line, and an array of innovative local voice services. The eligibility requirements should therefore be eliminated.

## **II. The Commission Should Clarify Its Transition Rules**

### **A. The Commission Should Clarify that the *TRRO* Does Not Preempt Existing Contractual Change-of-Law Provisions.**

The Commission should clarify that the *TRRO*'s new substantive unbundling rules do not automatically abrogate existing interconnection agreements' terms governing UNE provisioning, as CTC Communications et. al. explain.<sup>19</sup> The Commission should make clear that, where an interconnection agreement contains change-of-law provisions that govern how the contracting carriers are to respond to regulatory changes, the Commission intended that those processes would be used.

In fact, the Commission squarely instructed in Paragraph 233 of the *TRRO* that its new rules would not automatically override interconnection agreements:

#### **Implementation of Unbundling Determinations**

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. . . . *[T]he incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.* We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.<sup>20</sup>

Thus, the Commission has recognized that it is the carriers that are to implement the Commission's findings through their agreements – not the Commission itself directly through the *TRRO*. As this paragraph's position at the end of the *TRRO*, its placement under the general heading "Implementation of Unbundling Determinations," and its reference to "our rule

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<sup>19</sup> CTC Pet. at 16-21.

<sup>20</sup> *TRRO* ¶ 233 (footnotes omitted and emphasis added).

changes” and “the conclusions adopted in this Order” show, it is meant to apply to the entire *TRRO*, not just negotiations regarding the embedded base. Nonetheless, despite this directive, the petition for reconsideration correctly points out that further clarification is warranted because some ILECs and a significant number of state commissions have treated the *TRRO* as abrogating existing interconnection agreements, even when those agreements contain change-of-law provisions designed to govern the implementation of new substantive rules.<sup>21</sup> This has led to unnecessary and costly litigation, which is likely to continue for months, with the federal courts also dividing over the proper interpretation of the *TRRO*.

In ordering that carriers negotiate changes to interconnection agreements, the Commission reinforced a rule embodied in the very structure of the Act under which unbundling rules are implemented through amendments to section 252 interconnection agreements. Until those interconnection agreements have been amended, the provisions in those agreements control. The controlling provisions include those specifying the process that will be used for amending the agreements.

Moreover, the change-of-law provisions in most of MCI’s interconnection agreements were voluntarily negotiated, often at the behest of the ILECs, and are thus not based on the Commission’s unbundling rules. As the Commission has said, “[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252.”<sup>22</sup> And carriers are not limited by the Commission’s unbundling rules in conducting those negotiations. Rather, they are free to agree to terms “without regard to” section 251

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<sup>21</sup> CTC Pet. at 16-17.

<sup>22</sup> *TRO* ¶ 701.

standards.<sup>23</sup> Thus, a Commission decision changing section 251 standards does not automatically override voluntary agreements as to how such changes will be implemented.

For these reasons, in the past, carriers have implemented new unbundling rules in the manner specified in their interconnection agreements. Moreover, it is irrelevant that the determinations in the *TRRO* rescinded unbundling obligations, whereas many of the past changes increased them. The Commission has previously rejected an ILEC's argument that regulations eliminating unbundling obligations are "fundamentally different" from regulations adding unbundling obligations; it therefore rejected the incumbent's proposed "one-way" change-of-law provision and instead concluded that "the change of law process should *not vary* depending on whether the change adds or removes obligations."<sup>24</sup> Finally, in the August 2004 *Interim Order* that preceded the *TRRO*, the Commission indicated its expectation that the coming changes would be implemented through the usual change-of-law process and authorized carriers to set that process in motion in anticipation of the forthcoming final rules.<sup>25</sup>

Notwithstanding that negotiated amendments to interconnection agreements represent the normal means for implementing new unbundling rules required by those interconnection agreements – a process that Paragraph 233 of the *TRRO* directly reinforces – many ILECs, state commissions, and courts have viewed the *TRRO* as effecting an immediate abrogation of existing contracts. Under their reading, ILECs are not required to fill new orders as of March 11 regardless of what existing interconnection agreements may provide. That erroneous interpretation relies largely on the fact that the *TRRO* expressly established twelve- or eighteen-month transition periods for *existing customers* that went *beyond* the transition that might be

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<sup>23</sup> 47 U.S.C. § 252(a)(1).

<sup>24</sup> *In re Petition of WorldCom, Inc.*, 17 F.C.C.R. 27,039 (2002) (emphasis added).

<sup>25</sup> *Interim Order*, 19 F.C.C.R. 16,783, ¶ 22 (2004).

available under the interconnection process. (While some interconnection agreements provide for a period of negotiation, other agreements might specify that new unbundling rules would take effect immediately.)<sup>26</sup> The Commission wanted to ensure that, as competitors had long depended on the old rules, there was an adequate time for competitors to establish new facilities to serve existing customers.<sup>27</sup> But the Commission's decision to establish *additional* protections regarding existing customers that went beyond the protections that might be afforded by interconnection agreements certainly does *not* eliminate the contractual process for implementing rule changes as regards new customers.

If the Commission had intended to abandon the process of implementing Commission decisions embodied in the structure of the Act, and to abrogate voluntary change of law provisions in doing so, it surely would have said so explicitly. Indeed, the Commission was required to make such an explicit determination. The *Mobile-Sierra* doctrine holds that – where an agency has the power to abrogate a voluntary agreement at all – the agency may effect that result only if it does so expressly and makes an explicit finding that *abrogating the contractual provision* is in the public interest. See *Texaco Inc. v. FERC*, 148 F.3d 1091, 1097 (D.C. Cir. 1998); *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501-02 (D.C. Cir. 1987).<sup>28</sup> It is not

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<sup>26</sup> See *Interim Order* ¶ 17.

<sup>27</sup> *TRRO* ¶¶ 142-144, 195-197, 226-27.

<sup>28</sup> The *Western Union* case is virtually on all fours with the present situation. There, a contract between phone companies set access rates and included a procedural provision stating that new rates could become effective only on six-months' notice. 815 F.2d at 1500. An FCC order purported to abrogate the entire contract, including the notice provision, after concluding that the rates in the contract were contrary to the public interest. But the court of appeals rejected the Commission's purported abrogation of the notice provision, concluding that the Commission's public interest findings showed only that the *rates* were contrary to public policy. *Id.* at 1501-02. As regards the notice provision, the Commission had merely suggested generally that "speed was essential" and that the notice provision would impede the speedy implementation of new rates. *Id.* The court deemed this insufficient to abrogate the notice provision, even though the Commission's public interest findings did succeed in abrogating the rate provisions.

enough for the agency to conclude that its underlying substantive rule change is in the public interest, which is (at most) all that the Commission did in the *TRRO*. Here, rather than making such a determination, the Commission reinforced the change of law process in Paragraph 233.

While MCI believes that the proper reading of the *TRRO* is that the Commission did not intend to abrogate contractual change-of-law processes, MCI also agrees with CTC Communications *et al.* that there are, at a minimum, serious questions regarding the Commission's authority to effect such an abrogation. While the *Mobile-Sierra* cases hold that the Commission has the power (if it makes the proper findings) to abrogate rate terms in contracts that are *filed with it and over which it exercises exclusive authority*,<sup>29</sup> interconnection agreements are not such contracts. By federal law, they are filed with and interpreted by state commissions, not the Commission. And they are also approved or rejected by state commissions (except in unusual circumstances).<sup>30</sup> While the Commission has authority to change the background rules against which interconnection agreements are negotiated, there is nothing in the statute suggesting the Commission may effectively reject interconnection agreements – a role the statute assigns to state commissions.<sup>31</sup> Given this serious question about the Commission's authority to abrogate interconnection agreements, as well as the strong policy reasons against such abrogation, the Commission should clarify that it did not intend to abrogate change of law provisions.

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<sup>29</sup> *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999),

<sup>30</sup> *See* 47 U.S.C. § 252(a)-(c), (e)(1)-(2); *see also* *Iowa Utils. Bd.*, 525 U.S. at 384-85; *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278-79 (11th Cir. 2003) (en banc).

<sup>31</sup> *See* 47 U.S.C. § 252(e). The Commission appeared to recognize as much in *IDB Mobile Comm. v. COMSAT Corp.*, 16 F.C.C.R. 11474 (2001): “We note that the *Sierra Mobile* analysis does not apply to interconnection agreements reached pursuant to Sections 251 and 252 of the Act, because the Act itself provides the standard of review of such agreements” -- a standard that is to be applied by state commissions.

There are strong policy reasons for it to do so. Use of contractual change-of-law provisions has always been regarded as a beneficial method of ensuring that new rules are implemented in an orderly fashion that does not disrupt the marketplace.<sup>32</sup> The ILECs' attempts to engage in unilateral self-help, in contrast, have strongly deleterious consequences for the marketplace. If CLECs are unable to place service orders and must turn away customers in the interim, while they are attempting to develop alternative arrangements, this will harm the long-term prospects for the alternative competitive arrangements that the Commission intended to foster. At the same time, incumbents can use the threat of a unilateral cut-off to coerce CLECs into signing commercial agreements that are heavily skewed towards the incumbents.

Moreover, the ILECs are using their abrogation argument as a one way ratchet to enable them to immediately implement the changes favorable to them from the *TRRO* without implementing the changes favorable to competitors -- with respect to commingling, for example, from the *TRO*. Negotiations of all of these changes should occur together so that all carriers have an incentive to quickly complete the negotiations to take advantage of the changes by which they will benefit. Additionally, abrogation of interconnection agreements deprives competitors of the benefits of their bargain and thus undermines the important policy of respecting voluntary agreements. For all of these reasons, MCI agrees that the Commission should clarify that it did not intend to override contractual mechanisms for incorporating regulatory changes.

**B. The Commission Should Clarify That the Transition Plan Allows CLECs to Continue Serving Existing Customers.**

CTC Communications *et al.* have asked the Commission to clarify that the *TRRO*'s transition plan allows CLECs to continue to serve their existing customers using additional lines

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<sup>32</sup> See, e.g., *TRO* ¶¶ 700-01.

at existing locations or new lines at new locations.<sup>33</sup> MCI agrees with this request. Such a clarification would be useful because, despite the fact that the *TRRO* repeatedly refers to the “embedded *customer* base,”<sup>34</sup> some ILECs have taken the view that no new facilities can be ordered during the transition periods, even to serve existing customers.

The ILECs’ position causes exactly the type of disruptions to customers and business plans that the Commission intended to avert.<sup>35</sup> If CLECs are unable to provide existing customers with a new line at their existing locations upon demand, the customers will in all likelihood be forced to cancel their existing service. Likewise, under the ILECs’ approach, CLECs stand to lose any customer who moves to a new address. The inability to add new lines for existing customers is especially harmful with regard to small business customers, who frequently request additional lines. The point of the Commission’s transition rules was precisely to avoid this sort of potentially irreparable damage to CLECs customer relationships while carriers developed or negotiated alternative arrangements. The Commission should therefore reiterate and clarify that its transition rules allow new orders to the extent necessary to serve the embedded customer base.

### **III. The Commission Should Reject Iowa Telecom’s Request That It Add Another Basis to Find Non-Impairment for Dedicated Transport**

The Commission should reject Iowa Telecom’s request to fundamentally revise the Commission’s impairment criteria for loops and transport by adding a third disjunctive criterion that would lead to a finding of non-impairment with respect to dedicated interoffice transport. The Commission analyzed extensive data on the existence of actual and potential alternatives to the ILECs’ dedicated interoffice transport. It ultimately concluded that CLECs were not

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<sup>33</sup> CTC Pet. at 21-22.

<sup>34</sup> See, e.g., *TRRO* ¶¶ 142, 195, 227 (emphases added).

<sup>35</sup> See *id.* ¶ 226.

impaired where specific thresholds were crossed based on: (1) the number of fiber-based collocators at the wire centers at each end of a transport route; or (2) the number of business lines at these wire centers. Iowa Telecom now asks the Commission to add a third disjunctive criterion -- “the presence of at least four or three (respectively) competitive dedicated interoffice providers each with a point of presence anywhere in the wire center.”<sup>36</sup> The Commission should reject this request.

In its Order, the Commission already considered the possibility that there would be some competitors, such as intermodal competitors, that would construct alternative transport facilities but not do so between ILEC wire centers. It correctly concluded that the fiber-based collocation test captures many facilities of intermodal competitors, which often collocate at ILEC wire centers. It further explained that its business line count, and its fiber-based collocation test, both served as proxies for transmission alternatives even when these alternatives do not run between ILEC offices. This is because these tests capture areas that are “rich in potential revenues,” the very areas where any alternative transmission that does not run between ILEC offices is likely to exist.<sup>37</sup> Moreover, the Commission established “business line density thresholds lower to account for incumbent LEC line loss due to facilities that bypass the incumbent’s loop network altogether.”<sup>38</sup>

Iowa Telecom does not even purport to show that the Commission was wrong that its business line and fiber-based collocation tests are adequate to evaluate impairment. It provides no evidence that there are significant areas with business lines and fiber-based collocators below the Commission’s thresholds, but where there are nonetheless a significant number of transport

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<sup>36</sup> Iowa Telecom Pet. at 4.

<sup>37</sup> *TRRO* ¶ 95. *See also id.* ¶ 89.

<sup>38</sup> *Id.* ¶ 104.

providers that provide real alternatives to the ILEC. Iowa Telecom acknowledges that it has not collected data on this outside of Iowa.<sup>39</sup> And even inside Iowa, it provides no data showing that there are multiple alternatives on or near transport routes on which the Commission would otherwise have found impairment. It simply lists what it deems to be alternative providers that exist somewhere in Iowa.

Moreover, even if the “alternatives” Iowa Telecom lists were near transport routes for which there would otherwise be an impairment finding, that would not show these are real alternatives. Because they do not run between ILEC offices, these facilities do not provide an alternative for traffic that needs to begin or end at such offices. But the traffic in a wire center must all go through an ILEC office except where a CLEC is providing its own loops. Thus, in the vast majority of instances -- those where CLECs are not using their own loops -- these “alternative” transport facilities do not serve as an alternative.

Moreover, in many cases, the facilities to which Iowa Telecom points are not even local transport facilities at all. For example, Iowa Telecom points to MCI as the owner of fiber facilities in Iowa. But MCI’s facilities in Iowa are almost all used to carry long distance traffic after the traffic reaches its long distance network. Due to the limited number of fiber strands in these facilities, they cannot be readily used to connect to MCI loops even in the limited instances where MCI has such loops. And the facilities certainly cannot not serve as a transport alternative for any customers (whether MCI local customers or other local customers) that are not served by MCI loops, as there is no way to get the traffic to these facilities except through the ILEC wire centers.<sup>40</sup> If Iowa Telecom’s suggestion were accepted, MCI (as well as electric power

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<sup>39</sup> Iowa Telecom Pet. at 5.

<sup>40</sup> *Cf. TRRO* ¶ 168 (“the presence of fiber rings in the absence of a sufficiently high business line count might indicate a wire center service area that happens to fall along a ring that serves other

companies, cable television operators and others with fiber) would be counted as a transport alternative in wire centers where the vast majority of customers have to use ILEC loops and for whom MCI's fiber facilities and those of similar providers would be entirely irrelevant. Carriers that leased ILEC loops could be left without transport alternatives to the ILEC and without UNE transport.

Moreover, Iowa Telecom's suggestion would significantly complicate the administrative issues in assessing impairment, a process that has already begun. Unlike fiber-based collocators, the ILECs do not have lists of competitors with dedicated transport in particular wire centers. Nor do CLECs have data to dispute any ILEC showings. Moreover, whether such transport provided real alternatives would depend on whether that transport was used to connect to CLEC loops and "such information is extremely difficult to obtain and verify."<sup>41</sup> There is no need to establish additional administrative proceedings to assess transport alternatives that are already effectively accounted for by the Commission's existing criteria.

### **CONCLUSION**

For the foregoing reasons, MCI requests that the Commission grant the Petitions for Reconsideration of the various CLECs with respect to the issues described above and deny the Petition of Iowa Telecom.

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busy, high-revenue areas but that does not itself offer revenues sufficient to justify competitive deployment of high-capacity loops.")

<sup>41</sup> *TRRO* ¶ 105.

Respectfully submitted,

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