

BellSouth D.C., Inc.
Legal Department
Suite 900
1133 21st Street, N.W.
Washington, D.C. 20036-3351

bennett.ross@bellsouth.com

Bennett L. Ross
General Counsel-D.C.

202 463 4113
Fax 202 463 4195

June 6, 2004

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

Re: *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;

Dear Ms. Dortch:

BellSouth Corporation ("BellSouth") is filing herewith its Consolidated Response to the petitions for reconsideration and clarification filed in the above-referenced proceedings by: (i) Cbeyond Communications ("Cbeyond"); (ii) Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Inc., Eschelon Telecom, Inc., NuVox Communications, SNIp LiNK, LLC, Xspedius Communications LLC, and XO Communications, Inc. ("Birch Joint Petitioners"); (iii) CTC Communications Corp., Gillette Global Networks, 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. ("CTC Joint Petitioners"); (iv) the PACE Coalition; (v) American Public Communications Council, Navigator Telecommunications, LLC, Nii Communications, and Symtelco, LLC; (vi) Iowa Telecommunications Service, Inc.; and (vii) T-Mobile USA, Inc. This Consolidated Response is supported by the Reply Declarations of Jerry Hendrix and Keith Milner.

The Commission's rules limit each opposition to a petition for reconsideration to 25 double-spaced typewritten pages. 47 C.F.R. § 1.429(f). Rather than file separate oppositions to each petition to ensure compliance with the Commission's 25-page limitation, BellSouth has, in good faith, consolidated its responses to all seven petitions in a single pleading. Such consolidation was particularly appropriate, given that the three petitions filed by Cbeyond, the Birch Joint Petitioners, and the CTC Joint Petitioners seek reconsideration of the same issue – namely, the cap on DS1 transport adopted in the *Triennial Review Remand Order*. Both the Birch Joint Petitioners and CTC Joint Petitioners also raise many of the same issues relating to the Commission's wire center methodology and Enhanced Extended Loop eligibility criteria.

Ms. Marlene H. Dortch

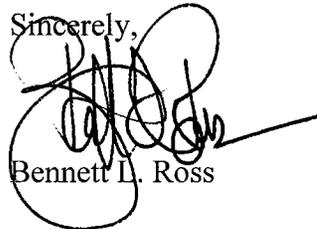
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To the extent the Commission believes that BellSouth's pleading does not conform with the Commission's page limitation requirements, BellSouth respectfully requests that the Commission waive Part 1.429(f) of its rules as it may apply to BellSouth's Consolidated Response. This Consolidated Response addresses seven petitions for reconsideration, for which the Commission's rules theoretically permit seven separately filed oppositions with a combined page limit of 175 pages. BellSouth's Consolidated Response is less than 50 pages, and the pleading otherwise conforms with the relevant Commission rules pertaining to pleadings, briefs and other papers, as well as its rules pertaining to petitions for reconsideration. 47 C.F.R. §§ 1.47-1.52, 1.429.

Please include this letter in the record in the above-referenced proceedings. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Bennett L. Ross", is written over the word "Sincerely,". The signature is stylized and includes a long horizontal line extending to the right.

Bennett L. Ross

BLR:kjw

cc: Julie Veach
Jeremy Miller

#588143

**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)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

**CONSOLIDATED RESPONSE OF BELL SOUTH CORPORATION TO
PETITIONS FOR RECONSIDERATION AND CLARIFICATION**

BELLSOUTH CORPORATION

Bennett L. Ross
1133 21st Street, N. E.
Suite 900
Washington, D. C. 20036
(202) 463-4113

Richard M. Sbaratta
Theodore R. Kingsley
Meredith E. Mays
Suite 4300
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375-0001
(404) 335-0738

Date: June 6, 2005

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**CONSOLIDATED RESPONSE OF BELL SOUTH CORPORATION TO
PETITIONS FOR RECONSIDERATION AND CLARIFICATION**

I. INTRODUCTION

BellSouth Corporation ("BellSouth") respectfully submits its consolidated response to the Petitions for Reconsideration and Clarification filed in this proceeding.¹ BellSouth supports, in part, the petition filed by Iowa Telecom. However, the remaining petitions should be denied because they do not come close to satisfying the Commission's standards for reconsideration and, for the most part, merely regurgitate arguments that the Commission has already considered and rejected or raise arguments that are legally and factually flawed.

¹ Petition for Reconsideration of Cbeyond Communications ("Cbeyond"); Petition for Reconsideration of Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Inc., Eschelon Telecom, Inc., NuVox Communications, SNiP LiNK, LLC, Xspedius Communications LLC, and XO Communications, Inc. (collectively referred to as "Birch Joint Petitioners"); Petition for Reconsideration of CTC Communications Corp., Gillette Global Networks, 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 referred to as "CTC Joint Petitioners"); Petition for Reconsideration and/or Clarification of the PACE Coalition ("PACE"); Petition for Partial Reconsideration of the American Public Communications Council, Navigator Telecommunications, LLC, Nii Communications, and Symtelco, LLC (collectively referred to as "Payphone Petitioners"); Petition for Reconsideration of Iowa Telecommunications Service, Inc. d/b/a Iowa Telecom ("Iowa Telecom"); and Petition for Reconsideration of T-Mobile USA, Inc. ("T-Mobile").

Challenges to the Commission's Wire Center Impairment Methodology. The Commission should reject challenges to its definition of a business line adopted for purposes of applying the Commission's nonimpairment thresholds for determining unbundled access to high-capacity loops, transport and dark fiber. Notwithstanding Petitioners' claims to the contrary, defining digital lines on a 64 kbps-equivalence basis is a reasonable attempt to devise an administrable method of estimating demand for telecommunications services. Likewise, the definition correctly includes all unbundled loops leased by a competing local exchange carrier ("CLEC"), regardless of the type of services being provided over that loop or the nature of the customer being served, since such facilities represent revenue opportunities that should be reflected in the Commission's nonimpairment test. Proposed changes to the Commission's business line definition, such as defining a business line based exclusively on ARMIS data, would understate competitive supply by excluding both lines served by CLECs entirely over their own competitive facilities as well as lines leased from incumbent local exchange carriers ("ILECs") and would overstate the need for unbundled access contrary to the directives of the D.C. Circuit.

The Commission also should reject proposals to modify its transport test by finding that CLECs are not impaired without unbundled access to high-capacity transport only between wire centers where both the Commission's minimum fiber-based collocator and business line thresholds have been met. Because the Commission has recognized that markets with four or more facilities-based competitors are already fully competitive, any impairment test that requires both the presence of four or more fiber-based collocators and a specific number of business lines in order to warrant unbundling relief disregards the potential competition inquiry that the D.C. Circuit ordered the Commission to undertake.

The Commission should grant Iowa Telecom's Petition for Reconsideration, which asks the Commission to add a third disjunctive factor to its transport impairment test that, if met, would relieve the ILEC of the obligation to provide unbundled access to dedicated interoffice transport – namely, “the presence of at least four or three (respectively) competitive dedicated interoffice transport providers each with a point of presence anywhere in the wire center.” Because collocation is not a prerequisite for a carrier offering dedicated interoffice transport and because numerous competitive alternatives for such transport exist in wire centers with business lines below the Commission's thresholds, Iowa Telecom's proposal would ensure that relevant competitive deployment is taken into account in assessing impairment. However, BellSouth disagrees with Iowa Telecom's suggestion that the Commission can or should delegate to the state public service commissions the authority to determine where ILECs have been relieved of the obligation to provide unbundled access to dedicated interoffice transport.

Requests that the Commission reconsider its determination not to reclassify wire centers to restore unbundling obligations once nonimpairment thresholds have been met are misguided. These requests are predicated on the erroneous assumption that a decline in business lines is an indication of impairment, which is not the case, since such declines are just as likely the result of competition, particularly from competitors serving customers entirely over their own competitive facilities. Continued consolidation in the telecommunications industry, which may result in a reduction in the number of unaffiliated fiber-based collocators in a particular wire center, would not alter the fact that a sufficient degree of collocation had existed that indicated the duplicability of these network elements and, thus, a lack of impairment. Furthermore, reclassification of wire centers would create opportunities and incentives for regulatory arbitrage, which the Commission correctly refused to allow.

Challenges to the Commission's DS1 Transport Cap. The Commission's rule that limits a CLEC to the purchase of 10 individual circuits of unbundled DS1 transport on a particular route is fully supported by the evidence in the record. On those routes where CLECs are impaired without unbundled access to DS3 transport, the Commission reasonably concluded that a CLEC should purchase unbundled DS3 transport when it requires more than 10 DS1 transport links. On those routes where CLECs are not impaired without unbundled access to DS3 transport, the Commission reasonably concluded that a CLEC should self-provide transport or obtain transport from another carrier when it requires more than 10 DS1 transport links.

The DS1 cap works to encourage CLECs to manage their networks efficiently so that when a sufficient amount of traffic is passed along a particular route, the CLEC should use a higher-capacity facility. The "cross-over" analysis and other aspects of Petitioners' arguments on this issue are fraught with erroneous assumptions and fundamentally ignore the Commission's impairment standard which requires that impairment be determined based upon a "reasonably efficient competitor" and not a carrier's "particular business strategy."

Challenges to the Commission's Enhanced Extended Loop ("EEL") Eligibility Criteria. Pending mergers, which have yet to be approved, provide no basis for altering the Commission's determination that unbundling is unnecessary in markets where there is "robust competition" or that long distance services is such a market. That the Commission has a rule prohibiting carriers from using unbundled network elements to provide exclusively long distance services does not obviate the need for EEL eligibility criteria, which serve as a test to determine whether that rule is being followed. Without EEL eligibility criteria, ILECs would be left at the mercy of carriers providing exclusively long distance services that seek to game the system by converting special access to EELs to obtain favorable rates or to otherwise engage in regulatory arbitrage.

Challenges to the Commission's Transition Plan. PACE's complaints about the Commission's transition plan demonstrate no legal error and merely restate arguments previously considered by the Commission. PACE's request that the Commission "clarify" that ILEC unbundled local switching obligations that remain in place during the transition period are neither account specific nor location specific should be denied. Such purported clarification is completely at odds with the letter and spirit of the Commission's rules as well as subsequent state and federal decisions interpreting those rules.

Challenges by Commercial Mobile Radio Providers ("CMRS"). T-Mobile repeats the same arguments it previously made in challenging the Commission's determination that CMRS providers are not impaired without access to unbundled network elements – a determination that is consistent with the instructions of the D.C. Circuit, the Commission's own precedent, and the record established in this proceeding. The telecommunications market includes interconnected voice CMRS services that consumers may and increasingly do use as substitutes or replacements for all or a portion of traditional wireline phone service, and CMRS providers are not impaired without access to unbundled network elements in serving these consumers. Under the Commission's "at a minimum" impairment analysis, the Commission properly concluded that even if CMRS providers were "impaired" (which, as a matter of both fact and law, they are not), the costs of allowing providers to have unbundled access exceed any incremental benefits.

Challenges by Payphone Service Providers. Similarly, payphone providers have not shown that their special business interests trump the considered determinations of the Commission, and particularly the "reasonably efficient competitor" aspect of the Commission's impairment test. The Commission gave the proper weight to the "evidence" presented and properly considered section 276 in its impairment analysis.

II. DISCUSSION

A. Standard For Reconsideration

Commission precedent makes clear that Petitioners must show either a material error or omission in the original order or raise additional facts not known or not existing until after the petitioner's last opportunity to present such matters.² Petitions that simply reiterate arguments that the Commission has already considered and rejected will not be granted.³ The public interest in expeditious resolution of Commission proceedings is done a disservice if the Commission readdresses arguments and issues it has already considered.⁴ As none of the Petitions, except that filed by Iowa Telecom, meets the foregoing standards, they must be denied.

B. Wire Center Impairment Methodology

1. Business line counts

Both the CTC Joint Petitioners and the Birch Joint Petitioners complain about the Commission's rules for counting business lines, which, according to the Birch Joint Petitioners, "systematically overstate the presence of facilities based competition in the wire centers" by: (1)

² See *LMDS Communications, Inc.*, FCC File No. 0000013644, *Order on Reconsideration*, 15 FCC Rcd 23747, 23749, ¶ 6 (WTB 2000).

³ See, e.g., *Policies Regarding the Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations*, MM Docket No. 87-68, *Memorandum Opinion and Order*, 4 FCC Rcd 2276, 2277, ¶ 7 (1989) ("*New Broadcasting Stations*"); *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, *Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, 17 FCC Rcd 8520, 8525, ¶ 15 (2002) (citing 47 C.F.R. § 1.429).

⁴ *Proposed New Broadcasting Stations*, 4 FCC Rcd at 2277, ¶ 7 (also noting that "[i]t is well established that reconsideration will not be granted merely for the purpose of again debating matters on which the agency has once deliberated and spoken").

counting digital lines on a per 64 kbps-equivalent basis; and (2) including all UNE loops as business lines.⁵ Such complaints are meritless.

The CTC Joint Petitioners take issue with the Commission's 64 kbps-equivalent rule because they argue it "is unsupported and erroneously skewed to overstate revenue opportunities."⁶ However, this argument misconstrues the purpose of the Commission's business line definition. Although the definition was intended as "an administrable proxy for determining *where significant revenues are available* sufficient for competitors to deploy [competitive] facilities, despite the fixed and sunk costs of deployment,"⁷ it was not intended as a method for calculating with specificity the specific size of those "revenue opportunities" available, as the CTC Joint Petitioners erroneously claim.

Rather, as the Commission explained, "Wire centers that possess a high level of demand for telecommunications services are more likely to attract and support competing . . . facilities

⁵ Birch Joint Petition at 10-15; *see also* CTC Joint Petition at 11-15. Far from "overstating" the presence of facilities-based competition, BellSouth believes that the Commission's methodology is unlawful by establishing the relevant thresholds at unreasonably high levels and by requiring the presence of both fiber-based collocators and a specified number of business lines in assessing impairment for high-capacity loops. For example, the Commission's approach assumes that DS-1 loop facilities are not suitable for competitive supply anywhere in such major and highly competitive markets as Houston, St. Louis, San Diego, San Antonio, and Tampa, even though there are as many as 17 competitive networks in Houston, and at least 10 in each of the other metropolitan areas. UNE Fact Report 2004, App. D (filed Oct. 4, 2004). In addition, the Commission's approach assumes that high-capacity transport facilities are not suitable for competitive supply, even though there may be numerous non-located facilities-based carriers offering competitive transport in a particular wire center. Iowa Telecom Petition at 5-6. As a result, the Commission's methodology requires unbundling in wire centers where CLECs are already competing with their own facilities.

⁶ CTC Joint Petition at 13.

⁷ *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, *Order on Remand*, FCC 04-290, ¶ 103 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*").

that duplicate the incumbent LEC's network.”⁸ Thus, the Commission had to devise an administrable method of estimating demand for telecommunications services, and there can be no serious dispute that the Commission's 64 kbps-equivalents rule is a reasonable method for doing so. As a result, it is irrelevant that the rule may not reflect the total number of “available channels for voice grade switched access lines” or may include non-switched services, as the Birch Joint Petitioners contend.⁹

Furthermore, the Commission's 64 kbps-equivalents rule was an attempt to strike a balance, which both the Birch Joint Petitioners and CTC Joint Petitioners fail to appreciate. As the Commission acknowledged, the most “complete picture” of the competitive market would include “the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers.” However, the Commission elected not to include such competition in its impairment methodology because, according to the Commission, it was “extremely difficult to obtain and verify.”¹⁰ Instead, the Commission elected to estimate demand for telecommunications services by broadly defining the term “business line,” and the Petitioners should not be heard to complain about the breadth of this definition now.¹¹

⁸ *Id.*

⁹ Birch Joint Petition at 13-14.

¹⁰ *Triennial Review Remand Order*, ¶ 105.

¹¹ The proposal by the Birch Joint Petitioners that CLECs “report actual voice switched access circuits” in lieu of the Commission's business line adjustments is untimely and unworkable. Birch Joint Petition at 17. During the comment cycle of this proceeding, the CLECs had ample opportunity to submit evidence detailing the extent of their deployment of competitive facilities but uniformly failed or refused to do so. Furthermore, this proposal raises the very problems that the Commission's impairment methodology was designed to avoid – namely, establishing a test that could be satisfied by information that “was possessed entirely by a span of competitive LECs and was not easily verifiable.” *See Triennial Review Remand Order*, ¶ 99.

That the Commission's 64 kbps-equivalents rule may have a "profound impact" on the number of wire centers meeting the Commission's nonimpairment thresholds, as the Birch Joint Petitioners contend, is both misleading and irrelevant.¹² While pointing to the change in the number of wire centers meeting these thresholds based upon BellSouth's December 2004 and February 2005 filings, this change was the result of an error by BellSouth in the mathematical formula used in applying the 64 kbps-equivalents rule, as the Birch Joint Petitioners acknowledge, and not a reflection of the rule itself.¹³ BellSouth subsequently corrected its error, and the true "change" in the number of wire centers meeting the Commission's thresholds is not nearly as "profound" as the Birch Joint Petitioners contend.¹⁴

Both the Birch Joint Petitioners and the CTC Joint Petitioners also complain about the treatment of unbundled loops under the Commission's business line definition. In particular, they seek reconsideration of the Commission's decision to define a business line so as to include

¹² Birch Joint Petition at 11-12.

¹³ *Id.* at 12 (citing *Ex Parte* Letter from Bennett Ross, Counsel for BellSouth, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, FCC (Mar. 23, 2005)).

¹⁴ *See Ex Parte* Letter from Bennett Ross, Counsel for BellSouth, to Thomas Navin, Chief, Wireline Competition Bureau, FCC (June 3, 2005) ("*BellSouth Ex Parte*"). The December 2004 filing understated the unbundling relief to which BellSouth was entitled under the Commission's rules for reasons unrelated to the 64 kbps-equivalent rule. This is because the December 2004 wire center filing did not include "all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled network elements," as the Commission's rules require. In particular, BellSouth's December 2004 wire center filing did not capture DS-1 loops provisioned as part of a so-called Enhanced Extended Link, nor were DS-3 loops included in the data. Both of these loop types are reflected in the business line counts used to identify the wire centers set forth in BellSouth's June 3, 2005 filing. *Id.*

ll unbundled loops, including those that a CLEC may use for non-switched services as well as to serve residential customers.¹⁵ Reconsideration of this issue is not warranted.

First, the Commission defined a business line so as to capture “the business opportunities in a wire center, *including business opportunities already being captured by competing carriers through the use of UNEs.*”¹⁶ Unbundled loops being leased by a CLEC to serve customers, regardless of the type of services the customer is buying (i.e., switched or non-switched) or the nature of the customer (i.e., business or residential), represent a “business opportunity” (i.e., the opportunity to earn revenues) that should be reflected in the Commission’s nonimpairment test. The Birch Joint Petitioners and CTC Joint Petitioners do not and cannot contend otherwise.

Second, as the Commission stressed in establishing its business line definition, it wanted an accurate but “simplified” approach to applying its impairment thresholds.¹⁷ Inquiring into the type of service being provided over an unbundled loop (i.e., switched or non-switched) or the nature of the customer being served by the loop (i.e., business or residential) would be neither. There is no mechanism in place by which CLECs currently report such data, and BellSouth has no way of knowing with accuracy how a CLEC is using an unbundled loop leased from BellSouth without physically inspecting a CLEC’s collocation arrangements or customer records. It is unlikely that the CLECs would consent to such a process and, even if they did, such a process would be an administrative and regulatory quagmire.

¹⁵ Birch Joint Petition at 15; CTC Joint Petition at 14-15.

¹⁶ *Triennial Review Remand Order*, ¶ 105 (emphasis added).

¹⁷ *Id.*

There is no merit to the Birch Joint Petitioners' proposal that the Commission should define a business line "using solely the ARMIS criteria."¹⁸ Since only retail lines on which the ILEC collects an "interstate end user common line charge" are reported in ARMIS, this proposal would result in a business line definition that not only excludes lines served by competing carriers entirely over their own competitive facilities but also over unbundled facilities leased from the ILEC. Such an approach would not serve as a reasonable proxy for those wire centers possessing "a high level of demand for telecommunications services," which was the Commission's intent in relying upon business line density in developing its impairment thresholds.¹⁹ Indeed, under this approach, CLECs would be "impaired" and thus entitled to unbundled access to DS-1 and DS-3 loops in wire centers where the ILEC has lost the most retail access lines to facilities-based competitors, which would be an absurd result.

Furthermore, the D.C. Circuit expressly held that unbundling can only be lawfully required where facilities are "unsuitable" for competitive supply or where it would be "wasteful" for CLECs to use their own facilities.²⁰ A test that purposefully ignores where competitors have deployed or are using facilities of their own would blatantly violate this holding.

Despite the Birch Joint Petitioners' and the CTC Joint Petitioners' complaints about the Commission's business line definition, only a relatively small number of wire centers in BellSouth's region qualify for unbundling relief based on this definition. For DS-1 and DS-3 loops, for example, BellSouth has been relieved of unbundling obligations in only 11 and 28

¹⁸ Birch Joint Petition at 16.

¹⁹ *Triennial Review Remand Order*, ¶ 103.

²⁰ *United States Telecom. Ass'n. v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003).

wire centers, respectively. These 28 wire centers represent only 2 percent of BellSouth's 1,583 central offices and serve less than 18 percent of BellSouth's total retail and resold business lines.²¹ Under such circumstances, the Birch Joint Petitioners' argument that the Commission's unbundling approach has resulted "in greater restrictions on UNE availability than are warranted" rings hollow.²²

2. Fiber-based collocators

The Birch Joint Petitioners complain about the Commission's decision to adopt a transport test that requires a finding of nonimpairment based upon either a specified number of business lines or a specified number of fiber-based collocators, while adopting a loop test that requires both a specified number of business lines and fiber-based collocators in order to warrant a finding of nonimpairment.²³ Although BellSouth agrees that these tests are "inconsistent" and "self-contradictory," the solution is not to adopt a transport test "that requires a minimum number of fiber collocators and a minimum number of business lines" in violation of *USTA II*, as the Birch Joint Petitioners propose. Rather, consistent with the D.C. Circuit's reasoning, the Commission should find that CLECs are not impaired without unbundled access to any high-capacity facilities in those wire centers where either the Commission's minimum fiber-based collocator or business line thresholds have been met.

As the D.C. Circuit explained, the Commission's impairment analysis must assess not whether a market is fully competitive but rather whether CLECs are capable of competing

²¹ *BellSouth Ex Parte* at 2.

²² Birch Joint Petition at 11.

²³ *Id.* at 17-21.

without unbundled network elements – that is, whether “competition is possible” without access to unbundled network elements in a particular market.²⁴ As a result, a proper impairment test must consider those markets where competition has occurred as well as those markets where competition is “possible.”

Wire centers with four or more facilities-based competitors are already fully competitive, as the Commission has recognized in other contexts.²⁵ Thus, an impairment test that requires both the presence of four or more fiber-based collocators and a specific number of business lines in order to warrant unbundling relief disregards the potential competition inquiry that the D.C. Circuit ordered the Commission to undertake. Although the Commission made this mistake in formulating its loop impairment test, it should not repeat the same mistake in its transport impairment test, as the Birch Joint Petitioners request.²⁶

3. Non-located transport providers

Iowa Telecom asks the Commission to reconsider its transport impairment test by adding a third disjunctive factor that, if met, would relieve the incumbent of an obligation to provide unbundled access to dedicated interoffice transport – namely, “the presence of at least four or three (respectively) competitive dedicated interoffice transport providers each with a point of

²⁴ *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 575 (D.C. Cir.) (“*USTA II*”), *cert. denied*, 125 S. Ct. 313 (2004) (issue in conducting impairment analysis is “whether a market is suitable for competitive supply”).

²⁵ *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order*, 11 FCC Rcd 3271 (1995) (concluding that the long-distance market is competitive, even though it has only four facilities-based providers).

²⁶ The Birch Joint Petitioners’ claim that a “significant number” of wire centers meeting the business line thresholds for purposes of the Commission’s transport impairment test “did not have multiple fiber based collocators” is belied by the Commission’s analysis, which found that 86 percent of wire centers with at least 38,000 business lines had two or more fiber-based collocators. *Triennial Review Remand Order*, ¶ 114.

presence anywhere in the wire center.”²⁷ BellSouth supports this request. As Iowa Telecom correctly explains, collocation is not necessary for the presence of competitive dedicated interoffice transport, and because numerous competitive alternatives for such transport exist in wire centers with business lines below the Commission’s thresholds, such competitive deployment must be taken into account in assessing impairment.

However, BellSouth disagrees with Iowa Telecom’s suggestion that the extent of competitive deployment or application of the Commission’s impairment tests should be left to the state commissions to address “in the context of arbitrations.”²⁸ Allowing 50 state commissions to decide the wire centers in which CLECs are not impaired without unbundled access to high-capacity facilities would be unlawful. In *USTA II* the D.C. Circuit struck down the Commission’s attempt to delegate to the state commissions the decision where its so-called “competitive triggers” had been met so as to relieve ILECs from an obligation to unbundle high-capacity loops and transport. For the same reason, the Commission could not lawfully delegate to the state commissions the decision to determine where ILECs are relieved of the obligation to provide high-capacity facilities under the Commission’s new regime. The Telecommunications Act of 1996 requires a uniform methodology and application of the Commission’s unbundling rules, which cannot occur if unbundling determinations are left to the state commissions.²⁹

²⁷ Iowa Telecom Petition at 3-4.

²⁸ *Id.* at 7.

²⁹ The Commission appeared to recognize as much, holding that the Commission would determine “where . . . no section 251(c)(3) unbundling requirement exists” for high-capacity facilities. *See, e.g., Triennial Review Remand Order*, ¶ 142 (transport) & ¶ 195 (loops).

4. Reclassification of wire centers

Both the Birch Joint Petitioners and the CTC Joint Petitioners object to the Commission's determination that "wire centers may not be reclassified to restore unbundling obligations once thresholds have been met."³⁰ Such objections are without merit, and neither petition offers any basis for the Commission's granting reconsideration of this issue.

First, it is not true, as the CTC Joint Petitioners contend, that "[i]f business lines and/or fiber-based collocators drop, the only reasonable conclusion is that it is no longer feasible to [sic] CLECs to construct or lease facilities."³¹ To the contrary, a decline in business lines is just as likely the result of competition, particularly from competitors serving customers entirely over their own competitive facilities, which are not included in the Commission's "business lines" definition. Indeed, as cable operators continue to make inroads into the telecommunications market with their Voice over Internet Protocol offerings, the wire centers they target will suffer a "drop" in business lines, but such a drop would be attributable to competition and not any alleged inability of "CLECs to construct or lease facilities."

Likewise, a drop in fiber-based collocators does not mean that competition is no longer feasible or that CLECs are suddenly impaired. For example, most industry analysts predict continued consolidation in the telecommunications industry, which may result in a reduction in the number of unaffiliated fiber-based collocators in a particular wire center. However, such consolidation would not alter the fact that "a sufficient degree of collocation" had existed, which according to the Commission, "indicates the duplicability of these network elements and, thus, a

³⁰ CTC Joint Petition at 6 (citing 47 C.F.R. §§ 51.319(a)(4)-(5) & 51.319(e)(3)); *see also* Birch Joint Petition at 24-25.

³¹ CTC Joint Petition at 7.

lack of impairment.”³² Furthermore, Company A’s acquisition of Company B, both of which are fiber-based collocators in a particular central office, does not mean that Company B’s fiber and other collocated facilities will suddenly be removed or otherwise unavailable for competitive use. On the contrary, Company A likely would make use of Company B’s fiber and facilities and that it may elect to do so in connection with its own existing collocation arrangement rather than maintaining Company B’s separate collocation arrangement is irrelevant to the Commission’s impairment analysis.³³

Second, any requirement that ILECs reclassify wire centers would encourage the type of “gaming” about which the Commission was rightfully concerned.³⁴ By way of illustration, assume a wire center with three fiber-based collocators but fewer than 24,000 business lines that currently qualifies as a Tier 2 wire center for purposes of unbundled DS-3 transport relief; if that wire center were subject to reclassification, as both the CTC and Birch Joint Petitions request, it would create financial incentives for these three fiber-based collocators to eliminate one of their collocation arrangements in order to “game” the Commission’s unbundling rules. For specifically, in order to secure unbundled access to DS-3 transport from that central office, fiber-based collocator A may decide to cease maintaining its own collocation arrangement and lease space from fiber-based collocators B and C instead, which would cause the total number of collocators in the central office to “drop” from three to two. Such an outcome would not be the

³² *Triennial Review Remand Order*, ¶ 96.

³³ Although both the Birch Joint Petitioners and the CTC Joint Petitioners take particular issue with SBC’s proposed acquisition of AT&T and Verizon’s proposed acquisition of MCI, these mergers have yet to be approved and, in any event, have nothing to do with the Commission’s nonimpairment thresholds, which apply to all ILECs. To the extent the Commission has any competitive concerns about the proposed mergers, these concerns should be addressed in the context of the review and approval process, and not in this proceeding.

³⁴ *Triennial Review Remand Order*, ¶ 106.

result of the competitive process but rather through regulatory gamesmanship that the rule-change proposed by the Birch Joint Petitioners and the CTC Joint Petitioners would encourage.

C. DS1 Transport Cap

The Birch Joint Petitioners, the CTC Joint Petitioners, and Cbeyond challenge the Commission's cap on unbundled DS1 transport, arguing that the cap: (1) is "irrational";³⁵ (2) "makes little sense";³⁶ and (3) is "severe and artificial."³⁷ Rhetoric aside, these arguments are fallacious.

The Commission's rule that limits a CLEC to the purchase of 10 individual circuits of unbundled DS1 transport on a particular route is based on the Commission's finding that "it is efficient for a carrier to aggregate traffic at approximately 10 DS1s."³⁸ This rule is fully supported by the evidence in the record, which established that carriers can and do use DS3s in place of multiple DS1s at a level of traffic approximated by 10 DS1s.

Although the Birch Joint Petitioners insist that "it is hard to imagine the rationale that could possibly be offered for limiting on every route in the nation the quantity of UNEs that a requesting carrier can obtain,"³⁹ the rationale is straightforward. On those routes where CLECs are impaired without unbundled access to DS3 transport, the Commission reasonably concluded that a CLEC should purchase unbundled DS3 transport when it requires more than 10 DS1 transport links. On those routes where CLECs are not impaired without unbundled access to

³⁵ Birch Joint Petition at 3.

³⁶ CTC Joint Petition at 23.

³⁷ Cbeyond Petition at 2.

³⁸ *Triennial Review Remand Order*, ¶ 128.

³⁹ Birch Joint Petition at 4.

DS3 transport, the Commission reasonably concluded that a CLEC should self-provide transport or obtain transport from another carrier when it requires more than 10 DS1 transport links.⁴⁰

Notwithstanding the Birch Joint Petitioners' claims to the contrary, the DS1 cap encourages CLECs to manage their networks efficiently so that when a sufficient amount of traffic is passed along a particular route, the CLEC should use a higher-capacity facility. The Birch Joint Petitioners' apparent view that CLECs should be allowed to purchase unlimited unbundled DS1 transport wherever and whenever they want would lead to uneconomic results. Were the Commission to allow such an outcome (which it should not), a CLEC would rarely, if ever aggregate its DS1 traffic onto DS3 transport, even though a CLEC would almost certainly do so if it were providing and using its own facilities on that same route. Furthermore, on those routes where the CLEC is not entitled to obtain DS3 transport at TELRIC rates, the CLEC should not be allowed to circumvent this result simply by ordering an unlimited number of DS1s at TELRIC rates, as the Birch Joint Petitioners and CTC Joint Petitioners seek to do.

⁴⁰ Notwithstanding the Birch Joint Petitioners' claims to the contrary, nothing in the Commission's rule indicates that the cap on DS1 unbundled transport applies only on those routes "where requesting carriers were found to be non-impaired for DS3 transport." Birch Joint Petition at 2. The rule clearly states that a "carrier may obtain a maximum of ten unbundled DS-1 dedicated transport circuits on each route where DS-1 dedicated transport is available on an unbundled basis." 47 C.F.R. § 51.319(e)(2)(ii)(B). The rule is not limited to only certain routes, except to the extent that the obligation to provide unbundled DS1 transport and thus the application of the cap extend only to routes on which the requesting carrier is impaired without unbundled access to DS1 transport. The Birch Joint Petitioners' reliance upon Paragraph 128 of the *Triennial Review Remand Order* is misplaced. Rather than excluding some routes, this paragraph merely clarifies that the DS1 transport cap applies *even on* routes where DS3 transport is not available on an unbundled basis. It would not make sense for the Commission to impose a DS1 transport cap on routes where carriers are not impaired without access to unbundled DS3 transport but not impose the cap on routes where carriers are impaired without access to unbundled DS3 transport. Since the Commission found that it is efficient for a carrier to aggregate its traffic on a route where the facility will only be available at a market rate, it surely is efficient for the carrier to aggregate its traffic if the facility is available at TELRIC.

That a CLEC may have to install multiplexers in order to utilize DS3 transport is irrelevant.⁴¹ Multiplexing multiple lower speed transmission paths (for example DS1s) into higher speed transmission paths (for example DS3s) is a common cost saving technique capitalizing on the economies of scale inherent in such an arrangement. Multiplexing is simply a cost of doing business in an efficient and cost effective manner. Requests to remove the cap for DS1 transport merely reflect the CLECs' desire to avoid such costs by having the ILECs install and operate that multiplexing equipment.

Cbeyond has offered a "cross-over" analysis that purports to demonstrate the "CLECs true costs" and to justify the establishment of a cap on DS1 transport of either 194 DS1s or 435 DS1s.⁴² However, this analysis is fraught with erroneous and unwarranted assumptions so as to render it practically useless.⁴³

For example, Cbeyond's analysis erroneously claims that the Commission ignored the costs required for equipment to "concentrate" the DS1 circuits in a collocation arrangement above the typical ratio of 28 DS1 circuits per DS3 circuit, including the monthly recurring costs

⁴¹ Birch Joint Petition at 5.

⁴² Cbeyond Petition at 4-5.

⁴³ As a preliminary matter, the Commission cannot rely upon Cbeyond's analysis because it is inconsistent with the Commission's impairment standard, which requires that impairment determinations be assessed "from the perspective of the reasonably efficient competitor" and not based upon "the individualized circumstances of the actual requesting carrier." *Triennial Review Remand Order*, ¶ 26. In paragraph 3 of his Declaration, however, Cbeyond's witness Batelaan makes clear that "Cbeyond's business customers range in size from those . . . that use from 5 to 48 phone lines." Without the use of concentration, even Cbeyond's largest business customer would need no more than two (2) DS-1s (that is, 48 phone lines spread over 2 DS-1s, each capable of handling 24 voice-grade connections)." Thus, Cbeyond's analysis is predicated upon a "particular business strategy" – one geared toward serving smaller business customers – rather than considering "all the revenue opportunities that such a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could reasonably expect to sell." *Triennial Review Remand Order*, ¶ 24.

for two (2) non-ILEC provided DS-3 interoffice transport facilities.⁴⁴ However, notwithstanding Cbeyond's claims to the contrary, CLECs do not always need to equip a collocation arrangement for two DS3 circuits. Because the topic at hand is interoffice transport, a reasonably efficient CLEC would make extensive use of Synchronous Optical Network ("SONET") ring architecture in its network, which allows traffic to be transported simultaneously in both clockwise and counter-clockwise directions such that a single cable cut or equipment failure anywhere along the ring does not result in isolation of any other two points along the ring. Thus, for interoffice transport using SONET ring technology, a single DS3 would suffice, assuming a need for no more than 28 DS1 circuits in that route. Thus, Cbeyond's cost analysis is inflated due to the assumption that a second, redundant DS3 will always be required.⁴⁵

Cbeyond's cost analysis also is inflated by overstating the costs for collocation and by erroneously including costs for alleged "delays" in collocation provisioning and in the conversion process – delays that Cbeyond's own witness acknowledges "may not be representative." Cbeyond's assumptions are factually inaccurate and inconsistent with the reasonably efficient competitor standard to which any legitimate cost analysis must adhere, as explained in greater detail in the Reply Declaration of Keith Milner.⁴⁶

Furthermore, by insisting that 435 DS1 circuits is the average "crossover" point for a CLEC that already has acquired unbundled loop and transport combinations (or 194 DS1 when there are no existing unbundled loop and transport combinations), Cbeyond's "analysis" does not even make walking around sense. Because a single DS3 circuits has a capacity of 28 DS1

⁴⁴ Batelaan Declaration, ¶ 7.

⁴⁵ Milner Reply Declaration ¶¶ 6-7.

⁴⁶ *Id.* ¶¶ 8-14.

circuits, to accept Cbeyond's analysis, the Commission would have to assume that it is more economical for a reasonably efficient carrier to acquire 435 individual DS1 rather than 16 DS3 circuits. To state this assumption is to refute it, as carriers can and do deploy DS3 facilities well before reaching the 435 (or 194) DS1 "crossover point" proposed by Cbeyond.⁴⁷

Both the Birch Joint Petitioners and the CTC Joint Petitioners insist that the cap on DS1 transport should not apply to EELs because otherwise, "it would substantially undermine the availability of non-multiplexed DS1 EELs."⁴⁸ Again, this argument ignores that the Commission's impairment standard requires consideration of a "reasonably efficient competitor" and not a carrier's "particular business strategy," such as a CLEC electing to use EELs.⁴⁹ If it is more economic for a reasonably efficient competitor to use DS3 transport, then DS3 transport should be used, even for the transport segment of an EEL arrangement.

D. EEL Eligibility Criteria

The Birch Joint Petitioners and the CTC Joint Petitioners also ask the Commission to reconsider the criteria that restrict the circumstances under which CLECs may convert special access to EELs. They argue that such reconsideration is warranted because: (1) the AT&T/SBC and MCI/Verizon mergers obviate the need to restrict special access conversions; (2) the *Triennial Review Remand Order* allegedly "removed the need for the EEL eligibility criteria"; and (3) the EEL eligibility criteria allegedly "harm" requesting carriers because they "present significant compliance issues."⁵⁰ These arguments are unpersuasive.

⁴⁷ *Id.* ¶¶ 15-17.

⁴⁸ Birch Joint Petition at 5; *see also* CTC Joint Petition at 23.

⁴⁹ *Triennial Review Remand Order*, ¶ 25.

⁵⁰ Birch Joint Petition at 7-10; CTC Petition at 8-10.

As to the pending mergers, which have yet to be approved, they provide no basis for altering the Commission's determination that unbundling is unnecessary in markets where there is "robust competition" or that long distance services is such a market.⁵¹ While complaining about the inability of CLECs to "match the efficiencies and economies of scale and scope that the merger partners claim will be achieved by the mergers,"⁵² the CTC Joint Petitioners overlook that the standard for assessing impairment requires that "inferences regarding the potential for deployment are based on the characteristics of markets where actual deployment has occurred."⁵³ Here, actual deployment has occurred in the long distance market, which is "highly competitive" and a market "where competition has evolved without access to UNEs."⁵⁴ These characteristics will not change regardless of what happens to an individual competitor such as AT&T or MCI.

Furthermore, in expressing the belief that the long distance services market is competitive, the D.C. Circuit noted that CLECs were unable to point to any "evidence suggesting that they are impaired with respect to the provision of long distance services."⁵⁵ The CLECs' inability to do so was not surprising given that competitors in the long distance services market "purchase special access services from ILECs, rather than leasing the necessary facilities at UNE

⁵¹ *Triennial Review Remand Order*, ¶¶ 30-34 (quoting *USTA II*, 359 F.3d at 576, 592) (noting the D.C. Circuit's holding that "robust competition in the relevant markets [of mobile wireless and long distance services] belies any suggestion that the lack of unbundling makes entry uneconomic").

⁵² CTC Joint Petition at 8.

⁵³ *Triennial Review Remand Order*, ¶ 28.

⁵⁴ *Id.* ¶ 36 (quoting *Ninth CMRS Competition Report*, FCC 04-216, para. 195).

⁵⁵ *USTA II*, 359 F.3d at 592; *see also id.* at 576.

rates.”⁵⁶ Special access will continue to be available whether or not the mergers are approved, and again, the fact that AT&T and MCI may eventually be acquired does not create impairment when none previously existed.

The CTC Joint Petitioners’ argument that the mergers will eliminate or substantially eliminate “the concern about special access to UNE conversions” is nonsense.⁵⁷ According to the Commission, the “concern” about special access services being converted to unbundled network elements is twofold: first, the threat to “an important source of funding for universal service”,⁵⁸ and, second, “circumvention” of the Commission’s unbundling rules by carriers that are not impaired without access to unbundled network elements.⁵⁹ The threat to universal service and the circumvention of the Commission’s unbundling rules impact every ILEC and every carrier offering long distance or wireless services, and their impact will not magically disappear in the event the SBC/AT&T and Verizon/MCI mergers are approved.

⁵⁶ *Id.* at 592. The D.C. Circuit’s conclusions concerning the competitiveness of the long distance market and the lack of impairment by long distance carriers without access to unbundled network elements is fatal to the CTC Joint Petitioners’ assertion that the Commission’s “determination that UNEs may not be used exclusively for long distance services ... is inconsistent with *USTA II*.” CTC Joint Petition at 10. As the Commission correctly observed, the application of the “at a minimum” language in Section 251(c)(3) to prohibit access to unbundled network elements in a market where competition has evolved without such access “is the most faithful implementation of *USTA II*.” *Triennial Review Remand Order*, ¶ 37. The lesson of *USTA II*, which the CTC Joint Petitioners apparent did not learn, is that mandatory unbundling has costs which must be taken into account in a lawful impairment analysis.

⁵⁷ CTC Joint Petition at 9.

⁵⁸ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587, 9592, ¶ 7 (2000).

⁵⁹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al., Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17351, ¶ 591 (2003) (“*Triennial Review Order*”) (subsequent history omitted).

Equally nonsensical is the argument that the *Triennial Review Remand Order* “removed” the need for the EEL eligibility criteria.⁶⁰ Although the Commission revisited the “qualifying services” approach to impairment in response to *USTA II*, its rationale for establishing the EEL eligibility criteria remains equally valid today. These criteria ensure that carriers not impaired without access to unbundled network elements – such as carriers providing exclusively long distance service – do not obtain such access by being allowed to convert special access to EELs.⁶¹

While challenging the EEL eligibility criteria, the Birch Joint Petitioners concede that they prevent long distance carriers from “obtain[ing] favorable rates or otherwise engage[ing] in regulatory arbitrage.”⁶² This was the Commission’s intent in establishing the EEL eligibility criteria, as the *Triennial Review Order* makes clear. As the Commission explained:

[T]he criteria afford high-capacity EEL access to an integrated communications provider that sells a bundle of local voice, long-distance voice, and Internet access to small businesses, because such a provider is competing against the incumbent LEC’s local voice offerings. *In contrast, a provider of exclusively long-distance voice or data services that seeks to use high-capacity UNE facilities without providing any local services would fall short of one of the tests, if not all.*⁶³

⁶⁰ Birch Joint Petition at 7.

⁶¹ If anything, the Commission’s EEL eligibility criteria do not go far enough. Because carriers other than those providing exclusively long distance and wireless services make considerable use of special access in competing in the telecommunications market and thus are not impaired without access to unbundled network elements, the Commission erred in not prohibiting carriers using special access from converting those circuits to unbundled network elements. Furthermore, the Commission’s current EEL eligibility criteria do not adequately prevent carriers that are not impaired without access to unbundled elements from obtaining such access through the conversion process.

⁶² Birch Joint Petition at 8 (quoting *Triennial Review Order*, ¶ 591).

⁶³ *Triennial Review Order*, 18 FCC Rcd at 17354-55, ¶ 598 (emphasis added) (citations omitted).

Despite the change in the Commission's approach to ensuring that long distance carriers do not have access to unbundled network elements, the Commission's recognition of "the harms associated with gaming by long-distance providers" has remained constant.⁶⁴ The EEL eligibility criteria were designed to prevent such gaming, and they are as essential today as when they were first adopted.

According to the Birch Joint Petitioners, the EEL eligibility criteria are "superfluous" because "the Commission has now prohibited directly the use of any UNE to provide exclusively long distance service."⁶⁵ However, simply because the Commission has a rule prohibiting particular carriers from using UNEs does not obviate the need for a test to determine whether that rule is being followed. The Commission's EEL eligibility criteria constitute that test, without which the ILECs would be left at the mercy of carriers providing exclusively long distance services that seek to game the system by converting special access to EELs "in order to obtain favorable rates or to otherwise engage in regulatory arbitrage."⁶⁶

That carriers are willing to engage in such "regulatory arbitrage" is illustrated by NuVox, one of the parties to the Birch Joint Petition. For more than three years, BellSouth has sought to audit EELs that NuVox converted from special access based upon its certification that it was the exclusive provider of local exchange service to the customers in question. Although NuVox

⁶⁴ *Id.* at 17355, ¶ 599; *see also* 17356-57, ¶¶ 604-05 (explaining that the collocation EEL eligibility requirement was adopted because collocation "is traditionally not used by interexchange carriers" and necessitates that the "collocation must be within the incumbent LEC network, and cannot be at an interexchange carrier POP or ISP POP"); *see also Triennial Review Remand Order*, ¶ 230 (declining to adopt an across-the-board prohibition on special access conversions, in part, because "a significant percentage of the special access channel terminations that the BOCs sell to carriers are provided to interexchange carriers . . . and are therefore largely shielded already from potential conversion to UNEs") (citations omitted).

⁶⁵ Birch Joint Petition at 9.

⁶⁶ *Triennial Review Order*, 18 FCC Rcd at 17351, ¶ 591.

sought to delay this process at every opportunity, the audit in Georgia is nearly complete, and the auditor has been attempting to finalize a written report of its review of 44 circuits that NuVox converted in Georgia. The preliminary results of that audit, as summarily reported verbally by the auditor, indicate that nearly 60% of NuVox's circuits in the audit are either out of compliance or data was not available to demonstrate with certifiable confidence that the circuits were ever in compliance. The auditor further advised that NuVox's internal control and record-keeping practices (which are regional, not Georgia-specific) provided a poor to non-existent "control" structure that would not have permitted NuVox to make *any* of its certifications with the requisite confidence. As this one example illustrates, it is not enough for the Commission simply to have a rule without having some means to verify compliance with that rule, as the Birch Joint Petitioners suggest.⁶⁷

That ensuring compliance imposes "costs" does not warrant elimination of the Commission's EEL eligibility criteria, notwithstanding the Birch Joint Petitioners' claims to the contrary.⁶⁸ First, compliance is a necessary cost of business, particularly in an industry as heavily regulated as telecommunications. Second, it is impossible to know with any certainty what "costs" the Commission's current EEL eligibility criteria will entail because, as the Birch Joint Petitioners concede, those criteria have yet to be incorporated into many interconnection agreements.⁶⁹ Thus, the Birch Joint Petitioners' claim that compliance with the current EEL eligibility criteria "will carry significant burdens" is speculative at best.⁷⁰

⁶⁷ Hendrix Reply Declaration ¶¶ 4-9.

⁶⁸ Birch Joint Petition at 10.

⁶⁹ Birch Joint Petition at 9 (noting that the Birch Joint Petitioners "have not yet agreed on contractual revisions implementing the architectural restrictions"). Some of the Birch Joint Petitioners (who are not identified) claim that they "already have expended considerable

E. Transition Plan Issues

The Commission should dismiss the PACE petition outright. The PACE petition seeks reconsideration of the twelve-month transition plan established in the *Triennial Review Remand Order* for unbundled local circuit switching, proposing instead the three-year transition plan for switching originally adopted in the vacated *Triennial Review Order* because “the ILECs failed to appeal or seek reconsideration of the transition plan adopted in the *Triennial Review Order*, presumably in recognition of its reasonableness.”⁷¹ Not only is this statement wrong,⁷² but the

resources in audits initiated by incumbent LECs,” which, they assert, “have not identified any use of EELs for exclusively long distance services.” Birch Joint Petition at 10. However, this claim is untrue as it relates to BellSouth. Because the Birch Joint Petitioners have yet to agree on contract terms with BellSouth to implement the Commission’s current EEL eligibility criteria, none of these carriers has been audited to determine whether they are using EELs “for exclusively long distance services.”

⁷⁰ In addition to being speculative, many of the costs incurred to date in connection with EEL audits are completely unrelated to the audit itself but rather are associated with efforts to prevent the audit from ever taking place. NuVox, for example, has refused to allow BellSouth to conduct audits of its EEL conversions, even though the parties’ interconnection agreement plainly gives BellSouth the right to do so. As a result, BellSouth was forced to initiate actions in Florida, Kentucky, North Carolina, South Carolina, Tennessee, and Georgia in order to vindicate its audit rights. After the Georgia Commission allowed BellSouth to proceed with an audit of 44 of NuVox’s circuits, BellSouth had to obtain a commission order directing NuVox to comply by providing the auditor with the management assertions necessary for the audit report to be completed, which NuVox had refused to provide. In North Carolina, after BellSouth obtained an order from the state commission directing that the audit proceed, NuVox went to federal court to enjoin the audit. Likewise, in Kentucky, NuVox has refused to comply with an order of the Kentucky Public Service Commission directing an audit of certain EEL circuits, even though the commission’s order has not been stayed and the docket has been closed. NuVox has gone so far as to file a lawsuit in its home state of South Carolina against the auditor conducting the Georgia audit in a last-ditch effort to prevent release of the written audit report. Hendrix Reply Declaration ¶¶ 6-13. These “costs” associated with NuVox’s actions could readily have been avoided had NuVox simply consented to the audit as agreed in the parties’ interconnection agreement; such “costs” hardly constitute grounds for elimination of the current EEL eligibility criteria.

⁷¹ PACE Petition at 9.

⁷² The Commission’s legal error in perpetuating an unlawful unbundling regime for local circuit switching in the *Triennial Review Order*, including a three year “transition plan” that effectively required ILECs to provide unbundled switching far longer than permitted by statute, was so egregious that BellSouth and other ILECs sought the extraordinary remedy of mandamus from the D.C. Circuit seeking vacature of the Commission’s local circuit switch unbundling

PACE petition disingenuously ignores the intervening August 20, 2004 *Interim Order and NPRM*, which the Commission adopted in response to the D.C. Circuit's vacatur of the *Triennial Review Order*,⁷³ and which established the record upon which the Commission relied in establishing the transition plan adopted in the *Triennial Review Remand Order*.⁷⁴

As BellSouth pointed out in its comments, the consecutive six month “Interim Period” and “Transition Period” terms established in the *Interim Order and NPRM* represented the “outer limits of any transition plan that the Commission can or should adopt,” and in fact urged the Commission to “end the ruinous and economically distortive UNE regime immediately” in the absence of any impairment finding.⁷⁵ Other commenters also noted that, after eight years of unlawful unbundling, it was imperative for the Commission to adopt procedures to facilitate a rapid transition away from the maximum unbundling regime that had been repudiated three times by higher courts.⁷⁶ Thus, PACE’s suggestion that BellSouth and the other ILECs have recognized the “reasonableness of the transition plan adopted in the *Triennial Review Order* is inaccurate.

rules. *United States Telecom Ass’n v. FCC*, Nos. 00-1012, 00-1015, *et al.*, Qwest Communications International Inc., United States Telecom Association, BellSouth Corporation and SBC Communications Inc., Petition for a Writ of Mandamus to Enforce the Mandate of this Court, at 13, 15 (Aug. 23, 2003). Of course, the D.C. Circuit ultimately vacated those rules, effectively rejecting the Commission's three year transition plan that PACE now endorses.

⁷³ *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, *Order and Notice of Proposed Rulemaking*, 19 FCC Rcd 16783 (2004) (“*Interim Order and NPRM*”).

⁷⁴ *Triennial Review Remand Order*, ¶ 19 (“our decision today [in the *Triennial Review Remand Order*] is based on comments filed in response to this NPRM and focuses on those issues that were remanded to us”).

⁷⁵ BellSouth Comments at 82-83 (filed Oct. 4, 2004).

⁷⁶ BellSouth Reply Comments at 75 (filed Oct. 19, 2004), citing Qwest Comments at 89-92, Verizon Comments at 133, SBC Comments at 118-20.

The PACE petition utterly falls short of the standards for reconsideration. Not only does the petition fail to demonstrate any material legal error, it merely reiterates facts previously raised and considered without addressing the relevant facts established in the record generated by the *Interim Order and NPRM*, which resulted in the ultimate transition plan for switching adopted in the *Triennial Review Remand Order*.

Finally, PACE requests that the Commission “clarify” that ILEC unbundled local switching obligations that remain in place during the transition period established by the *Triennial Review Remand Order* are neither account specific nor location specific.⁷⁷ PACE seeks the ability to add additional lines to existing UNE-P accounts and to transfer UNE-P service of an existing customer from one location to another, as well as to add or remove features to existing accounts until the transition is complete.⁷⁸ Instead of weaning carriers away from UNE-P arrangements and toward alternative methods of competition, as the Commission plainly intended, PACE would have the Commission *expand* the activities that the Commission has found to be unlawful and contrary to the purposes of the 1996 Act. PACE’s arguments also are wrong and have been rejected by the courts and various state commissions.

The Commission has made clear that during the transition period CLECs may not add new switching UNEs or new UNE-P arrangements nor may they add new customers using the UNE-P. In particular, the Commission’s transition plan “does not permit competitive LECs to add *new UNE-P arrangements* using unbundled access to local circuit switching pursuant to

⁷⁷ PACE Petition at 10-12.

⁷⁸ *Id.* at 10.

section 251(c)(3).”⁷⁹ The Commission’s rules likewise provide that, without exception, “[r]equesting carriers may not obtain new local switching as an unbundled network element.”⁸⁰ When a CLEC orders a new UNE-P line to serve an existing customer, it is ordering new local switching (and a “new UNE-P arrangement”), which is prohibited under the *Triennial Review Remand Order*, as several federal courts recently have held.⁸¹

The PACE Petition conveniently overlooks these federal district court cases. In any event, as the Commission stressed, the purpose of its transition plan is to give the CLECs time to move away from unlawful unbundling.⁸² According to PACE’s vision, CLECs would be free to add new UNE-P arrangements for existing customers right up until 11 months and 29 days after the *Triennial Review Remand Order* went into effect, even though PACE members and all other CLECs are supposed to be using the 12-month transition period to “perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating

⁷⁹ *Triennial Review Remand Order*, ¶ 227 (emphasis added); see also *id.* ¶ 5 (“This transition plan applies only to the embedded base, and does not permit competitive LECs to add new switching UNEs”) (emphasis added).

⁸⁰ 47 C.F.R. § 51.319(d)(2)(iii).

⁸¹ See *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm’n*, No. 3:05CV173LN, 2005 U.S. Dist. LEXIS 8498, at *9, *26 (S.D. Miss. Apr. 13, 2005) (stating that “the FCC’s intent in the *Triennial Review Remand Order* is an unqualified elimination of new UNE-P orders as of March 11, 2005, irrespective of change of law provisions in the parties’ interconnection agreements” and precluding, without reservation, the Mississippi PSC from “enforcing that part of its order requiring BellSouth to continue to process new orders for UNE-P switching”); *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., LLC*, No. 1:05-CV-0674-CC, 2005 U.S. Dist. LEXIS 9394, at *7 (N.D. Ga. Apr. 5, 2005) (“The FCC’s decision to create a limited transition that applied only to the *embedded base* and required higher payments *even for those existing facilities* cannot be squared with the PSC’s conclusion that the FCC permitted an indefinite transition during which competitive LECs could order new facilities and did not specify a rate that competitors would pay to serve them.”) (emphasis added).

⁸² *Triennial Review Remand Order*, ¶ 227.

alternative access arrangements, and performing loop cutovers or other conversions.”⁸³ PACE’s petition, if granted, would only serve to frustrate the Commission’s goal of moving away from the UNE-P and encouraging carriers to negotiate alternative, commercial arrangements. A CLEC end user’s desire to move to a new location or to add an additional line presents a perfect opportunity for the CLEC to transition that particular end user to an alternative arrangement, as the Commission anticipated would occur during the transition period. PACE’s petition not only ignores that this opportunity exists, but in fact reflects its members’ intent to maintain the illegal regime as long as possible, ignoring its obligations to perform “an orderly transition.”

PACE’s request also ignores decisions from state commissions that have declined to require ILECs to continue providing new UNE arrangements for existing customers. For instance, the California Public Service Commission (“PUC”) stated, “we note that the FCC has clearly stated that ‘Incumbent LECs have *no* obligation to provide competitive LECs with unbundled access to mass market local circuit switching.’”⁸⁴ Moreover, the California PUC noted, “it is clear that the FCC desires an end to the UNE-P, for it states ‘. . . we exercise our “at a minimum” authority and conclude that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, *justify a nationwide bar on such unbundling.*’”⁸⁵ Especially persuasive to the California PUC was the

⁸³ *Id.*

⁸⁴ Assigned Commissioner’s Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders, *Petition of Verizon California Inc.*, App. No. 04-03-014 (Cal. PUC Mar. 11, 2005), available at http://www.cpuc.ca.gov/word_pdf/RULINGS/44496.pdf, at 7 (quoting *Triennial Review Remand Order*, ¶ 5) (emphasis added by California commission). On March 17, 2005, the California Public Utility Commission voted to adopt the Assigned Commissioner’s ruling in its entirety.

⁸⁵ *Id.* (quoting *Triennial Review Remand Order*, ¶ 204) (emphasis added by California commission)).

fact that, in adopting the transition plan requirement, the Commission referred to “the embedded base of unbundled local circuit switching” and not the “*embedded base of customers*.”⁸⁶ Accordingly, the California PUC held that “since there is no obligation and a national bar on the provision of UNE-P, we conclude that ‘new arrangements’ refers to any new UNE-P arrangement, whether to provide service for new customers or to provide a new arrangement to existing services. The [*Triennial Review Remand Order*] clearly bars both.”⁸⁷

Moreover, because federal law defines switching to include line-side facilities, trunk side facilities, and all the features, functionalities and capabilities of the local switch,⁸⁸ when a requesting carrier purchases the unbundled local switching element, it obtains all switching features in a single element on a per-line basis.⁸⁹ Thus, because unbundled switching includes the port and functionalities on a per-line basis, the prohibition against new adds also applies to lines. As a result, t CLECs may not add new UNE-P lines to an existing customer account, because to do so would result in a new UNE-P line. Nor may CLECs move an existing UNE-P line from an existing customer location to a different location, because that would result in a new UNE-P line at the different location.⁹⁰ Because the Commission's rules are already clear, there is nothing to clarify, and the PACE Petition should be denied.

⁸⁶ *Id.* (emphasis in original).

⁸⁷ *Id.* On the theory that the parties needed “additional time to negotiate the applicable ICA amendments necessary to transition and to continue to serve the CLECs embedded customer base,” the California PUC did ask SBC to “continue processing CLEC orders for the embedded base of customers, including additional UNE-Ps, until no later than May 1, 2005.” *Id.* at 9.

⁸⁸ *Triennial Review Remand Order*, ¶ 200.

⁸⁹ *Triennial Review Order*, 18 FCC Rcd at 17246, ¶ 433; *Triennial Review Remand Order* at n.529.

⁹⁰ Although new lines may not be added or existing locations moved, BellSouth's embedded UNE switching customers are permitted to add features to existing lines.

F. CMRS Issues

In seeking reconsideration of the Commission's decision that carriers offering exclusively wireless services are not entitled to unbundled network elements, T-Mobile repeats the arguments it made in its petition for reconsideration of the *Triennial Review Order*.⁹¹ T-Mobile subsequently made the same arguments during the pleading cycle established by the *Interim Order and NPRM*.⁹² Given that the "public interest in expeditious resolution of Commission proceedings is done a disservice if the Commission readdresses arguments and issues it has already considered,"⁹³ the Commission should dismiss T-Mobile's instant petition as duplicative and procedurally invalid, since it raises no supporting facts or arguments which not been previously presented.⁹⁴

With respect to the merits of its reconsideration petition, T-Mobile does not even allege that it is impaired under the Commission's new impairment standard without access to unbundled network elements. Nor does it make any attempt to show impairment, which is not surprising given that the wireless industry in general, and T-Mobile in particular, continue to thrive without unbundled access.

⁹¹ T-Mobile USA, Inc. Petition for Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147 (filed Oct. 2, 2003) ("T-Mobile 2003 Petition").

⁹² Comments of T-Mobile USA, Inc., WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 4, 2004); Reply Comments of T-Mobile USA, Inc., WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 19, 2004).

⁹³ *New Broadcasting Stations*, 4 FCC Rcd at 2277, ¶ 7 (also noting that "[i]t is well established that reconsideration will not be granted merely for the purpose of again debating matters on which the agency has once deliberated and spoken").

⁹⁴ 47 C.F.R. § 1.429.

At the time of the *Ninth CMRS Report*, there were already roughly the same number of wireless subscribers (161 million) as wireline access lines (185 million), thanks to a double digit increase in wireless subscribership since the previous report (13%), and the industry enjoyed robust growth in jobs (7%), capital investment (15%), and increased average monthly minutes of use (19%) during the same period of time.⁹⁵ Indeed, just two weeks before T-Mobile filed its most recent petition, CTIA-The Wireless Association™ released its semi-annual industry survey that estimated that wireless subscribership had grown by an additional 13.7% in 2004 (the first year, CTIA’s press release crowed, that Americans “used more than 1 trillion wireless minutes”).⁹⁶ CTIA also reported that the total number of wireless subscribers in America now exceeds 180 million,⁹⁷ that the real price of a wireless minute had fallen by 81% in the ten-year period ending in 2004, and that the wireless industry’s commitment to network expansion and capital investment in 2004 reached nearly \$28 billion, a figure that is “*more than the first ten years of wireless investment combined.*”⁹⁸

And only three weeks before it filed its current petition, T-Mobile publicly reported that it added more than 1 million new customers in the 4th quarter of 2004 as well as had \$2.5 billion in Operating Income Before Depreciation and Amortization (“OIBDA”) in the full year 2004.⁹⁹ “This has been a highly successful, award winning year for T-Mobile USA,” said Robert Dotson,

⁹⁵ *Ninth CMRS Competition Report*, 19 FCC Rcd at 20691, 20700, Tables 1 and 9.

⁹⁶ *It’s a Wireless World...Industry Metrics Show Fantastic Growth*, Press Release (March 14, 2004) available at www.ctia.org/news_media/press/body.cfm?record_id=1508.

⁹⁷ According to CTIA, that number is 180,464,003. *Id.*

⁹⁸ *Id.*

⁹⁹ T-Mobile USA Reports Fourth Quarter and Full Year 2004 Results, Press Release (Bellevue, Mar. 3, 2005) available at <http://www.T-Mobile.com>.

President and CEO of T-Mobile USA, in announcing the acquisition of “4.2 million net new customers” in 2004 and thereby increasing T-Mobile’s “customer base by 32% since the end of 2003.”¹⁰⁰ This good news got even better, as T-Mobile subsequently announced that it gained nearly a million new customers in the first quarter of 2005 and had \$826 million in OIBDA for the same period. “T-Mobile’s focus on delivering exceptional value to consumers has driven another stellar quarter of growth,” said CEO Dotson. “These operating results [increase in customer base to over 18 million, significant reduction in churn during first quarter 2005],” continued Dotson, “have been accompanied by a full seven percentage point improvement in our OIBDA margin over the first quarter of 2004.” The company could not resist emphasizing this success and the bright prospects of the domestic market:

“We are very pleased with T-Mobile USA’s first quarter of 2005 results which prove the continuing growth potential of the US wireless market”, said Rene Obermann, CEO of T-Mobile International and Member of the Board of Management, Deutsche Telekom. “With net adds approaching one million and OIBDA of more than \$800 million, T-Mobile USA delivered once again.”¹⁰¹

It is, therefore, frivolous for T-Mobile to rehash arguments that it needs unbundled access to ILEC facilities in order to “offer its services at more attractive prices,” to “be able to invest in facility and other upgrades to improve service quality”¹⁰² and to argue by implication (but not directly) that its business self-interest rises to the legal standard of “impairment.” T-Mobile’s financial success, its positive growth, and its continuing investment in its network, are not the actions of an impaired firm, which is fatal to its petition for reconsideration. T-Mobile’s attempt

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² T-Mobile 2005 Petition at 5.

to benefit its bottom line must not be confused with a genuine economic or competitive disadvantage.¹⁰³

T-Mobile maintains that when the Commission ruled that CMRS carriers may not obtain access to UNEs “for the exclusive provision of wireless services” it did not “mean that CMRS carriers are completely barred from obtaining access to UNEs.”¹⁰⁴ “Specifically,” T-Mobile contends that the Commission should clarify “that incumbent LECs are required to provide CMRS carriers unbundled access to the transmission links that connect a cell site to a central office and to interoffice transport connecting LEC central offices.”¹⁰⁵ T-Mobile is wrong. After undertaking its Section 251(d)(2) analysis on remand, the Commission lawfully determined that CMRS providers are not impaired without access to unbundled network elements and barred CMRS providers from all such access in conformity with the instructions of the D.C. Circuit, the Commission’s own precedent, and the record established in this proceeding.¹⁰⁶ In light of this determination, it was and is unnecessary for the Commission to decide whether facilities linking wireless and incumbent LEC networks constitute “entrance facilities.”¹⁰⁷

¹⁰³ Reply Declaration of Aniruddha Banerjee, Ph.D., NERA Economic Consulting, on behalf of BellSouth Corporation (Oct. 19, 2004), Attachment 2 to BellSouth Reply Comments, WC Docket 04-313 & CC Docket No. 01-338 (filed Oct. 19, 2004) at 57-58, ¶ 116. Dr. Bannerjee, at 45-60 completely refuted the claims of “impairment” made by T-Mobile in its Oct. 4, 2004 Comments in this docket.

¹⁰⁴ T-Mobile 2005 Petition at 2.

¹⁰⁵ *Id.* at 2-3.

¹⁰⁶ *Triennial Review Remand Order*, ¶¶ 34-40.

¹⁰⁷ *Id.* n.377 (“Because we now conclude that wireless carriers may not obtain UNEs solely to provide mobile wireless service, we find it unnecessary to reconsider whether facilities linking wireless and incumbent LEC networks are properly considered entrance facilities”) (relying on analysis in ¶ 366 of the *Triennial Review Order*).

T-Mobile alleges that it can “plausibly” argue that the Commission “never reached the issue” of whether CMRS carriers may obtain access to UNEs in order to “compete as a replacement for wireline service,” in order to provide “landline replacement service,” and in order to provide “telephone service to mass market consumers.”¹⁰⁸ There is nothing plausible about T-Mobile’s argument. The argument is, at heart, the same argument that T-Mobile made in its 2003 Petition and in its comments in response to the *Interim Order and NPRM* and which was rendered legally irrelevant by the Commission’s impairment analysis on remand from the D.C. Circuit.¹⁰⁹ Furthermore, the argument is completely at odds with, and refuted by, the Commission’s precedent and the record established in this and other proceedings.

In the *Triennial Review Order*, the Commission interpreted the term “telecommunications service,” as used in Section 251(c)(3), and the term “services,” as used in Section 251(d)(2), as applying only to “those services that compete directly against traditional incumbent LEC services.”¹¹⁰ The Commission then found that it would be reasonable to interpret the statute so that its impairment inquiry was centered on those telecommunications services that competitors provide in direct competition with the incumbent LEC’s core services (and which the Commission called “qualifying services”).¹¹¹ In addressing wireless access to UNEs, the Commission found that because they “compete against telecommunications services

¹⁰⁸ T-Mobile 2005 Petition at 2, n.5 & 5.

¹⁰⁹ *Triennial Review Remand Order* at n.99 (dismissing T-Mobile 2003 Petition) and n.377 (deeming it unnecessary in light of its new 251(d)(2) analysis, to reconsider whether facilities linking wireless and incumbent LEC networks should be subject to UNE access). *See also New Broadcasting Stations*, 4 FCC Rcd at 2277, ¶ 7 (“[i]t is well established that reconsideration will not be granted merely for the purpose of again debating matters on which the agency has once deliberated and spoken”).

¹¹⁰ *Triennial Review Order*, 18 FCC Rcd at 17071, ¶ 141.

¹¹¹ *Id.* at 17069-70, ¶ 139.

that have been traditionally within the exclusive or primary domain of incumbent LECs services, CMRS providers also qualify for access to UNEs, subject to the limitations described herein.”¹¹²

Thus, in the *Triennial Review Order*, the Commission held that carriers could have access to UNEs in order to provide wireless services in competition with incumbent LEC core services.¹¹³ Nevertheless, in the same order, the Commission concluded that competing carriers, generally, should not have unbundled access to the transmission links connecting their networks with incumbent LEC networks (“entrance facilities”), and that CMRS carriers, in particular, were therefore ineligible for UNE access to the links connecting CMRS base stations and incumbent LEC networks.¹¹⁴

In 2003, T-Mobile urged the Commission, as it does now, to permit unbundled access to the links connecting CMRS providers’ base stations to incumbent LEC central offices.¹¹⁵ In 2003 T-Mobile urged the Commission, as it does today, to “redefine” these inter-network transmission links as “loops,” and to revise its service eligibility requirements accordingly.¹¹⁶ In

¹¹² *Id.* at 17070-71, ¶ 140 (footnotes omitted).

¹¹³ *Id.* See, e.g., n.468 (citing with approval, the observation of Progress Telecom that “[n]othing in the Communications Act . . . even remotely suggests that a requesting carrier must use the standalone UNEs for the provision of *wireline* services in order to obtain them from the incumbent LECs.”) (emphasis in original).

¹¹⁴ *Triennial Review Order*, 18 FCC Rcd at 17026, ¶ 368 (dismissing, as moot, a then-pending petition for declaratory ruling filed by wireless carriers seeking a declaration that CMRS carriers have UNE access to unbundled transport facilities from an incumbent LEC wire center to a CMRS base station or mobile switching center). *Id.* at nn.1124-25. The Commission, however, stated that all telecommunications carriers, including CMRS carriers, would have the ability to access transport facilities *within* the incumbent LEC’s network pursuant to section 251(c)(3). *Id.* ¶ 368.

¹¹⁵ *Cf.* T-Mobile 2003 Petition at 7-13 with T-Mobile Petition at 4-9.

¹¹⁶ *Cf.* T-Mobile 2003 PFR at 9-13 with T-Mobile 2005 PFR at n.22. (base station to CO links as “loops”) and *cf.* T-Mobile 2003 PFR at 13-17 with T-Mobile 2005 PFR at 9-10 (requesting corollary reconsideration of service eligibility rules). T-Mobile’s alternative suggestion to “reclassify” these entrance facilities as “interoffice transport,” *id.*, is unavailing in

both the T-Mobile 2003 Petition and the pending petition for reconsideration, T-Mobile argues that it needs access to these links as unbundled network elements in order to provide CRMS in competition with incumbent LEC mass-market voice telephony.¹¹⁷ These arguments are nothing new, as T-Mobile has made them before.¹¹⁸

However, such arguments are foreclosed by the *Triennial Review Remand Order*, which formally and finally rejected the requests of T-Mobile and other wireless petitioners for UNE access.¹¹⁹ It did so after undertaking an entirely new impairment analysis under Section 251(d)(2), in light of the D.C. Circuit's vacatur of the *Triennial Review Order*'s "qualifying services" condition of UNE access,¹²⁰ and the D.C. Circuit Court's clear holding that UNEs should not be made available in markets where the evidence indicates that: (1) carriers' reliance on special access has not posed a barrier that makes entry uneconomic; and (2) competition has occurred without mandatory unbundling.¹²¹

light of the *Remand Order*'s lawful 251(d)(2) analysis, *Triennial Review Remand Order*, ¶¶ 34-37, and is estopped by T-Mobile's own pleading concession that it "does not seek reconsideration of the FCC's decision that incumbent LECs are not required to provide entrance facilities as UNEs." T-Mobile Petition at 5, n.11.

¹¹⁷ Cf. T-Mobile 2003 Petition at 3-7 with T-Mobile Petition at 1-9.

¹¹⁸ See, e.g., T-Mobile Oct. 4, 2004 Comments, WC Docket No. 04-313, at 4-6 (arguing that T-Mobile needs UNE access to base station-to-CO links in order to provide CMRS as an alternative to local wireline service), 7-14 (arguing that T-Mobile is impaired by the costs of its base station to CO links), and 23-24 (urging Commission to modify service eligibility rules). These arguments, like the T-Mobile 2003 PFR, were rendered moot by the Commission's conclusion that wireless service providers may not have access to UNEs. See, e.g., *Triennial Review Remand Order* at n.377 ("Because we now conclude that wireless carriers may not obtain UNEs solely to provide mobile wireless service, we find it unnecessary to reconsider whether facilities linking wireless and incumbent LEC networks are properly considered entrance facilities").

¹¹⁹ *Triennial Review Remand Order* at n.99 (dismissing all wireless carrier petitions for reconsideration of the *Triennial Review Order*, including the T-Mobile 2003 PFR, as moot).

¹²⁰ *USTA II*, 359 F3d at 591-92.

¹²¹ *Id.* at 575, 576.

The only reason that the Commission had previously found that CMRS providers “qualify for access to UNEs” was because CMRS “are used to compete against telecommunications services that have been traditionally within the exclusive or primary domain of incumbent LECs services” and, therefore, CMRS are a “qualifying service.”¹²² The qualifying service rules set forth in the *Triennial Review Order* maintained that carriers were barred, as a statutory matter, from using UNEs to provide exclusively those telecommunications services that do not compete with “core” incumbent LEC offerings.¹²³ The Commission, on remand, expressly abandoned the “qualifying services” approach.¹²⁴

In its current petition, T-Mobile argues that it should be allowed access to UNEs in order to provide CMRS as a landline replacement service in competition with incumbent LECs, without regard to any impairment analysis or other factors that the Commission must consider under Section 251(d)(2). While this argument is premised upon the “qualifying service” approach articulated by the Commission in the *Triennial Review Order*, the Commission’s reasoning underlying this approach was vacated in part and questioned in part by the D.C. Circuit in *USTA II*, and ultimately abandoned by the Commission on remand from the court. T-Mobile, therefore, cannot credibly argue with any good faith that the Commission “did not reach” the issue of whether “CMRS carriers may obtain access to UNEs to compete to provide landline replacement service.”¹²⁵

¹²² *Triennial Review Order*, 18 FCC Rcd at 17070-71, ¶¶ 140, 141.

¹²³ *Triennial Review Remand Order*, ¶ 34.

¹²⁴ *Id.* By “mobile wireless service,” the Commission refers to “all mobile wireless telecommunications services, including commercial mobile radio service (CMRS).” *Id.* at n.97.

¹²⁵ T-Mobile 2005 Petition at 2-3, n.5.

In the *Triennial Review Remand Order* the Commission made clear that CMRS providers may not obtain access to UNEs to provide CMRS regardless of how those services are marketed or ultimately used in the market place. On remand the Commission expressly abandoned the “qualifying services” rule.¹²⁶ Thus, in accordance with the *USTA II* court’s instructions,¹²⁷ the Commission subjected all telecommunications services to the Section 252(d)(2) unbundling inquiry and denied access to UNEs in cases where the requesting carrier seeks to provide service exclusively in a market that is sufficiently competitive without the use of unbundling, such as the wireless market.¹²⁸

The mobile wireless services market, which the Commission found “[b]ased on the record, the court’s guidance, and the Commission’s previous findings”¹²⁹ to be competitive, includes the provision of all interconnected voice CMRS services¹³⁰ including those that consumers may and increasingly do use as substitutes or replacements for all or a portion of a

¹²⁶ *Triennial Review Remand Order*, ¶ 34.

¹²⁷ 359 F.3d at 564-93; *Triennial Review Remand Order*, ¶ 31.

¹²⁸ T-Mobile 2005 Petition at 1-2 (“T-Mobile is the sixth largest national wireless carrier in the United States;” “commercial mobile radio service (“CMRS”) carriers such as T-Mobile have played a leading role in the development of facilities-based, intermodal competition...”).

¹²⁹ *Triennial Review Remand Order* at n.377 (“Because we now conclude that wireless carriers may not obtain UNEs solely to provide mobile wireless service, we find it unnecessary to reconsider whether facilities linking wireless and incumbent LEC networks are properly considered entrance facilities”) (relying on analysis in ¶ 366 of the *Triennial Review Order*).

¹³⁰ The Commission’s *Ninth CMRS Competition Report* defines three product markets within CMRS: interconnected mobile voice; interconnected mobile data; and mobile satellite service. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 04-111, *Ninth Report*, 19 FCC Rcd 20597, 20611, ¶ 31 (2004). Operators that offer commercially available, interconnected mobile voice services provide access to the public switched telephone network via mobile communication devices employing radiowave technology to transmit calls. Providers using cellular radiotelephone, broadband PCS, and SMR licenses dominate the mobile telephone sector of the CMRS market. *Id.* at 20611-12, ¶ 32.

mass market customer's local wireline phone service.¹³¹ This is because the record, much of it built by T-Mobile and other wireless carriers, as well as the Commission's previous findings, demonstrated that a derivative phenomenon in the highly competitive mobile wireless services market was that the CMRS services that mobile wireless service exclusively provide are increasingly seen as substitutes for wireline service, despite the fact that mobile wireless carriers have never used UNEs in their provision of mobile wireless service.¹³² Indeed, in its 2003 Petition, T-Mobile argued that "wireless carriers have succeeded in mounting an intermodal challenge to the local service monopolies of incumbent LEC's 'to a far greater extent than what could have been reasonably predicted in 1996:'"

Initially, wireless service was more of a complement than a competitor to wireline telephone service. That situation has changed, however, as wireless rates have fallen dramatically in recent years, innovative service packages (e.g. big "buckets" of minutes; free long distance) have been developed, and technical quality and coverage have improved. Consequently, many consumers now view their wireless phone as their "primary phone[.]" Indeed, a growing number of CMRS customers are "cutting the cord" and replacing their landline phones entirely with wireless phones¹³³

In the *Triennial Review Remand Order* the Commission drew heavily from the record established in its own *Ninth CMRS Competition Report*, along with the Commission's four previous annual CMRS competition reports and the *AWS/Cingular Merger Order*, to observe that the Commission itself had "repeatedly found the mobile wireless service market to be

¹³¹ As the Commission notes, total residential access lines can decline without wireline customers "cutting the cord" completely, as customers can replace additional residential lines ("second lines") with DSL, cable broadband, or wireless connections. *Id.* at 20684, n.578.

¹³² *Triennial Review Remand Order* at n. 108 (citing to T-Mobile Comments and Reply Comments).

¹³³ T-Mobile 2003 Petition at 5 (citations omitted).

competitive.”¹³⁴ In the *Ninth CMRS Competition Report* the Commission remarked that “[e]vidence continues to mount” that “consumers are substituting wireless service for traditional wireline communications.”¹³⁵ The Commission observed the continuing trend of mobile telephone service effects on the operational and financial results of companies that offer wireline services: decreasing residential access lines, dropping long distance revenues, and decline declining payphone profits.¹³⁶ “Certainly,” noted the Commission, “this is due to the relatively low cost, widespread availability, and increased use of wireless service.”¹³⁷

Thus, when the Commission conducted its new impairment analysis on remand, it had before it: (1) the vacatur of its “qualifying service” UNE eligibility criterion; (2) the D.C. Circuit’s guidance, based largely on the Commission’s own precedent, that the appropriate Section 251(d)(2) inquiry “would likely foreclose access to UNEs for the provision of mobile wireless and long distance service;”¹³⁸ and (3) additional evidence of increasing and significant wireless substitution. As a result, the Commission correctly held that CMRS carriers were not entitled to access to unbundled network elements.

¹³⁴ *Triennial Review Remand Order* at n.106.

¹³⁵ *Ninth CMRS Competition Report*, 19 FCC Rcd at 20684, ¶ 213.

¹³⁶ *Id.*

¹³⁷ *Id.* ¶ 214. See *Triennial Review Remand Order* at n.106 (citing *Ninth CMRS Competition Report* for the CMRS market conditions giving rise to these consumer benefits: “increased service availability, intense price competition, and a wider variety of service offerings”). In the same footnote, the Commission cited to the *AWS/Cingular Merger Order*. In that order, the Commission noted that while “[c]ustomers of mobile telephony services are unlikely to find wireline services to be close substitutes because wireline services lack the mobility dimension of wireless services,” some consumers “may find wireless services to be a good substitute for wireline service.” *Application of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations, et al.*, WT Docket No. 04-70, *et al.*, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21558, n.267 (2004).

¹³⁸ *Triennial Review Remand Order*, ¶ 35, citing *USTA II*, 359 F.3d at 576.

Importantly, and for the first time in the context of wireless providers, the Commission made clear that its decision to foreclose unbundling for wireless carriers rested on its “at a minimum” authority:

Where a requesting carrier seeks access to a UNE in order to provide a telecommunications service where competition has evolved without access to such a UNE, we find the costs cognizable under the Act of unbundling that UNE outweigh the benefits of unbundling, *even if some level of impairment might be present*. We believe this application of our at a minimum authority is the most faithful implementation of *USTA II*.¹³⁹

Therefore, even if T-Mobile could credibly demonstrate that it is impaired in its ability to provide CMRS as a wireline replacement service (which it cannot), this demonstration would be of no legal significance. Under the rule of *USTA II*, “whatever incremental benefits could be achieved under the Telecommunications Act of 1996 by requiring mandatory unbundling” would be “outweighed by the costs of requiring such unbundling,” which is “an especially intrusive form of economic regulation” that is, in turn, “among the most difficult to administer.”¹⁴⁰ After analyzing carefully the record before it and in accordance with its specific guidance on remand, the Commission intentionally, consciously and deliberately foreclosed all wireless access to UNEs in light of the highly competitive, and heretofore UNE-free, market for all wireless mobile services, including interconnected mobile voice services. The Commission did not err in doing so, and T-Mobile’s arguments to the contrary must be rejected.

¹³⁹ *Id.* ¶ 37 (emphasis added). The D.C. Circuit broadly upheld the Commission’s exercise of its “at a minimum” authority to consider factors other than impairment when evaluating whether an element should be subject to unbundling. *Id.* ¶ 33, citing *USTA II*, 359 F.3d at 579.

¹⁴⁰ *Triennial Review Remand Order*, ¶ 36.

G. Payphone Issues

The Commission should reject the petition for partial reconsideration filed by the APCC. The Commission did not err when it declined APCC's invitation to find that CLECs that are not impaired without access to unbundled local switching in general are nevertheless impaired when they seek to provide service to payphone service providers (PSPs). The Commission was right to be skeptical of APCC's evidentiary data, the cornerstone of which was three CLECs apparently self-reporting in response to an APCC-generated information request.¹⁴¹ The Commission has adequately considered section 276 in its section 251 analysis because, pursuant to section 276, the Commission has already provided that rates for the lines that incumbent LECs provide to CLECs who in turn use those lines to provide service to PSPs must be cost based and meet the new services test.¹⁴² Thus, APCC has failed to show that the Commission should create a special exception to its conclusion that CLECs are unimpaired without unbundled access to switching, and state that CLECs are nevertheless entitled to UNEs when they serve PSPs.

In assessing impairment, the Commission presumes a "reasonably efficient competitor."¹⁴³ It has consistently rejected proposals, such as that set forth in the APCC reconsideration petition, that it should evaluate a requesting carrier's impairment with reference to that carrier's particular business strategy, noting that such an approach "could reward those carriers that are less efficient or whose business plans simply call for greater reliance on UNEs."¹⁴⁴ APCC demands that the Commission base its analysis on a particular carrier's

¹⁴¹ APCC Petition at 12-13.

¹⁴² Wisconsin Public Service Commission; Order Directing Filings, CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd 2051, 2055, ¶ 12 (2002) ("Wisconsin Order").

¹⁴³ *Triennial Review Remand Order*, ¶ 24.

¹⁴⁴ *Id.* ¶ 25, quoting *Triennial Review Order*, 18 FCC Rcd at 17056, ¶ 115.

business model – that of the CLEC that serves payphone providers. This approach is unreasonable, as it would require the Commission to analyze impairment on a competitor-by-competitor basis, without taking into account the revenue opportunities, efficiencies and costs of a reasonably efficient competitor’s entire network in each relevant geographic market.¹⁴⁵ As the Commission has already considered and rejected such an approach, APCC’s petition must be dismissed.

Second, unlike the “significant evidence of competitive deployment” that was filed with the Commission from the various state proceedings, and which resulted in “more detailed evidence” than the Commission has had in many past proceedings,¹⁴⁶ APCC’s evidentiary showing is limited, arbitrary, and insufficient to overcome the Commission’s findings with respect to overall lack of impairment with respect to unbundled switching. APCC relies on two *ex partes*, filed by two Bell operating companies for different purposes over two years ago in the *Triennial Review* proceeding long before the vacated and remanded *Triennial Review Order* issued, and purports to correlate the data contained in them with information received from a mere three CLECs in apparent response to an APCC-generated survey in order to present nationwide conclusions of impairment at total odds with the work on local unbundled switching produced by the state commissions, the parties to the federal proceedings, and this Commission. Facially, this presentation lacks the rigor and reliability of the overwhelming record evidence that led the Commission to conclude that incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market switching, and has no more persuasive

¹⁴⁵ *Triennial Review Remand Order* at n.76.

¹⁴⁶ *Id.* ¶ 4.

authority today than it had when it was first considered, and properly rejected, by the Commission.

Finally, APCC's attempt to draw parallels between section 276 and section 706 in the way that should form the Commission's unbundling decisions is misguided. Section 706, while setting forth a Congressional aspiration, is a de-regulatory, not a regulatory, statutory provision. Under section 276 of the Act, by contrast, the Commission has promulgated rules after a series of complicated and drawn out regulatory proceedings in order to guarantee per call compensation to payphone providers,¹⁴⁷ to assure payphone providers that they may purchase intrastate lines at rates that comply with the federal "new services" test,¹⁴⁸ to preempt any state attempts to cap rates for local coin calls, to impose competitive safeguards on BOC-provisioned payphone services and to impose onerous recordkeeping requirements on all carriers that complete calls from payphones. In light of this, it was neither error nor an abuse of the discretion the Commission has to interpret section 251(d)(2)'s "at a minimum" language for the Commission to conclude that section 276 does not mandate, contrary to its considered impairment analysis, maintaining UNE switching for a limited subset of CLECs that choose to serve payphone providers.

¹⁴⁷ 47 C.F.R. § 64.1300 *et seq.*

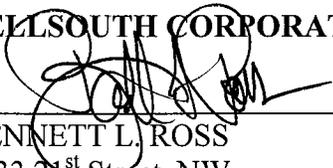
¹⁴⁸ *See Wisconsin Order*, 17 FCC Rcd at 2055, ¶ 12.

III. CONCLUSION

The Commission should grant, in part, Iowa Telecom's petition for reconsideration by including in its definition of Tier 1 and Tier 2 wire centers a third disjunctive factor – the presence of at least four or three (respectively) competitive dedicated interoffice transport providers each with a point of presence anywhere in the wire center. The remaining petitions for reconsideration and clarification should be denied.

Respectfully submitted,

BELLSOUTH CORPORATION



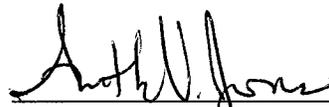
BENNETT L. ROSS
1133 21st Street, NW
Suite 900
Washington, DC 20036
(202) 463-4113

RICHARD M. SBARATTA
THEODORE R. KINGSLEY
MEREDITH E. MAYS
Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375-0001
(404) 335-0738

Date: June 6, 2005

CERTIFICATE OF SERVICE

I do hereby certify that I have this 6th day of June 2005 served the following parties to this action with a copy of the foregoing **CONSOLIDATED RESPONSE OF BELLSOUTH CORPORATION** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.



Anthony V. Jones

SERVICE LIST

Albert H. Kramer
Robert F. Aldrich
Jacob S. Farber
Payphone Commenters
Dickstein Shapiro Morin &
Oshinsky LLP
2101 L Street, N.W.
Washington, D. C. 20037-1526

Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
Edward W. Kirsch
Joshua M. Bobeck
Swidler Berlin LLP
3000 K Street, N. W., Suite 300
Washington, D. C. 20007

Brad E. Mutschelknaus
Steven A. Augustino
Scott A. Kassman
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Genevieve Morelli
Jennifer M. Kashatus
Erin W. Emmott
Pace Coalition
Kelley Drye & Warren LLP
1200 19th Street, N. W., Suite 500
Washington, D. C. 20036

Thomas Jones
Jonathan Lechter
Cbeyond Communications, LLC
Willkie Farr & Gallagher LLP
1875 K Street, N. W.
Washington, D. C. 20006

Thomas J. Sugrue
Vice President, Government
Affairs
James W. Hedlund
Senior Corporate Counsel
Federal Regulatory Affairs
T-Mobile USA, Inc.
401 9th Street, N. W., Suite 550
Washington, D.C. 20004

Donald G. Henry
Edward B. Krachmer
Iowa Telecommunications
Services, Inc. D/B/A Iowa Telecom
115 S. Second Avenue West
P. O. Box 1046
Newton, Iowa 50208

+Marlene H. Dortch
Office of the Secretary
Federal Communications
Commission
The Portals, 445 12th Street, S. W.
Room TW-A325
Washington, D. C. 20554

+Best Copy and Printing, Inc.
Portals, 445 12th Street, S. W.
Room CY-B402
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BellSouth Comments
CC Docket Nos. 04-313, 01-338
October 4, 2004
PC Docs # 550129

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

In the Matter of

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

REPLY DECLARATION OF JERRY HENDRIX

Comes the affiant, Jerry Hendrix, and being duly sworn, deposes and says:

1. My name is Jerry Hendrix. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375. I am currently Assistant Vice President – Pricing for BellSouth Telecommunications, Inc. (“BST”). I am responsible for overseeing the negotiation of Interconnection Agreements between BellSouth and Competitive Local Exchange Carriers (“CLECs”). Prior to assuming my present position, I held various positions in the Network Distribution Department and then joined the BellSouth Headquarters Regulatory Organization. I have been employed with BellSouth since 1979.
2. BST and NuVox Communications, Inc. negotiated an Interconnection Agreement in 2002, which I executed on behalf of BST. The terms and conditions of this Agreement were voluntarily negotiated pursuant to Section 252(a)(1) of the Telecommunications Act of 1996 (“1996 Act”). The Parties did not arbitrate any of the provisions in the Agreement before a state public service commission.
3. In Section 10.5.4 of the Agreement, the Parties agreed that, upon 30 days’ written notice, BST could audit NuVox’s converted Enhanced Extended Links (“EELs”) to verify

compliance with the requirement that NuVox provide a significant amount of local exchange traffic over the EELs. Agreement, Att. 2, § 10.5.4, Exh. A.

4. Pursuant to the Agreement, BST requested an audit of NuVox's EELs on March 15, 2002. On that date, I sent NuVox a letter notifying NuVox of BST's intent to conduct an audit thirty days hence "to verify NuVox's local usage certification and compliance with the significant local usage requirements of the FCC Supplemental Order." My letter informed NuVox that an independent auditor would conduct the audit, and that BST would incur the costs of the audit (unless the auditors found NuVox's circuits to be non-compliant).
5. Between March 2002 and May 2002, BST and NuVox exchanged correspondence and had discussions regarding BST's audit request. Despite the fact that BST satisfied all prerequisites to conduct the audit under the Agreement, NuVox persistently refused to permit the audit to take place.
6. In May 2002 BST filed a complaint against NuVox with the Georgia Public Service Commission ("GPSC") seeking an order directing the audit to proceed. After more than two years, an evidentiary hearing, and multiple oral arguments, the GPSC entered an order on June 30, 2004, allowing BST to audit 44 circuits that NuVox had converted from special access to EELs based upon NuVox's certification that it was the "exclusive provider of local exchange service" to the customers served by these circuits.
7. Consistent with the GPSC's June 30, 2004 Order, BellSouth employed the independent audit firm, KPMG, LLP to undertake the Georgia audit. I understand that, in March, 2005 KPMG has concluded its collection of information and documentation for this audit, prepared its preliminary findings and submitted those findings to NuVox. Since then, it is

my understanding that KPMG has been awaiting, NuVox's management assertions, the final step before KPMG can complete its report. I further understand that despite repeated requests from KPMG, NuVox refused to provide KPMG with the requested information.

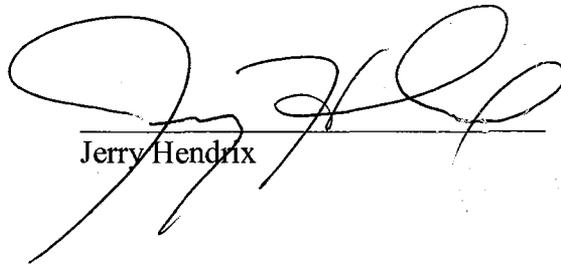
8. BST subsequently filed a motion seeking an order from the GPSC directing NuVox to provide the management assertions necessary for KPMG to release the audit report and close the audit. On May 4, 2005, the GPSC entered an order which directed NuVox to file with the Commission and provide to KPMG management assertions by May 11, 2005, except for matters that required verification, which NuVox was directed to provide by June 3, 2005.
9. While KPMG's report has not been finalized for release, "high-level" results of the audit were provided to BST in a readout session with KPMG. Based on those high-level discussions, BST anticipates that the Georgia audit will confirm substantial (*i.e.*, material) non-compliance (and possible outright misrepresentation) regarding the circuits inspected, as well as an inadequate control and recordkeeping structure established and/or maintained by NuVox in support of the certifications that were made to justify the circuit conversions. In fact, KPMG has preliminarily indicated that of the 44 EEL circuits that were audited, 19 are demonstrably out of compliance and the records for an additional 7 are so deficient as to support a finding of non-compliance. BST further learned that NuVox's record-keeping practices (which are centralized, *i.e.*, regional, not Georgia-specific) provided a poor to non-existent "control" structure that would not have permitted NuVox to make *any* of its certifications with requisite confidence, including the 18 remaining circuits for which compliance apparently has been confirmed.

10. In addition to Georgia, BST also has sought to audit NuVox's EEL circuits in Kentucky, Florida, North Carolina, South Carolina, and Tennessee. In each instance, NuVox has refused to allow the audit to proceed, and BST was left with no choice but to file complaints seeking to enforce its audit rights under each of the Parties' separate state-approved Interconnection Agreements.
11. In North Carolina, the North Carolina Public Utilities Commission entered an order on February 21, 2005, granting BellSouth's request to audit all of the EELs that NuVox had converted from special access in that State. NuVox subsequently filed a complaint in federal court seeking to enjoin the audit from proceeding. The federal court granted a preliminary injunction to preserve the *status quo* pending a hearing on the merits, which is scheduled for June 6, 2005.
12. In Kentucky, the Kentucky Public Service Commission ("KPSC") entered an order on April 15, 2005, authorizing BellSouth to conduct an audit of 15 EELs that NuVox had converted from special access in that State. NuVox sought reconsideration of that order, which has been denied by operation of Kentucky law due to KPSC inaction on the request. The independent auditor engaged for that audit (Grant Thornton, LLP) has contacted NuVox three times to commence fieldwork on the audit -- twice during the statutory period governing the KPSC's consideration of NuVox's petition for reconsideration, and now once since the expiration of that period without KPSC action on the petition. NuVox has refused to cooperate with the audit to date.
13. In a last ditch effort to prevent preparation and release of the written Georgia audit report, NuVox sued KPMG in NuVox's home state of South Carolina, seeking an injunction

against disclosures "to third parties," and alleging that KPMG violated a nondisclosure agreement in conducting the Georgia audit. That case is currently pending.

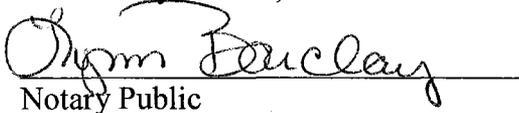
14. BellSouth is now faced with substantial and growing losses from the continued delay in its ability to audit NuVox's EELs. Taking Tennessee as an example, if NuVox's converted Tennessee EELs were audited and all were found non-compliant, NuVox would owe BellSouth approximately \$5 million (as of April 2005), which represents the difference between the special access rates that should have been paid, in the event noncompliance is found, and the lower EEL rates that NuVox actually paid. Even if only half of NuVox's EELs in Tennessee were found to be noncompliant, NuVox would owe BellSouth more than \$2.5 million. Similarly, if NuVox's converted Florida EELs were audited and all were found non-compliant, the SPA-UNE differential as of April 2005 would be approximately \$7.6 million. Again, even if only half of NuVox's EELs in Florida were found to be non-compliant, NuVox would owe BellSouth more than \$3.8 million. On a region-wide basis, NuVox's EELs-related exposure to BellSouth is staggering – in the tens of millions, potentially. This is an amount that will only grow so long as NuVox is allowed to continue paying EEL rates for circuits that have been improperly converted from special access.

15. This concludes my Reply Declaration.



Jerry Hendrix

Subscribe to and Sworn to before me
this 3rd day of June, 2005.



Notary Public

Lynn J. Barclay
Notary Public, DeKalb County, Georgia
My Commission Expires August 13, 2006.

#587729.3

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY DECLARATION OF W. KEITH MILNER

I, W. Keith Milner, being of lawful age and duly sworn upon my oath, do hereby declare and state:

1. My name is W. Keith Milner. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375. I am Assistant Vice President - Interconnection Operations for BellSouth. I have served in my present role since February 1996.
2. My career in the telecommunications industry spans over 35 years and includes responsibilities in the areas of network planning, engineering, training, administration, and operations. I have held positions of responsibility with a local exchange telephone company, a long distance company, and a research and development company. I have extensive experience in all phases of telecommunications network planning, deployment, and operations in both the domestic and international arenas.

3. In paragraph 3 of his Declaration, Mr. Batelaan states “Cbeyond’s business customers range in size from those... that use from 5 to 48 phone lines. Without the use of concentration, even Cbeyond’s largest business customer would need no more than two (2) DS-1s (that is, 48 phone lines spread over two (2) DS-1s, each capable of handling 24 voice-grade connections). Mr. Batelaan further states “The average Cbeyond customer is on the smaller end of this range, with only 9 employees and 7 business lines.” Thus, the typical Cbeyond customer requires no more than one (1) DS-1 to handle its line demand. This is an important point because Mr. Batelaan’s analysis is predicated upon the costs Cbeyond incurs in serving small business customers via an integrated package of voice and data services operating collectively at the DS-1 transmission level (roughly 1.5 megabits per second).
4. However, it is my understanding that a proper impairment analysis must consider the costs of a reasonably efficient competitor without regard to the business strategy of a particular carrier. Mr. Batelaan’s cost analysis is inconsistent with this principle because it reflects Cbeyond’s actual costs based upon its particular business strategy.
5. In paragraph 4 of his Declaration, Mr. Batelaan takes issue with the FCC’s determination of a cap of ten (10) DS-1s in a given route for unbundled transport and contends the FCC’s determination is “inconsistent with the cross-over analysis that Cbeyond would perform...” Mr. Batelaan asserts

that the FCC's analysis did not account for "numerous costs". In paragraph 6 of his Declaration, Mr. Batelaan lists those costs as follows:

- The monthly recurring costs for two (2) non-ILEC provided DS-3 interoffice transport facilities.
 - The one-time non-recurring costs for the two (2) non-ILEC DS-3 transport facilities
 - The non-recurring and recurring costs associated with constructing and paying rent on collocation arrangements.
 - In cases where Cbeyond has previously purchased unbundled loop and transport combinations in a given central office, the non-recurring cost of "converting" the transport part of the combination to non-ILEC transport facilities.
6. In paragraph 7 of his declaration, Mr. Batelaan lists another cost he apparently believes the FCC ignored, notably the costs required for equipment to "concentrate" the DS-1 circuits in a collocation arrangement above the typical ratio of 28 DS-1 circuits per DS-3 circuit. Mr. Batelaan does not describe the type of equipment he believes should be included in his cost analysis but to the extent he is referring to the use of so-called digital cross-connect systems (which allow breaking down a DS-1 transmission stream to individual DS-0 streams which are then combined with DS-0 streams from other DS-1s), BellSouth does not use such equipment in its provision of unbundled DS-1 loop plus transport combinations. Thus, the "concentration" costs to which Mr. Batelaan

appears to be referring are not costs that would be incurred by a reasonably efficient competitor.

7. Regarding Mr. Batelaan's assumption concerning the monthly recurring costs for two (2) non-ILEC provided DS-3 interoffice transport facilities, it is not always the case that a reasonably efficient competitor would always equip a collocation arrangement for two (2) DS-3 circuits, notwithstanding Mr. Batelaan's suggestion to the contrary. The topic at hand is interoffice transport and BellSouth as well as many other carriers make extensive use of Synchronous Optical Network ("SONET") ring architecture in their network, especially in transport routes between central offices. By its nature, a SONET ring simultaneously transports traffic in both clockwise and counter-clockwise directions. The benefit derived is that a single cable cut or equipment failure anywhere along the ring does not result in isolation of any other two (2) points along the ring. Instead, the equipment on the fiber optic ring either senses or is alerted that one (1) of the two (2) feeds (that is, the clockwise feed or the counter-clockwise feed) has been disrupted and that the remaining active feed will be utilized. Alternatively, if ring architecture is not used in a given instance, it is a common industry practice to deploy redundant fiber optic cables in physically diverse routes such that a single cut of one of the cables is cut, the traffic is automatically routed over the redundant facility. Thus, if the concern is for the interoffice portion of the network and if the transport uses SONET ring technology or physically diverse cable routing, a single DS-3 will suffice assuming a

need for no more than 28 DS-1 circuits in that route. Thus, Mr. Batelaan's cost analysis is inflated due to his assumption that a second, redundant DS-3 will always be required.

8. Regarding Mr. Batelaan's assumption about non-recurring and recurring costs associated with constructing and paying rent on collocation arrangements, I would first note that the use of so-called Enhanced Extended Links ("EELs") which are loop and interoffice transport combinations allows the CLEC to collocate in as few as one central office in a given market. Thus, Cbeyond's customers served by EELs might for example be located in 30 different BellSouth central offices in a given market but Cbeyond need only designate the one (1) central office to which the EELs are to be delivered and Cbeyond would then need to collocate in only that one (1) central office. Indeed, according to Mr. Batelaan in paragraph 3 of his Declaration **[proprietary begin]** *redacted* **[proprietary end]** of Cbeyond's DS-1 circuits are provisioned as EELs thus greatly reducing Cbeyond's collocation expenses.
9. In paragraph 9 of his Declaration, without providing an elaboration or explanation, Mr. Batelaan estimates Cbeyond's "collocation costs per central office" in Georgia to be approximately **[proprietary begin]** *redacted* **[proprietary end]**. While it is impossible to determine from Mr. Batelaan's Declaration to determine the constituent parts of those costs (that is, whether for example his figures include the costs of Cbeyond's collocated equipment), I would point out that BellSouth's standard

collocation offer to CLECs in Georgia includes an Initial Application Fee for Physical Collocation of only \$1,285.98. The recurring Floor Space space preparation charge per square foot per month is \$4.52. Thus, Cbeyond or any CLEC adopting BellSouth's standard offer could obtain 100 square feet of unenclosed physical collocation space for an initial fee of about \$1,300 and monthly recurring fees for space preparation of \$452 which are far less than the costs per central office Mr. Batelaan claims Cbeyond has expended. Bellsouth would charge additional collocation fees based on other factors such as whether the CLEC desired BellSouth to provide a collocation enclosure and the amount of central office power consumed by the CLEC's equipment. However, in assessing the collocation costs a reasonably efficient competitor would incur, Mr. Batelaan's estimates are overstated.

10. With regard to Mr. Batelaan's assumption regarding cases where Cbeyond has previously purchased unbundled loop and transport combinations in a given central office, and his comments regarding the non-recurring cost of "converting" the transport part of the combination to non-ILEC transport facilities, he assumes a conversion cost of "\$5000 per DS3 equivalent when, in many cases, the conversion cost may be much higher." I would note that BellSouth's non-recurring fees to establish up to 28 DS-1 circuits on a single DS-3 are set on in the Interconnection Agreement between BellSouth and Cbeyond. While complaining that such fees are "well in excess of any reasonable cost of providing the

- 'conversion service," Mr. Batelaan acknowledges that Cbeyond agreed to these are rates in their Interconnection Agreements, which state Commissions approved. Other than complaining about these rates in Mr. Batelaan's Declaration, I am unaware of any complaint by Cbeyond to any state Commission in BellSouth's nine-state region or to this Commission regarding conversion rates charged by BellSouth.
11. Regarding Mr. Batelaan's assumption about the costs required for equipment to "concentrate" the DS-1 circuits in a collocation arrangement above the typical ratio of 28 DS-1 circuits per DS-3 circuit, no such concentrating equipment is or has been used for the unbundled DS-1 loop and transport combinations Cbeyond and other CLECs acquire from BellSouth. As far as I can tell, Mr. Batelaan does not specifically enumerate the costs of such concentration equipment but whatever the amount, it should not have been included in his cost analysis. In other words, Mr. Batelaan incorrectly inflates his cost analysis with equipment arrangements that are not used when Cbeyond acquires such loop and transport combinations from BellSouth.
 12. In paragraph 10 of his Declaration, Mr. Batelaan explains that his cost analysis assumes "substantial delays in both the conversion process and collocation builds." Both assumptions are misguided and inconsistent with the reasonably efficient competitor standard to which any legitimate cost analysis must adhere.

13. With respect to alleged delays in collocation builds, Mr. Batelaan claims that in one (1) market in which BellSouth operates, it took approximately **[proprietary begin]** *redacted* **[proprietary end]** to construct the collocation arrangements. While Mr. Batelaan offers no details about the market in which these alleged delays occurred (facts he would possess and could have disclosed in order to allow BellSouth to provide a more complete response), his claims are belied by BellSouth's collocation provisioning interval performance, which is stellar. In order to prepare this response to Mr. Batelaan's Declaration I reviewed statistics showing BellSouth's handling of Cbeyond's collocation requests in Georgia. That information is shown in Proprietary Exhibit WKM-1 to my Reply Declaration. The report is arranged to show the provisioning interval set by the Georgia Public Service Commission ("GPSC") for a given collocation provisioning type and the actual interval within which BellSouth provided the collocation for Cbeyond. Note that for collocation provisioning activities for which the GPSC set an interval of 20 days, BellSouth completed its work in an average of **[proprietary begin]** *redacted* **[proprietary end]** days and that the longest actual provisioning interval of **[proprietary begin]** *redacted* **[proprietary end]** days was still well below the stated interval. For the single collocation provisioning activity for which the GPSC set an interval of 45 days, BellSouth completed its work for Cbeyond in **[proprietary begin]** *redacted* **[proprietary end]** days. For those collocation provisioning activities for

which the GPSC set an interval of 60 days, BellSouth completed its work for Cbeyond in an average of **[proprietary begin]** *redacted* **[proprietary end]** days and only **[proprietary begin]** *redacted* **[proprietary end]** completed outside the stated interval and that **[proprietary begin]** *redacted* **[proprietary end]** was about four (4) years ago in 2001. To summarize BellSouth's collocation provisioning for Cbeyond, **[proprietary begin]** *redacted* **[proprietary end]** were completed on time or were completed early. Only **[proprietary begin]** *redacted* **[proprietary end]** missed and even **[proprietary begin]** *redacted* **[proprietary end]** missed by only **[proprietary begin]** *redacted* **[proprietary end]** for a provisioning completed over four (4) years ago. Further, much of the provisioning process (for example the installation of Cbeyond's equipment within the collocation arrangement) is conducted by Cbeyond or its agents, which may explain the one unsubstantiated incident of delay about which Mr. Batelaan is complaining.

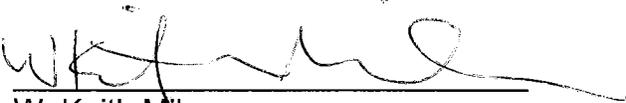
14. Mr. Batelaan's assumption about "substantial delays" in the conversion process also is misguided. Although Mr. Batelaan complains it took **[proprietary begin]** *redacted* **[proprietary end]** to 'convert' the UNE transport to DS3 connections at the collocation," again he offers no details. I would note here also that Cbeyond itself is responsible for many significant provisioning and conversion activities and any delay on the part of Cbeyond's employees or those of its agents will necessarily elongate any "conversion" intervals. Importantly, Mr. Batelaan acknowledges that

such intervals “may or may not be representative,” which is fatal to Mr. Batelaan’s cost analysis, which assumes “substantial delays” that do not usually occur.

15. In paragraph 11 of his Declaration, Mr. Batelaan suggests that the average “crossover” point for instances where Cbeyond has already acquired unbundled loop plus transport combinations is an astounding 435 DS-1 circuits. A single DS-3 circuit has a capacity of 28 DS-1 circuits. Mr. Batelaan, therefore, is saying that Cbeyond would seemingly rather acquire 435 individual DS-1 level transport circuits prior to acquiring the first DS-3 transport facility. This is nonsensical since the 435 DS-1 circuits could be accommodated by only 16 DS-3 circuits. Similarly, Mr. Batelaan suggests that the average “crossover” point for instances where Cbeyond has not already acquired loop plus transport combinations (and thus no “conversion” is required) is 194 DS-1 circuits. Thus, Mr. Batelaan contends that Cbeyond would acquire 194 new DS-1 transport facilities before it acquired its first DS-3 facility. This, too, is nonsensical since the 194 DS-1 circuits could be accommodated by only seven (7) DS-3 circuits.
16. Following Mr. Batelaan’s circular logic might lead one to conclude that DS-3 transport facilities are never economically justified. Consider Mr. Batelaan’s hopelessly flawed “crossover” of 435 DS-1 circuits. Assume a carrier had a demand for 436 DS-1 circuits (that is, one (1) circuit greater than Mr. Batelaan’s supposed average “crossover” point.) If the carrier deployed a single DS-3, that single DS-3 could accommodate only 28 of

- the 435 DS-1 circuits leaving 407 DS-1 circuits that now fall below his supposed “crossover” point. Thus, the carrier would never deploy a second DS-3 and would be saddled with operating both DS-1 and DS-3 circuits in a single route. The absurdity of such a conclusion is borne out not only by a reasonable analysis of costs (which Mr. Batelaan’s cost analysis is not for the reasons I previously discussed) but also by simple observation that carriers can and do deploy DS-3 facilities well before the 194 and 435 DS-1 cross over points Mr. Batelaan erroneously assumes.
17. Mr. Batelaan’s conclusions regarding his supposed “crossover” points are reminiscent of the adage of a group of scientists trying to “prove” that bumblebees cannot fly given bumblebees’ wingspan and power and weight ratios. Unfortunately for the scientists’ “proof”, the simple fact is that bumblebees can and do fly. Similarly, carriers can and do deploy DS-3 facilities when the quantity of DS-1 exceeds a crossover point of approximately ten (10) as the Commission rightly determined.

This concludes my Reply Declaration.


W. Keith Milner

Subscribe to and Sworn to before me
this 3rd day of June, 2005.


Notary Public

Gay P. Diz
Notary Public, DeKalb County
Georgia
My Commission Expires
February 09, 2007

REDACTED FOR PUBLIC INSPECTION

PROPRIETARY EXHIBIT WKM-1
BellSouth's Due Date Performance
Cbeyond Collocation Requests
Page 1 of 1

REDACTED