ORAL ARGUMENT HAS NOT BEEN SCHEDULED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1095 (and consolidated cases)

COVAD COMMUNICATIONS COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

OPENING BRIEF OF CLEC PETITIONERS AND INTERVENOR IN SUPPORT

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned CLEC Petitioners and Intervenors in Support certify as follows:

A. Parties and Amici

The parties who participated in the proceedings below are set forth in Appendix A of the *Order* under review.

Petitioners in these consolidated appeals are:

AT&T Corp. (05-1128)
ATX Communications, Inc. (05-1137)
BellSouth Corp., Qwest Communications International Inc., SBC Communications Inc., United States Telecom Association and Verizon (05-1101)
CompTel/ALTS (05-1133)
Covad Communications Company and DIECA Communications, Inc. d/b/a Covad Communications Co. (05-1095)
Florida Digital Network, Inc. d/b/a FDN Communications (05-1122)
MCI, Inc. (05-1138)
National Association of State Utility Consumer Advocates (05-1130)
New Jersey Division of the Ratepayer Advocate (05-1099)
Talk America Inc. (05-1100)
Time Warner Telecom Inc. (05-1108)

Respondents in these consolidated appeals are the Federal Communications Commission and the United States of America.

Intervenors are:

Alpheus Communications, L.P.
AT&T Corp.
ATX Communications, Inc.
BellSouth Corp.
Ciena Corp.
CompTel/ALTS
Covad Communications Co.
CTC Communications Corp.
Eschelon Telecom, Inc.
Florida Digital Network, Inc. d/b/a FDN Communications
Full Service Computing Corp. t/a Full Service Network
Gillette Global Network, Inc. d/b/a Eureka Networks

Line Systems, Inc.
MCI, Inc.
McLeodUSA Telecommunications Services, Inc.
Mpower Communications Corp.
NuVox, Inc.
Pac-West Telecomm, Inc.
Promoting Active Competition Everywhere Coalition
Penn Telecom Inc.
Qwest Communications International Inc.
RCN Telecom Services, Inc.
SBC Communications Inc.
SNiP LiNK, LLC
TDS Metrocom, LLC
Time Warner Telecom Inc.
United States Telecom Association
US LEC Corp.
Verizon telephone companies
XO Communications, Inc.
Xspedius Communications, LLC

B. Rulings Under Review

Petitioners seek review of the Federal Communications Commission's ("FCC") Order on Remand issued in the matter of *Unbundled Access to Network Elements; Review of the Section 271 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 & CC Docket No. 01-338, FCC 04-290 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*Order*"). On February 24, 2005, a summary of the *Triennial Review Remand Order* was published in the Federal Register at 70 Fed. Reg. 8940.

C. Related Cases

This Court has reviewed related orders of the FCC in the cases *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) and *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 15(c)(3), 26.1 and 28(a)(1)(A), CLEC Petitioners and Intervenor in Support respectfully submit the following corporate disclosure statements:

Alpheus Communications, L.P. Alpheus Communications, L.P. ("Alpheus") is a telecommunications carrier whose customers provide telecommunications and information services such as business and residential voice and data, DSL, long haul, wireless, Internet Access, and typical point-to-point telecommunications service. Alpheus is partially owned by El Paso Corporation, which is publicly traded on the New York Stock Exchange under the symbol "EP." No publicly held corporation owns more than 10% of the El Paso Corporation. No other corporation that directly or indirectly owns 10% or more of Alpheus is publicly traded.

ATX Communications, Inc. ATX Communications, Inc. ("ATX") provides integrated telecommunications services, including local exchange, long distance and internet service, throughout the United States. It is also a provider of systems integration and web design. ATX is a wholly owned subsidiary of Leucadia National Corporation. Leucadia stock is publicly traded on the New York Stock exchange under the ticker symbol "LUK". No publicly traded company owns more than 10% of the shares in Leucadia.

CompTel/ALTS. CompTel/ALTS is the leading industry association representing competitive communications service providers. CompTel/ALTS members are entrepreneurial companies building and deploying next generation, IP-based networks to provide competitive voice, data, and video services in the United States and around the world. CompTel/ALTS has not issued shares or debt securities to the public. CompTel/ALTS does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Covad Communications Company/DIECA Communications Inc. ("Covad"). Covad is a facilities based local exchange carrier that sells to Internet service providers and other resellers (on a wholesale basis) and to businesses and consumers (on a retail basis) high-speed digital data services known as "DSL" and "T1," as well as other vertical services associated with Internet access, such as managed security, virtual private networking, and VOIP services. Covad Communications Company and DIECA Communications Inc. are not publicly-held companies, but rather wholly owned by Covad Communications Group, Inc., which is a publicly-held company. There is no other publicly-held corporation or other publicly-held entity that has a direct financial interest in the outcome of the proceeding.

CTC Communications Corp. CTC Communications Corp. provides local exchange telecommunications services including voice and data communications services. CTC Communications Corp. is a wholly owned subsidiary of CTC Communications Group, Inc., which in turn is a wholly owned subsidiary of Columbia Ventures Corporation, which is a privately held entity. There is no publicly traded company that owns more than 10% of the stock of CTC Communications Corp. or any of its parent companies.

Eschelon Telecom, Inc. Eschelon is a facilities-based integrated provider that offers a comprehensive array of telecommunications and Internet services to small and mid-sized business customers. Eschelon is a privately held company with no parent companies. No publicly-held company has a 10% or greater ownership interest in Eschelon.

Florida Digital Network, Inc. d/b/a FDN Communications. FDN provides telecommunications services, including voice and data communications in the Southeastern United States. FDN also provides services through its subsidiary Southern Digital Network, Inc.

d/b/a FDN Communications. FDN has no parent corporation and no publicly held company owns stock in FDN.

Gillette Global Network Inc. d/b/a Eureka Networks. Gillette Global Network, Inc. d/b/a Eureka Networks ("Eureka Networks") provides local exchange telecommunications services, including voice and data communications. Eureka Networks' parent company is Eureka Broadband Corporation. There is no publicly traded company that owns more than 10% of the stock of Eureka Broadband Corporation.

McLeodUSA Telecommunications Services, Inc. McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") provides local exchange telecommunications services including voice and data communications services. McLeodUSA is a wholly owned indirect subsidiary of McLeodUSA Incorporated. No publicly held entity owns 10% or more of the stock of McLeodUSA Incorporated.

Mpower Communications Corp. Mpower Communications Corp. provides local exchange telecommunications services including voice and data communications services. Mpower Communications Corp. is a wholly owned subsidiary of Mpower Holding Corporation. No publicly held entity owns 10% or more of the stock of Mpower Holding Corporation.

NuVox Communications. NuVox Communications, through its operating subsidiaries (collectively, "NuVox"), is a facilities-based competitive local exchange carrier that provides a full suite of local and long distance telephone services, as well as Internet access and other data services, to primarily small and medium-sized business customers in 48 markets in sixteen states. NuVox is a privately held Delaware corporation and has no parent corporation. Wachovia Corporation, through eight direct or indirect subsidiaries all owned and ultimately controlled by

Wachovia, owns 10% or more of NuVox. No other publicly held company owns 10% or more of NuVox.

Pac-West Telecomm, Inc. Pac-West Telecomm, Inc. provides voice and data telecommunications services to service-provider customers such as paging companies, information and enhanced service providers. Pac-West Telecomm, Inc. is a publicly traded California corporation. No publicly held company owns 10% or more of the stock of Pac-West Telecomm, Inc. There are no subsidiaries or affiliates of Pac-West Telecomm, Inc. that have issued shares or debt securities to the public.

Promoting Active Competition Everywhere Coalition The Promoting Active Competition Everywhere ("PACE") Coalition is an unincorporated trade association representing CLECs. The PACE Coalition advocates policies favorable to its members before state and federal regulators and legislators. The members of the PACE Coalition have no ownership interests in the Coalition.

RCN Telecom Services, Inc. RCN Telecom Services, Inc. is wholly-owned by RCN Corporation, a publicly traded company trading on the NASDAQ under the symbol "RCNIV." RCN provides local exchange telecommunications services including voice and data communications services and also provides video services. There is no publicly-held entity that owns or controls ten percent or more of the equity of RCN Corporation. RCN Telecom Services, Inc. has its principal place of business in Princeton, New Jersey.

SNiP LiNK LLC. SNiP LiNK, LLC ("SNiP LiNK") is a competitive telecommunications company organized under the laws of New Jersey. It is certified in New Jersey, Pennsylvania and Delaware to provide local and long distance voice service bundled with broadband data and Internet access services. SNiP LiNK is privately held and has no parent

corporation or subsidiaries. No publicly held entity owns 10% or more of SNiP LiNK or is an affiliate of SNiP LiNK.

Talk America Inc. Talk America Inc. is a corporation organized under the laws of the Commonwealth of Pennsylvania with its principal place of business in New Hope, Pennsylvania. Talk America Inc. is a wholly owned subsidiary of Talk America Holdings, Inc., a publicly traded corporation organized under the laws of the State of Delaware. Talk America is a common carrier that offers local, long distance, and international services to customers nationwide.

TDS Metrocom, LLC. TDS Metrocom, LLC ("TDS Metrocom") provides local exchange telecommunications services including voice and data communications services. TDS Metrocom is a Delaware limited liability company with its headquarters in Madison, Wisconsin. TDS Metrocom is an indirect subsidiary of Telephone and Data Systems, Inc., which is a Delaware corporation with its headquarters in Chicago. Gabelli Asset Management, Inc., a publicly traded entity, as part of its mutual fund and/or asset management portfolios, owns more than 10% of Telephone and Data Systems, Inc.

Time Warner Telecom Inc. Time Warner Telecom is a leading provider of managed network solutions to a wide range of business customers throughout the United States. Time Warner Telecom's parent companies are Time Warner Inc., a publicly held company, Advance Telecom Holdings Corporation and Newhouse Telecom Holdings Corporation, privately held corporations affiliated with each other. Time Warner Inc., through subsidiaries, and Advance Telecom Holdings Corporation and Newhouse Telecom Holdings Corporation together both own more than 10 percent of Time Warner Telecom's stock.

US LEC Corp. US LEC Corp. is a publicly traded Delaware corporation headquartered in Charlotte, North Carolina. US LEC Corp. provides local exchange telecommunications services including voice and data communications services. No publicly held entity owns 10% or more of the stock of US LEC Corp.

XO Communications, Inc. XO Communications, Inc. ("XO") is a competitive local exchange carrier offering a full range of communications services, including local exchange, long distance, and data services to business customers nationwide. XO has no parent entity. All of its subsidiaries are wholly owned subsidiaries. XO is a publicly traded corporation; there are no publicly traded corporations that hold an equity interest of 10% or greater in XO.

Xspedius Communications, LLC. Xspedius Communications, LLC ("Xspedius") is a facilities-based telecommunications carrier that offers integrated voice, data and Internet services to small and medium-sized businesses throughout the southeastern states. Xspedius is a privately held company. Xspedius' parent companies are Xspedius Management Co., LLC and Xspedius Holding Co., LLC. There are no publicly held companies that own 10% or more of the stock of Xspedius.

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GLOSSARY

Pursuant to D.C. Circuit Rule 28(a)(3), the following is a glossary of abbreviations and acronyms used in this brief:

Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151-276
Adelstein Statement	Dissenting Statement of Commissioner Jonathan S. Adelstein
ALJ Proposal for Decision	ALJ Proposal for Decision in Case No. U-13796, appended to Initial Comments of the Michigan Public Service Commission, WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 4, 2004)
Alpheus Comments	Comments of Alpheus Communications, L.P., WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 4, 2004)
ALTS Comments	Comments of the Association for Telecommunications Services et al., WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 4, 2004)
AT&T ex parte	David L. Lawson, Sidley Austin Brown & Woods ex parte letter to M. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 dated Nov. 10, 2004
Batelaan Declaration	Declaration of Richard Batelaan on behalf of Comptel/ALTS (Attached to Comments of Comptel/ALTS) (filed Oct. 4, 2004)
Birch ex parte	Albert H. Kramer, Dickstein Shapiro Morin & Oshinsky ex parte letter to M. Dortch, Secretary, FCC, CC Docket No. 96-98 dated Jan.17, 2001
BOC	Bell Operating Company
CLEC	Competitive Local Exchange Carriers: new entrants that provide local telecommunications services in competition with LECs
CLEC ex parte	Becky Sommi, Broadview Networks, et al. ex parte letter to M. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 dated Dec. 8, 2004
Commission or FCC	Federal Communications Commission
Copps Statement	Dissenting Statement of Commissioner Michael J. Copps
DS1 Loop	A digital local loop having a total digital signal speed of 1.544 megabytes per second. A DS1 local loop can carry 24 individual voice calls simultaneously.
DS3 Loop	A DS3 loop is a digital local loop having a total digital signal speed of 44.736 megabytes per second. A DS3 loop equals 28 DS1 or 672 simultaneous voice calls
DSL	Digital Subscriber Line
Duke Declaration	Declaration of Mike Duke on behalf of KMC Telecom Holdings, Inc. (Attached to Initial Comments of The Loop and Transport CLEC Coalition)(filed Oct. 4, 2004)
EELs	Enhanced extended links
Falvey Declaration	Declaration of James C. Falvey on behalf of Xspedius Communications, Inc. (Attached to Initial Comments of The Loop and Transport CLEC Coalition)(filed Oct. 4, 2004)

FCC Building Access Proceeding	*In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Further Notice of Proposed Rulemaking, FCC 00-366 (Oct. 12, 2000)
Fea and Giovannucci Declaration	Declaration of Anthony Fea and Anthony Giovannucci on behalf of AT&T Corp. (filed Oct. 4, 2004)
FTTH	Fiber-to-the-Home
ILEC	Incumbent Local Exchange Carriers
Initial Comments of MCI	Comments of MCI, Inc., WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 4, 2004)
Initial Comments of NYSDPS	Initial Comments of the New York State Department of Public Service, WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 4, 2004)
Initial Comments of the NJDRA	Initial Comments of the New Jersey Division of Ratepayer Advocate, WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 4, 2004)
Initial Comments of the Pace Coalition, et al.	Comments of the PACE Coalition, et al., WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 4, 2004)
Initial NuVox Comments	Initial Comments of NuVox Inc., WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 4, 2004)
Iowa Utilities	*AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999)
Local Telephone Competition Report	Local Telephone Competition Report: Status as of December 31, 2004, Federal Communications Commission (July 2005)
MiCRA Study	"Mayo/MiCRA/Bates White Economic Impairment Analysis," WC Docket No. 04-313, CC Docket No. 01-338 dated Oct. 4, 2004
Murray Declaration	Declaration of Terry L. Murray, appended to ex parte letter from MCI to M. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 dated Oct. 4, 2004
NPRM	*Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (rel. Aug. 20, 2004)
Order	*Unbundled Access to Network Elements; Review of the Section 271 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (rel. Feb. 4, 2005)
PACE Coalition ex parte	Genevieve Morelli, Kelley Drye & Warren ex parte letter to M. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 dated Dec. 8, 2004
PACE Coalition Reply Comments	Reply Comments of the PACE Coalition, et al., WC Docket No. 04-313, CC Docket No. 01-338 (filed Oct. 19, 2004)
Phoenix Center Paper	George S. Ford & Lawrence J. Spiwak, Phoenix Center Policy Paper No. 19: The Positive Effects of Unbundling on Broadband Deployment, PHOENIX CENTER POLICY PAPER SERIES (Sept. 2004), attached as Exhibit 7 to the Initial Comments of the PACE Coalition, et al. (filed Oct. 4, 2004)
POTS	plain old telephone services

QSI Study	"Analysis of State Specific Loop and Transport Data," Study of QSI Consulting, Inc.(filed Oct. 4, 2004)
Qwest ex parte	Gary R. Lytle, Qwest ex parte letter to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313, CC Docket No. 01-338 dated Feb. 18, 2005
Ross Letter	Bennett L. Ross, BellSouth ex parte letter to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313, CC Docket No. 01-338 dated Feb. 18, 2005
Smith Letter	James C. Smith, SBC ex parte letter to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313, CC Docket No. 01-338 dated Feb. 18, 2005
Staff Report	Staff Report Appended to Letter from Michael Peevey, President, California Public Utilities Commission to M. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 dated Oct. 4, 2004
TELRIC	total element long-run incremental cost
Time Warner Telecom ex parte	Thomas Jones, Time Warner Telecom, Inc. ex parte letter to M. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 dated Dec. 1, 2004
Tirado Declaration	Declaration of Wil Tirado on Behalf of XO Communications, Inc. (Attached to Initial Comments of The Loop and Transport CLEC Coalition)(filed Oct. 4, 2004)
TRO	*In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 03-36 (rel. Aug. 21, 2003)
UNE	Unbundled network elements: individual facilities and functions of LECs that CLECs have rights to access and use
USTA I	*U.S. Telecom Assoc. v. FCC*, 290 F.3d 415 (D.C. Cir. 2002)
USTA II	*U.S. Telecom Assoc. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)
Verizon	*Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002)
Wigger Declaration	Declaration of Dan J. Wigger on behalf of Advanced Telecom, Inc. (Attached to Initial Comments of The Loop and Transport CLEC Coalition)(filed Oct. 4, 2004)
1999 UNE Remand Order	*In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket 96-98 (rel. Nov. 5, 1999)

JURISDICTIONAL STATEMENT

The *Order* was released on February 4, 2005. A summary was published in the Federal Register on February 24, 2005. The undersigned CLECs petitioned for review within 60 days of publication or have timely intervened in support. This Court has jurisdiction under 47 U.S.C. § 402(a); 28 U.S.C. §§ 2342 and 2344.

ISSUES PRESENTED FOR REVIEW

Whether the *Order* is arbitrary, capricious, and otherwise contrary to law insofar as it:

(1) Refuses to require nationwide unbundled access to ILEC DS1 capacity loops;

(2) Adopts a test based on characteristics of ILEC wire center areas to determine whether new entrants are impaired without access to DS1 and DS3 loops;

(3) Denies access to dedicated DS1 transport network elements linking certain ILEC wire centers based solely on the unsupported hypothesis that wholesale supply of those facilities will materialize along all such routes;

(4) Adopts a nationwide finding of non-impairment for unbundled local circuit switching used to serve mass market customers; and

(5) Imposes a $1 increase in the rates for unbundled local circuit switching used to serve mass market customers.

STATUTES AND REGULATIONS

Relevant statutes and regulations are reprinted in the Addendum.

STATEMENT OF THE CASE

The Commission's unbundling determinations in the *Order* directly retreat from the chief mandate of the Act: to open local telecommunications markets to competition. Likewise, they run directly afoul of this Court's previous decisions on this issue.

In *United States Telecom Ass'n. v. FCC*, the Court required the FCC to set forth a more nuanced, granular unbundling standard that did not abstract away from specific markets. 290 F.3d 415, 423 (D.C. Cir. 2002) ("*USTA I*"). Then, in *United States Telecom Ass'n. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), the Court found two key defects with, and struck down, the FCC's nationwide impairment findings with respect to mass market switching and interoffice transport. First, the Court concluded the FCC's findings were coupled with an illegal delegation of authority to states to identify circumstances in which the "nationwide" finding did not apply. *USTA II*, 359 F.3d at 565-68, 573-74. Second, the Court faulted the FCC for making nationwide impairment findings while at the same time concluding that states could and should find an absence of impairment under defined circumstances. *See USTA II*, 359 F.3d at 568-71, 573-74.

The *Order* swings too far in the other direction, however. Only partially applying *USTA II*'s rulings, the FCC ignores overwhelming evidence and its own findings about the infeasibility of competitive entry to reach untenable conclusions about the possibility of future competition on the basis of speculation and intuition unhinged from the record or marketplace reality.

USTA II did not generally conclude that the FCC had applied an incorrect impairment standard. To the contrary, while noting that the decision was "not the occasion for any general review of the Commission's standard as a general matter," *USTA II*, 359 F.3d at 572, the Court spoke positively about what the FCC had attempted:

> the [*TRO*'s] interpretation of impairment is an improvement over the Commission's past efforts in that, for the most part, the Commission explicitly and plausibly connects factors to consider in the impairment inquiry to natural monopoly characteristics (declining average costs throughout the range of the relevant market) . . . or at least connects them (in logic that the ILECs do not seem to contest) to other structural impediments to competitive supply . . . .

Id. at 571 (internal citations omitted). The Court also made a number of observations about the Commission's application of the impairment standard that the agency misapplied in the *Order*. In particular, the Court directed the FCC to establish unbundling criteria that take into account "relevant market characteristics" which capture "significant variation," *id.* at 563, sensibly define the relevant markets, *id.* at 563, 574-75, connect these markets to their impairment findings, *id.* at 574-75, and consider whether the "element in question" is "significantly deployed on a competitive basis." *USTA II*, 359 F.3d at 574.

On remand, the FCC has gone wrong again, making changes *USTA II* did not require, ignoring important parts of *USTA I* and *USTA II*, and impermissibly concluding that the Act disfavors impairment findings. This last conclusion is plainly contrary to law. The purpose of the unbundling requirement, and related market opening provisions, is to "eliminate the monopolies" held by the ILECs by giving "aspiring competitors every possible incentive to enter the local retail telephone markets, short of confiscating the incumbents' property." *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 476 (2002) ("*Verizon*"). The Act's unbundling obligation imposes sharing requirements on the incumbents that are "much more ambitious" than would be required under traditional antitrust principles. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398, 414 (2004).

The *Order* establishes new rules denying access to high capacity loops and dedicated transport in certain geographic areas, and denying access to mass market local circuit switching throughout the country. This Petition questions whether the denial of access to these network elements is arbitrary, capricious, and contrary to law in light of the record, the expansive nature of the Act's unbundling obligations as articulated by the Supreme Court, and this Court's guidance in *USTA I* and *USTA II*.

SUMMARY OF ARGUMENT

Proceeding from a fundamentally faulty premise, the FCC has embarked upon a major course adjustment rather than simply refining its impairment analysis consistent with this Court's direction. This Court instructed the Commission not to ignore potential competitive entry in appropriate circumstances when making impairment decisions. Instead, the agency reads *USTA II* to direct it to treat evidence of any competitive deployment in one market as singularly probative of the prospects for competition across the board. Reasoning on the basis of "correlation[s]" upon which it "draw[s] inferences" as to "likelihood[s]" of competitive entry, the FCC adopts a "regime" for making assumptions in the place of sensible, fact-intensive, market-focused reasoning. *Order* ¶ 43. Ultimately, the FCC takes this Court's directive not to ignore potential competition as a mandate to abstract away market-based evidence.

The agency's overcompensation is most plainly evident in the case of high capacity loops, which were referred to only in passing in *USTA II*, and whose continued availability was found helpful by the Court. 359 F.3d at 580. Rather than crediting its own findings that there is no evidence of "significant deploy[ment] on a competitive basis" of DS1 loops, *id.* at 574, and that there are "substantial operational barriers" to competitive loop deployment, *Order* ¶¶ 150-151, the FCC embarks upon an extraordinary hypothetical exercise to identify circumstances where what had not happened in reality "could" happen -- eliminating access to UNEs in those circumstances. The FCC translates hypothetical abstractions into a market definition, individual "wire center" service areas, that has nothing to do with the indicia of loop impairment it has identified.

On the record before the Commission, the competitive deployment of loops is limited to very high capacity loops deployed to individual buildings with large aggregate demand for

communications services. *See Order* ¶ 154. *See also* Duke Declaration ¶ 11. Even this deployment is so trivial that, Petitioners submit, the Commission could only rationally conclude that impairment exists on a nationwide basis for DS1 loops, particularly since the agency has already denied unbundling throughout the country for loops it found economically feasible to self-deploy. To the extent that this miniscule level of deployment (a few thousands out of millions of buildings nationwide by the Commission's own findings, *see TRO* ¶ 298 n.856) could warrant any further reduction in access to UNE loops, at most the Commission should have adopted a restriction tailored to the precise circumstances permitting deployment: large buildings with high aggregate demand for services. Instead, the Commission attempts to link these circumstances via a tenuous chain of inferences to entire geographic areas.

The Commission's misguided determination to define markets in a way that enables it to draw incorrect inferences of potential deployment has led it to commit several errors. Ultimately, it reaches a results-driven conclusion with respect to unbundling, reading the tea leaves about what this Court expects, rather than engaging in reasoned decision-making. It abandons sensible market analysis because it determined such analysis would be too burdensome. *Order* ¶ 44. It determines that theoretical competitors could enter markets that "resembl[e]" those with competitive entry, making it unnecessary to investigate actual competitive conditions. *Id.* ¶ 45. And it concludes that this Court has pre-judged the outcome of any analysis. *See id.*

The FCC's fundamental mistake is adopting the same geographic market for inferring potential deployment for both transport and loops, even though it recognizes that there are critical economic and structural differences between these elements that go to the heart of its analysis. *See Order* ¶¶ 71, 152. In attempting to shoehorn loops into essentially the same

impairment framework as it uses for transport, the FCC is forced to ignore its own impairment criteria, ignore its own factual findings, and "loftily abstract away from . . . specific markets" factors that are central to the question of loop impairment. *USTA I*, 290 F.3d at 423.

In denying access to mass market local switching on a nationwide basis, the FCC ignores record evidence, gathered in the states, that competitive switches are not and cannot practically and economically be used to serve mass market customers, and that the availability of unbundled local switching has spurred, rather than hindered, telecommunications infrastructure investment. Each of these errors and omissions renders the nationwide non-impairment finding for mass market local switching unlawful. The Commission's decision to increase local switching prices by $1 was made without conducting any analysis that the resulting prices for local switching would remain just and reasonable (as required by section 271 of the Act), and fails to address unchallenged evidence that they would not.

As described below, the Court should grant the instant petitions for review and:

(a) remand with direction to re-establish nationwide access to DS1 unbundled loop facilities or with direction to adopt a more reasonably granular market definition for loop impairment generally;

(b) remand with instructions to adopt nationwide access to DS1 dedicated transport;

(c) vacate the decision to deny access to mass market local circuit switching on a nationwide basis and remand with instructions to conduct the nuanced impairment analysis required by law; and

(d) vacate the decision to increase mass market local circuit switching rates by $1 and remand with instructions to ensure any rate increases are just, reasonable and non-discriminatory, and afford carriers a reasonable opportunity to compete.

ARGUMENT

I. THE COMMISSION'S IMPAIRMENT TEST FOR HIGH CAPACITY LOOPS, AND DS1 LOOPS IN PARTICULAR, IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW

The Commission has consistently found that DS1 loops do not generate nearly enough revenue to overcome the extraordinarily high fixed and sunk costs of constructing new loops. This fundamental economic fact does not vary from place to place, as evidenced by the FCC's amply supported finding that there is virtually no duplication of DS1 loops anywhere in the country and that wholesale DS1 alternatives are, with few isolated exceptions, non-existent. As a result, competitive carriers and competition are impaired without access to DS1 loops. Nonetheless, the FCC restricts access to these loops on the basis of market definitions and inferences that are divorced from the real world impediments that the agency itself finds compelling. Because the *Order*'s findings with respect to DS1 loops conflict with the FCC's stated analytical approach and violate *USTA II*, the Court should grant the instant petitions for review.

A. Deployment of High Capacity Loops Is Economically, Operationally, And Competitively Infeasible

DS1 loops are not suitable for competitive supply and, therefore, carriers are impaired without access to them.[1/] Carriers are impaired without unbundled access to network elements that are not suitable for multiple competitive supply. *See USTA II*, 359 F.3d at 571-73. *See also Order* ¶ 21 (impairment occurs when "lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic."). When there are no markets that vary "decisively" with

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1/ Although included in the general category of "high capacity loops," DS1 loops in fact have relatively small capacity, exponentially lower than the next standard increment, DS3 loops, and much closer to the copper wires extending to homes that this Court has recognized as "the most obvious candidates" for unbundling. *USTA II*, 359 F.3d at 561.

respect to the Commission's impairment criteria, there is no basis to deny nationwide unbundling. *USTA II*, 359 F.3d at 570. That is the case for DS1 loops. DS1 loops cannot economically be duplicated. There are substantial operational and structural impediments to their deployment, with no potential for intermodal competition. Moreover, additional restrictions on loop access are unnecessary in light of the FCC's nationwide ban on unbundling higher capacity loops.

1. Because it is not economically feasible to duplicate DS1 loops, there is no question they are not suitable for multiple competitive supply. In fact, the Commission has concluded that it becomes economically feasible to deploy only at capacity levels well in excess of a DS1 loop.[2/] The Commission's loop impairment criteria focuses on the ability of carriers to overcome the extraordinarily high entry barriers to duplicate loop elements given the revenue opportunity available for the capacity of the loop to be deployed. A loop's capacity is the most important variable in making this assessment because it dictates the revenue opportunity available to the carrier. *Order* ¶¶ 149-153; *TRO* ¶ 325. *See also TRO* ¶¶ 201, 206, 303-307, n. 884; *Order* ¶ 86.[3/] This Court has offered no criticism of that analysis. *See USTA II*, 359 F.3d at 572.

[2/] The Commission concluded in the *TRO* that it is economically possible to self-deploy at the level of three DS3 loops (the equivalent of one OC3 loop, the lowest OC level), and thus set a limit of two DS3 UNE loops that a carrier could obtain at any location. *TRO* ¶ 324. Thus, OCn level loops are not available as UNEs anywhere in the country. *See Order* ¶ 149. In the *Order*, the Commission further reduces this cap to a single DS3 UNE loop to a building, finding that it is "generally feasible" to self-deploy only when demand exceeds that capacity level. *Id.* ¶ 177. It also established a cap of ten DS1 loops to a building. *See id.* ¶ 181. Petitioners do not challenge these caps in this petition, but do challenge the FCC's wire center test to infer non-impairment for DS1 and DS3 loops.

[3/] The FCC categorizes high capacity loops into multiple capacity levels -- DS1, DS3 and Optical Capacity (OCn) loops. The "n" signifies that OC-level facilities are further subdivided into standard intervals beginning at OC3 level and ending at the OC192. At the lowest end of this spectrum are DS1 loops, which have capacity equivalent to that needed to carry 24

With respect to DS1 loops, the FCC has specifically found that the economic and operational barriers to deployment are "extremely high." *TRO* ¶ 325. The cost of deploying new loops is staggering. The FCC cites average costs of $200,000 to construct a loop to a building. *See Order* ¶ 150 n.418. In contrast, however, the limited capacity of DS1 loops restricts their use in the local market to serving small and medium size business customers, typically characterized by low revenue opportunity and frequent churn. *See id.* ¶ 170 n.469; *TRO* ¶ 325 (CLECs unable to extract long-term contracts from their customers). The undisputed record reflects that carriers serving DS1 customers often receive only $500 to $700 per month.[4/] *At this level, it could take four hundred years for a carrier to recapture its investment in deploying a DS1 loop.*[5/]

In light of these fundamental economic facts, DS1 loops cannot be duplicated economically in any market. *See TRO* ¶¶ 325-26 (CLECs "do not have the ability to recover sunk costs in self-deploying DS1 loops"). *Accord Order* ¶ 170 (CLECs "cannot deploy stand-alone DS1-capacity loops on an economic basis."). Duplicating DS1 loops is also economically wasteful and, as such, are not suitable for "multiple competitive supply." *USTA I*, 290 F.3d at 427. Customers change service providers frequently at the DS1 level. *TRO* ¶ 325. It simply

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individual voice calls simultaneously. To appreciate the limited capacity of DS1 loops, the next standard increment, a DS3 loop, equals 28 DS1 loops or 672 simultaneous voice calls. The lowest optical capacity (OC) loop, an OC3 loop, is, in turn, equal to three DS3 loops or 2,016 voice calls. *TRO* ¶ 315 n.931.

4/ *See* Initial NuVox Comments at 3; Batelaan Declaration ¶ 5.

5/ Even these staggering numbers dramatically understate the barriers facing a carrier seeking to compete by self deployment of loops to individual customer locations. If the carrier deploys loops to multiple buildings where potential customers reside, prior to actually receiving initial orders, the costs of entry multiply, with no assurance of a return. If, on the other hand, a competing carrier waits until it has an order from a customer before deploying loops to the customer's location, the substantial operational challenges to deploying a loop mean that the customer may be forced to wait weeks or months before service is available. This simple dilemma highlights the huge first mover advantages enjoyed by the incumbent, which has loops to virtually every customer location, an advantage built up over decades as a monopoly service provider.

makes no economic sense to require each successive service provider to undertake the cost of building a new loop facility. *See Order* ¶ 152 (noting that loop costs are sunk and the loop would have to be abandoned if the carrier loses the customer).

The evidence showing that DS1 loops are not significantly deployed on a competitive basis further confirms that there are no markets where these fundamental economic facts vary decisively. *See TRO* ¶¶ 298, 325. As noted by the FCC, "[t]he evidence submitted in the record shows that there is *de minimis* deployment of DS1 loops by carriers for their own use, as well as extremely limited availability of wholesale DS1 loops." *Order* ¶ 170 n.471. Thus, no markets vary "decisively" with respect to the relevant impairment criteria. *USTA II*, 359 F.3d at 570. The Commission's decision cannot be squared with these economic realities.

2. The FCC's impairment standard, sustained by this Court, explicitly calls for consideration of both economic *and* operational entry barriers. *See Order* ¶ 21. Loop impairment occurs not only through lack of sufficient revenue opportunity, but also through operational or structural impediments that prevent a carrier from constructing a loop to the customer's premises. Moreover, *USTA II* expressly requires an assessment of such impediments to "competitive supply." 359 F.3d at 572. In the *Order*, however, the FCC abruptly concludes these entry barriers will no longer be considered as part of the impairment inquiry. *Order* ¶ 163. The FCC gave no reasoned explanation for this departure from precedent, thus committing legal error. *See AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001) ("The FCC 'cannot silently depart from previous policies or ignore precedent' as it has done here.") (citations omitted).

The Commission's rejection of these entry barriers is particularly misguided because the *Order* continues to recognize that operational and structural impediments effectively preclude the ability of carriers to deploy loops to the building, even where revenue may be sufficient. *See,*

e.g., *Order* ¶ 150 (economics of loop deployment are determined by costs and revenues at "a particular customer location."); *id.* ¶ 151 (carriers "face substantial operational barriers" to self-deployment, in addition to costs of deployment, and listing types of operational barriers); *id.* ¶ 154 (economies of scale may permit deployment to a building, "assuming other barriers do not preclude construction"); *TRO* ¶ 302 ("The economics of serving a particular enterprise customer at each of its business' facilities may be very different depending on the location of the facility."); *id.* ¶ 303 (even if loop deployment to a particular customer location may be feasible on a cost-recovery basis, other obstacles at the location may render self-deployment infeasible.); *id.* ¶ 307 (entry barriers "are most precisely identified on each geographic route serving a particular customer location.").[6/] The FCC has also recognized that operational entry barriers provide the ILECs with substantial first-mover advantages, as they were often granted access and rights-of-way as part of their monopoly status. *See id.* ¶ 89.

Moreover, the record substantiates a finding that operational as well as economic entry barriers in fact can and do preclude self-provisioning loops to buildings. *See, e.g.*, Duke Declaration ¶¶ 8-11; Tirado Declaration ¶¶ 14-20. Indeed, even when carriers overcome such impediments and deploy loops to serve a customer, operational barriers can preclude carriers from reaching customers on other floors of the same building. *See* Fea and Giovannucci Declaration ¶¶ 39-50; Alpheus Comments at 39-40; ALTS Comments at 63.

The FCC dismisses these real and substantial barriers to entry as mere "deficiencies in its regulatory regime" to be addressed in other proceedings. *Order* ¶ 163. It proffers no

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6/ The Commission has, however, been able to distill certain generally applicable criteria to make nationwide *non*-impairment determinations for loops above a threshold capacity. *See TRO* ¶ 307. For example, as noted above, it has found that it is always economically feasible to self-deploy multiple DS3 and OCn-level loops and thus has eliminated unbundling of such loops nationwide. It found nationwide impairment without access to DS0 level loops. *See Order* ¶ 149.

justification as to why operational entry barriers that once informed its loop impairment analysis are now viewed as "disort[ing]" that analysis and are, conveniently, to be ignored. *Id.* The rationalization -- that operational entry barriers will later be addressed in FCC proceedings -- is a makeweight since the FCC has not even determined whether it has the authority to rectify impediments erected by landlords and municipalities.[7/]

To be sure, this Court has held that impairment should be measured not only by whether carriers are impaired but also whether the lack of unbundled access to that element impairs competition. *See USTA I*, 290 F.3d at 422. There is no question, however, that both circumstances pertain to DS1 loops. This is not a case where there is competition in the market from other sources, such as cable companies. *Cf. id.* at 428-430. The Commission has found little, if any, evidence of competition from other sources in the small to medium size business market served by DS1 loops. *See Order* ¶ 193; *id.* ¶ 170 n.471. Thus, denial of DS1 loop access impairs competition in this market, as recognized by the two dissenting Commissioners. *See* Copps Statement (the *Order* "pulls the bottom out from under small business competition."); Adelstein Statement ("By cutting facilities-based competitors off from access to essential network elements, the Commission undermines choice for small and medium size business customers."). The only reasonable conclusion is that the absence of nationwide DS1 loop unbundling "will genuinely impair competition that might otherwise occur." *USTA I*, 290 F.3d at 425.

3. Finally, the Commission never explains why imposing new restrictions on access to DS1 loops adds appreciably to its nationwide prohibition on loop unbundling above one DS3

7/ Indeed, the FCC has had for the past five years an open proceeding designed to address, *inter alia*, whether it has authority to address landlord impediments to building access. *See generally* FCC Building Access Proceeding.

or ten DS1 loops to the same building. These "loop caps" draw a bright line at the point that the FCC has determined loop duplication becomes economically feasible. *Order* ¶¶ 177, 181; *see supra* n.2. The capacity of a DS1 loop falls well below that line. The capacity-based caps, in contrast to the *Order*'s geographic-based impairment findings, track the relevant market characteristics and capture the significant variation applicable to loops because, as noted above, capacity is the key determinant to loop impairment. The caps reasonably predict where loop deployment may be feasible.

The agency's only explanation for imposing further restrictions is that there may be *some* building *some* place where *some* carriers might obtain or might deploy a DS1 loop. *Order* ¶ 165. In other words, despite unequivocal findings that DS1 loops cannot be deployed in any market on a standalone basis, the FCC determines that it must find a market where it can infer an ability to deploy DS1 loops. It is to this irrational endeavor to infer in the abstract where DS1 loops might be deployed, and upon that basis deny unbundling regardless of economic and operational reality, that Petitioners now turn.

B. The Commission Cannot Substantiate Its Analysis Of Potential Competition On The Basis Of Poorly Drawn And Contradictory Inferences

The FCC's misguided effort to identify some market where it can infer potential competitive deployment of high capacity loops builds upon one incorrect assumption after another, ultimately resulting in a construct that bears no relation to real world impairment for these facilities. The FCC ignores relevant market characteristics, defining the same geographic market -- wire center areas -- for loops and dedicated transport. Its resulting frame of reference is overbroad and violates its own announced standards.[8/] The FCC's ultimate justification for

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8/ Although this brief has focused on DS1 loops, the infirmities with respect to the FCC's identification of the wire center to predict potential deployment apply equally to single DS3

denying unbundling -- that DS1 loops can be carved out of higher capacity facilities -- is nothing but a self-serving abstraction. And it fails to consider narrower alternatives without reasonable explanation. *USTA II*, 359 F.3d at 571. By inferring an ability to deploy loops in broad geographic markets, the FCC "loftily abstracts away" real world impediments to loop deployment that otherwise have informed its loop impairment analysis. *USTA I*, 290 F.3d at 423. If inferences are to be drawn, they must be tightly constructed and rationally explained. The FCC's single-minded effort to generate inferences disfavoring loop impairment, however, results in the agency violating the very guidance from this Court it claims to be following. Because the *Order* fails to reflect the sort of "nuanced . . . and reasonab[le]" analysis demanded, the instant petitions for review should be granted. *USTA II*, 359 F.3d at 570.

1. The *USTA* decisions require a nuanced appreciation of impairment connected to specific markets or market categories and express skepticism whether there could be impairment in markets where the "element in question" is "significantly deployed on a competitive basis." *USTA II*, 359 F.3d at 574. They further provide that any process of inferring impairment or lack thereof from levels of actual deployment requires a sensible definition of markets in which deployment is counted. *See id.* If markets are similarly situated with regard to the barriers to entry the FCC says are controlling, *USTA II* provides that the FCC cannot treat competition in one market as irrelevant to the existence of impairment in the other. *See id.* at 574-75. Additionally, the FCC must explain why it believes that the error costs in terms of false impairment determinations in the market it defines are likely to be lower than other potential market definitions. *See id.* at 575.

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loops, access to which was also denied in certain wire centers. The court should remand the FCC's market analysis for DS3 loops as well.

None of this guidance, provided in the context of reviewing the FCC's previous determination to adopt nationwide impairment for dedicated transport using point-to-point routes as the market, *USTA II*, 359 F.3d at 574-75, compels or supports the FCC's potential competition analysis for loops. First, as previously discussed, the FCC concedes there is no market where DS1 loops are significantly deployed on a competitive basis. Recognizing there are no markets where DS1 loops themselves could be deployed -- but apparently determined to infer deployment anyway -- the FCC abstracts from circumstances in which much higher capacity loops might be deployed. Its theory is that DS1 loops might be carved out of higher capacity facilities because "the revenue opportunities associated with DS3 loops will, in some but not all areas, justify the attendant costs, and the competitors will, in some but not all areas, be able to provide service at the DS1 capacity level using higher-capacity competitive facilities." *Order* ¶ 165. Carving a DS1 level loop out of much higher capacity fiber loop is called channelization. But "[a]ny process of inferring impairment (or its absence) depends on a sensible definition of the markets in which deployment is counted." *USTA II*, 359 F.3d at 574.

The FCC defines the markets in which to infer whether multiple DS3 loops could be deployed (and thus potentially used to provide DS1 loops) based on criteria that have little, if anything, to do with loop impairment and which result in decidedly overbroad findings of non-impairment. In attempting to determine "similar markets," for which competitive deployment in one might be "probative" of potential competitive deployment in the other, the FCC relies on the overall revenue opportunity generated in an ILEC wire center area, as indicated indirectly by the number of business lines terminating at the ILEC's switching location in that wire center. *Order*

¶ 103.[9/] Overall revenue of a wire center, however, is not probative at all of the ability to deploy a loop to some, many, or a majority of individual buildings, given the entry barriers the FCC identifies for loops. As noted above, those entry barriers correlate to the revenue potential at each building, coupled with building specific operational entry barriers that may also have to be overcome. *See supra* pp. 8-11. The Commission's market definition is thus anything but "sensible." *USTA II*, 359 F.3d at 574.

2. The severity of the FCC's error in relying on wire centers as a relevant market for its impairment analysis is highlighted by the fact that it defines the same geographic market for loops as it does for dedicated transport, even though it recognizes that the two network elements are critically different with respect to its central impairment inquiry: whether the facility can generate sufficient revenue to overcome entry barriers. The FCC captures this critical difference perfectly in stating that "the revenues generated by dedicated transport do not depend on maintaining a single customer, or even several customers, but rather on maintaining a certain level of traffic on a route. Compared to loops, which serve individual customers, dedicated transport carries much more traffic and has much greater potential for added future traffic." *Order* ¶ 71. *See also id.* ¶ 152. But the FCC ignores this distinction when using wire centers as the market for loops as well as transport. While overall wire center revenue makes at least theoretical sense for transport because that element is used to aggregate many lines at the wire center, aggregate wire center revenue cannot predict loop impairment because it is based on the revenue potential of specific buildings in any particular area. *See id.* ¶¶ 150, 152. The FCC cannot overcome this fundamental disconnect between its wire center market definition and

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[9/] The FCC also looks to fiber-based collocation as a proxy for fiber networks in the wire center. *See Order* ¶ 96.

actual loop impairment criteria, and its efforts to do so lead to various unsupported and unreasonable assumptions.

The wire center test also guarantees erroneous impairment determinations because, although it is predicated on the ability of carriers to deploy very high capacity loops to large commercial, multi-tenant buildings very close to competitively deployed fiber networks, *Order* ¶¶ 154 n.431, 167-68, the FCC does not limit the application of the test to such buildings. The Commission's claim that it has the ability to identify entire wire centers where these building characteristics are sufficiently prevalent as to justify denying DS1 loop and single DS3 loop unbundling to every building in the area is not supportable. *See id.* ¶¶ 170-71, 178-80. To identify such wire centers, the Commission adopts two proxies, the number of fiber-based collocators in the wire center, and the number of business lines in the wire center. *See id.* ¶ 167. Fiber-based collocators are the FCC's proxy for the possible number of fiber transmission networks in the wire center.[10/] The FCC presumably believes that if the absolute number of fiber collocators in a wire center is large enough, most buildings would fall within a narrow corridor of one or more of those collocators' networks. *See id.* ¶ 168. The number of business lines is the FCC's proxy for the aggregate, concentrated, telecommunications revenue available in the wire center areas. *See id.* ¶¶ 103, 167-69. Based on these proxies, the Commission eliminates DS1 loop unbundling to any building located in a wire center with four or more fiber-based collocators and 60,000 or more business lines. *See Order* ¶ 178.[11/] It predicts that in such wire

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10/ Fiber-based collocation is only a proxy for a fiber network because collocation, the placement of a competitive carrier's equipment in the incumbent's switching office that is connected to the carrier's fiber, *Order* ¶ 102, provides no evidence of the actual extent of that carriers' fiber network or its use.

11/ The FCC eliminated UNE access to a single DS3 loop to any building in a wire center with at least 38,000 business lines and four or more fiber-based collocators. *See Order* ¶ 174.

centers, carriers have deployed, or are likely to deploy, DS3 or higher capacity loops to buildings "*throughout* the wire center serving area." *Id.* ¶ 171 (emphasis added).

But there is no basis upon which to predict, based solely on business line and fiber collocation proxies, that high capacity loops are or can be competitively deployed to buildings "throughout" a wire center. At best, the FCC finds that carriers can only deploy such loops to buildings within "narrow geographic corridors close" to competitive carriers' fiber rings. *Order* ¶ 154; *id.* ¶ 154 n.431. There is absolutely no evidence that the area of the affected wire centers is confined to such narrow strips.[12/] The Commission, in fact, makes no effort whatsoever to assess the size of the geographic area served by the wire centers in which loop unbundling would be banned.[13/] *See id.* ¶ 167 n.465 (our wire center tests "do not account for the size of the land areas served by those wire centers").[14/]

Nor does the Commission have any information on the extent to which those fiber networks cover the wire center areas, or the concentration or dispersion of business lines. The Commission candidly admits no line density information was submitted in the record. *See Order* ¶ 174 n.477. In fact, it has no idea how many buildings in the affected wire centers are of the large multi-tenant type that might be suitable for channelization, how many are not, or how many are within reach of fiber networks. And, even if a building is in reach of a fiber network, the

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12/ BOCs submitted maps purporting to show competitive fiber routes. The FCC found that these maps had little probative value in assessing DS1 and single DS3 loop impairment. *See Order* ¶¶ 187-89.

13/ The only wire center information available to the Commission consisted of confidential business-line counts and fiber collocations submitted by incumbent carriers just days before the *Order* was adopted. *See Order* ¶ 174 n.477 (citing BOC data submitted on December 7 and 10, a week or less than the *Order*'s adoption on December 15.)

14/ The FCC makes the generalized assertion that wire center areas are "relatively small" such that the characteristics in one section of a wire center are likely to be the same in any other section. *Order* ¶ 161. It provides no support for this assertion, which in any case conflicts with its admission that it did not account for size of wire centers.

FCC has no way of knowing whether that fiber network is being used for local loop access or simply as transport.[15/]

The evidence compels the conclusion that the FCC's proxies are an insufficient indicator of competitive deployment. After noting that the wire centers in which loops will no longer be available have "particularly extensive fiber build-out," the FCC concedes that "many" of the carriers that have the requisite fiber networks "are likely serving only a fraction of the buildings in the wire center service area." *Order*, ¶ 180. The FCC nonetheless hypothesizes "a very high likelihood" that competitors "will have deployed" or could deploy higher capacity loops to buildings in those centers where carriers have deployed to "only a fraction of the buildings." *Id.* *See also infra* pp. 22-23 (describing record evidence of the paucity of competitive deployment to buildings).

The Commission's test also irrationally targets the wrong buildings, denying access to loops based on the possibility that carriers could deploy higher capacity loops to large commercial buildings housing multiple tenants. The small to medium size business customers generally served with DS1 loops, however, do not reside in the large, multi-customer buildings purportedly suitable for channelization of DS1 loops. *See Order* ¶ 170 n.469. Rather, they tend to reside in smaller, single tenant buildings that the FCC conceded are not suitable for competitive loop supply. *See id.* Thus, the FCC's market definition is arbitrary because it is not rationally connected to the facts found. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983).

The FCC's determinations of which wire centers should be free from unbundling is also arbitrary. The FCC establishes the thresholds for restricting unbundling at wire centers based on

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[15/] *See Order* ¶ 188 (dismissing ILEC maps of CLEC fiber routes because they do not indicate whether fiber is being used for transport or local loop service.)

purported correlations between the number of business lines and fiber-based collocators using ILEC-supplied data. *See Order* ¶ 114 n.322. It concludes, for example, that two-thirds of wire centers with 38,000 or more business lines also have four or more collocators. *See id.* ¶ 117. The ILEC-supplied data on which the FCC relies in setting its thresholds is, however, based on a definition of business lines dramatically different from the definition ultimately adopted by the Commission, which the ILECs now use to designate wire centers where unbundling is eliminated.[16/] The ILEC-supplied data relied upon in setting the thresholds counted each UNE loop as one business line, regardless of capacity, *e.g.*, a DS3 loop counted as one business line,[17/] whereas the final rule established by the FCC for counting business lines is based on capacity, *e.g.*, a DS3 counts as 672 business lines. 47 C.F.R. § 51.5. Using one methodology to set impairment thresholds and a different, broader methodology for determining whether those thresholds are met eliminates any purported "rational connection between the facts found and the choice made," regarding the wire center thresholds. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).[18/]

3. Not only is the Commission's scheme concocted on the basis of inaccurate, unsupported, and speculative premises, but it violates the agency's own "reasonably efficient carrier" impairment standard, adopted in response to *USTA II*. *See Order* ¶ 24. The agency

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16/ *See* Smith Letter at n.2; Ross Letter at 1.

17/ *See id.*

18/ The FCC's use of voice grade equivalents in the business line definition is also internally inconsistent and an unexplained departure from precedent. The FCC previously rejected channel equivalency as an "accurate measure of competition" for "high capacity" services, because it "overstates competitive inroads in a market." *U.S. West Forebearance Order*, 14 FCC Rcd 19947, ¶ 27 (1999). This concern applies equally here, and without explaining the departure, the decision is arbitrary. *See AT&T Corp.*, 236 F.3d at 736. The FCC's decision to count each UNE loop as multiple business lines based on the maximum capacity of the loop (*e.g.*, a DS3 loop counts as 28 DS1 loops) is also arbitrary because the agency simultaneously finds that a reasonably efficient CLEC can economically replace DS1s with a DS3 once it exceeds 10 DS1s on a single route.

cannot announce a standard of analysis then turn around and ignore it. *See AT&T Corp.*, 236 F.3d at 736-37.

Under the FCC's standard, the reasonably efficient carrier is not presumed to have any particular set of assets. In fact, the Commission purports to reject arguments that, just because one entrant holds a particular set of assets, *e.g.*, a fiber ring network, any efficient carrier must be deemed to hold such assets. *Order* ¶ 26 n.77. *Verizon* likewise mandates that approach, precluding any presumption that simply because some carriers have the resources to duplicate certain elements, smaller carriers without similar resources may nonetheless be denied access to those elements through some sort of vicarious non-impairment theory. *See Verizon*, 535 U.S. at 510 n. 27. The Commission's basis for determining non-impairment, however, relies on a carrier holding a particular set of assets, *viz.* a fiber transmission network, from which it can deploy very high capacity loops to nearby buildings. The FCC's creation of a test that directly contradicts the standard it purported to adopt constitutes legal error. *See AT&T Corp.*, 236 F.3d at 736-37.

Moreover, the FCC claims that, when evaluating loop impairment, it will only consider use of "technologies of the desired capacity level" and will not deny unbundled access "simply because a requesting carrier can deploy an OCn-capacity facility." *Order* ¶ 28 n.79; *id.* ¶ 86 (purportedly rejecting argument that the ability to channelize "requires a finding of no impairment"). The Commission, however, ends up doing exactly what it says it was not going to do, denying unbundling of a desired capacity level, DS1 loops, based on the deployment of much higher capacity facilities. This is arbitrary and contrary to law.

4. The FCC then makes a series of cascading errors that undermine its key assumption that DS1 loops can be obtained by "channelization." First, it erroneously assumes that carriers without their own transport network will not be impaired in the affected wire centers

because they can obtain wholesale DS1 loops from other carriers. This conclusion is contrary to the FCC's finding that the availability of wholesale DS1 loops from non-incumbent carriers is "extremely limited," *Order* ¶ 170 n.471, even in areas of widespread competitive fiber deployment. *See id.* ¶ 180 (claiming affected wire centers average 13 fiber-based collocators). The FCC's finding of extremely limited wholesale loops is confirmed by evidence collected by state commissions.[19/]

Next, the FCC ignores evidence that carriers with the type of facilities that theoretically could provide wholesale, channelized DS1 loops, often have no ability or intent to do so. *See, e.g.*, Duke Declaration ¶¶ 21-25. In fact, as noted above, operational and/or economic barriers may prevent carriers from extending loops from one location to another inside a building, precluding the ability to provide a channelized wholesale DS1 loop to a carrier wishing to serve a customers located in other parts of the building.[20/] The Commission has acknowledged such evidence of carriers' inability to provide wholesale loops, *TRO* ¶ 325 n.958, but here simply ignores it.

Indeed, the record plainly shows that the number of buildings where competitive carriers have deployed high capacity facilities -- the predicate for channelization -- is miniscule. For example, XO, the largest CLEC beside AT&T and MCI, has built to approximately one percent of the buildings in its markets where it has fiber networks. *See* Tirado Declaration ¶ 16

19/ The FCC delegated to the state commissions the task of collecting evidence on the availability of wholesale DS1 loops. Although the delegation of the ability to determine impairment was subsequently ruled unlawful in *USTA II*, some states had already begun what the Commission calls "impressive efforts" to ascertain the state of competition. The results of those efforts confirms that wholesale DS1 loops are virtually non-existent. *See, e.g.*, QSI Study at 13-14 (finding two or more wholesalers offering DS1 loops at 36 buildings in the 12 states reviewed). *See also* AT&T ex parte at 2-3 (citing various state studies regarding the unavailability of wholesale DS1 loops).

20/ *See supra* p.11.

(declaring that XO has been able to build laterals to only 2,164 buildings out of the approximately 2.3 million commercial buildings located in the cities where XO has fiber transmission rings). The record regarding other CLECs is similar. *See, e.g.*, Wigger Declaration ¶ 19 (declaring that Advanced Telecom has deployed fiber to serve only 17 commercial buildings); Falvey Declaration ¶ 20 (declaring that Xspedius has deployed to only 600 buildings across 20 states and the District of Columbia and the majority are not for local loop access). *See also TRO* ¶ 298 n.856 (noting that both CLECs and ILECs report that CLECs have deployed loops to only about 3% to 5% of commercial buildings). Even in the areas where the FCC denies loop access because it believes channelization is most likely to occur -- those wire centers with a high number of business lines and fiber-based collocators -- the FCC concedes that "many" of the carriers with the requisite fiber networks "are likely serving only a fraction of the buildings in the wire center service area." *Order* ¶ 180. This miniscule level of actual deployment cannot support the FCC's abstracted promise of potential deployment on which the entire finding of no impairment is premised.

5. Finally, the agency irrationally rejects alternatives that it concedes would have resulted in more accurate determinations. To the extent that *de minimis* deployment might have warranted any reduction in access to loops at all; at most, the FCC should have adopted restrictions closely tailored to the precise circumstances permitting deployment -- large buildings with aggregate demand for services. In fact, carriers proposed narrower alternatives based on building specific assessments that could lead to fewer erroneous impairment determinations. *See* CLEC ex parte at 2; Time Warner Telecom ex parte at 4. The FCC admitted that building specific assessments "could assess variations in impairment far more subtly" than could a wire center test. *See Order* ¶ 155. But the FCC unreasonably rejected those tests, claiming hardship.

See id. ¶ 157. This is directly contrary to the Court's direction that the explanation for rejecting "a narrower alternative that has all the same advantages and fewer disadvantages" must be "reasonable." *USTA II*, 359 F.3d at 571.

The Commission claims it could not possibly conduct a fact-intensive, building specific analysis for the 700,000 to three million commercial buildings for which impairment would have to be evaluated. *See Order* ¶ 157. It further contends that a building-by-building test would require information that is not readily verifiable, as it is often exclusively in the hands of CLECs who may have little incentive to cooperate. These complaints assume, however, that a building test would require a review of every commercial building in the United States and that it must undertake a detailed examination of the extent of actual competitive deployment to that building and the capabilities of those competitive carriers.

But, as noted above, the number of buildings to which competitive carriers have deployed high capacity loops -- the predicate for channelization -- is minimal, even in the wire centers that meet the FCC's criteria.[21/] Thus, the FCC vastly overstates the universe of buildings to be reviewed.

The Commission had before it a proposed rule that denied unbundled access only if wholesale providers of DS1 loops actually served the building, demonstrating that entry barriers for that building had in fact been overcome. *See* CLEC ex parte letter at 2. While claiming that the specifics of such a rule would be too complex for it to administer, *Order* ¶ 159 n.446, the FCC fails adequately to explain why, as proposed, state commissions could not be enlisted to serve as fact finders as long the agency made the ultimate impairment decision. *See* CLEC ex parte letter at 4-5. The Commission misreads *USTA II* as precluding such an approach because

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21/ *See, e.g.*, Tirado Declaration ¶ 16; Wigger Declaration ¶ 19; Falvey Declaration ¶ 20.

USTA II rejected its previous "subdelegation" of authority to state commissions to make impairment determinations. *Order* ¶ 156. *USTA II*, however, also made clear that the FCC is free to seek state commission assistance in fact finding, information gathering or advice and recommendations. 359 F.3d at 567-68. The FCC in fact lauds the state commissions' fact-finding undertaken to implement the *TRO*. *See Order* ¶ 4.

The FCC also rejects building specific tests on the ground that such tests would require the collection and analysis of information not readily verifiable and often exclusively in the hands of the CLECs. *Order* ¶ 158. The FCC's wire center test, however, suffers the same infirmity, merely shifting from information under the control of CLECs to information under the control of ILECs, and the ILEC-controlled information is not readily available or verifiable.

Finally, the FCC claims that an actual deployment assessment would violate *USTA II*'s requirement to assess potential deployment. *See Order* ¶ 160. Not only is that erroneous, but the Commission also ignored a test based on the economic opportunity available at the building. *See* Time Warner Telecom ex parte at 4. By measuring revenue available at a location, the building revenue test has the potential to do directly what the Commission's wire center-based test only does indirectly through proxies, *i.e.*, using business line counts as a proxy for the revenue available at a wire center, which in turn ostensibly identifies concentrated building revenue demand. The Commission's failure to explain why it failed to even consider a test that plausibly results in significantly fewer errors and is at least as easily, if not more easily, administered, than the test it adopted cannot withstand review. *See USTA II*, 359 F.3d at 571.

II. THE COMMISSION'S ELIMINATION OF UNBUNDLING FOR DS1 TRANSPORT IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW

The Commission's decision to eliminate unbundling for DS1 dedicated transport in "Tier 1" wire centers suffers from the same failure of analysis as its determination regarding DS1 loops. For those same reasons, the decision must be remanded.[22/]

The record before the Commission establishes that carriers are impaired without access to DS1 transport. The FCC's decision to limit access to DS1 transport in the face of that record is predicated on a single paragraph in the *Order* where the Commission finds that "likely" wholesale alternatives "might" come into being. *Order* ¶ 127. The record, however, does not support such an inference.

To the contrary, the FCC had predicted in the *TRO* that wholesale DS1 transport would develop and it directed the states to assess whether wholesale DS1 transport existed on any routes. *See Order* ¶ 126; *TRO* ¶ 392. The states, however, found that wholesale alternatives exist only "on very few routes." *Order* ¶ 126. In fact, the QSI study cited by the Commission found that wholesale DS1 transport was available on *only* 150 routes in the fourteen states reviewed, including California, Texas, Illinois and Florida. *See* QSI Study at 15-21.

It is clear that in the absence of wholesale alternatives, carriers are impaired without access to DS1 UNE transport. *Order* ¶ 126. Nevertheless, the Commission "loftily abstract[s] away from all specific markets" *USTA I*, 290 F.3d at 423 and eliminates unbundled access to DS1 dedicated transport in certain wire centers based solely on the unfounded prediction that a

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22/ Dedicated transport UNEs are facilities dedicated to a particular carrier used for transmission between or among ILEC wire centers. *Order* ¶ 67. The Commission found that carriers are not impaired without DS1 transport when both ends of the transport route terminate in Tier 1 wire centers. *See id.* ¶ 126. Tier 1 wire centers are those with four or more fiber-based collocators or 38,000 or more business lines.

wholesale market will develop. *See Order* ¶¶ 126-27. The FCC thus eliminates DS1 UNE transport on many routes where carriers are unable to self-supply and where wholesale alternatives do not now exist, and where there is no basis to presume such alternatives will develop any time soon. The Commission errs by taking "relevant market characteristics" that capture "significant variations" and failing to connect them to its impairment findings. *USTA II*, 359 F.3d at 563, 574-75.

Moreover, the Commission wholly ignores evidence of operational impediments to the use of alternatives for DS1 transport, even should such alternatives develop. *See* Initial NuVox Comments at 16-21. Carriers often use DS1 interoffice links not as transport to aggregate the traffic from multiple end users, *see Order* ¶ 69, but as part of an end-to-end circuit that serves a single customer, called an EEL. *See USTA II*, 359 F.3d at 590. EELs are often comprised of a DS1 loop combined with a DS1 transport link. CLECs use EELs to provide service to the same class of small business customers that are served over stand-alone loops. *See* Initial NuVox Comments at 15-16. EELs allow carriers efficiently to serve consumers that they could not reach with a stand-alone loop, and their pro-competitive benefits are well recognized. *TRO* ¶ 576. The record reflects substantial impediments to having to break apart this functional end-to-end circuit and replace the ILEC UNE transport leg with a third-party provider. *See* Initial NuVox Comments at 17-21. The FCC ignores the record evidence of operational impediments to using wholesale DS1 transport in DS1 EEL configurations. Operational impediments such as these are real barriers to entry, and ignoring them is unlawful. *USTA II*, 359 F.3d at 571.

III. THE COMMISSION'S NATIONWIDE FINDING OF NON-IMPAIRMENT FOR MASS MARKET LOCAL SWITCHING IS ARBITRARY AND CAPRICIOUS

The Commission adopts a blanket non-impairment finding for mass market local switching in disregard of the unbundling analysis mandated by this Court's prior decisions in

USTA I and *USTA II* and unsupported by the record evidence. Accordingly, the FCC's nationwide non-impairment rule must be vacated and the issue remanded to the agency for further consideration.

A. The Commission Has Not Conducted The Required Granular Analysis

The FCC errs in adopting a nationwide non-impairment finding for local circuit switching used to serve mass market customers. *USTA I* and *USTA II* require the agency to take a nuanced approach to impairment, reviewing specific geographic markets and customer classes, and to take into consideration significant variations in particular markets and market categories. *See USTA II*, 359 F.3d at 563. The agency is not free to "loftily abstract[] away all specific markets." *USTA I*, 290 F.3d at 423. The FCC's earlier unbundling determinations, including its rule for mass market local switching, were rejected for failure to apply this standard, yet with respect to mass market local switching the FCC once again ignores the Court's directive and adopts a blanket unbundling rule. *See Order* ¶ 199.

The FCC's entire justification for failing to engage in the refined analysis required by the Court is contained in one brief sentence devoid of record support. The agency claims that it "would be impossible" to conduct a "fact-intensive, market-specific" inquiry along the lines it had previously asked the states to undertake. *Order* ¶ 44. Even if the FCC was correct that it did not have the ability to conduct the requisite fact-intensive inquiry called for,[23/] it conveniently ignores that the states already have assembled the market-specific data needed to make impairment determinations. Acting on the FCC's previous directive, the states have conducted

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23/ It is impossible to assess the reasonableness of the FCC's conclusion since the Commission provided no analysis of the issue and no basis upon which to evaluate it.

evidentiary proceedings, eliciting actual marketplace evidence to evaluate impairment.[24/] Numerous parties urged the FCC to incorporate the state records into its docket, yet the Commission declined to do so. *See, e.g.*, Initial Comments of MCI at 6, Initial Comments of the PACE Coalition, et al. at 42. The FCC merely "encouraged" parties to file summaries of the state proceedings. *NPRM* ¶ 15. The Commission's approach is particularly damning in light of its previous recognition that the states are "well situated to conduct the granular analysis required." *TRO* ¶ 189.

The Commission's failure to incorporate the states' detailed records into its impairment inquiry might not have constituted a fatal flaw, however, if the Commission had taken into account the state proceeding data that did make its way into the record at the FCC. Yet the FCC refuses even to acknowledge (let alone address the merits of) the findings and conclusions of many states and ignores the comments and exhibits compiling and analyzing the state evidentiary records presented by other interested parties. *See, e.g.*, Staff Report at 8; ALJ Proposal for Decision at 24; Declaration of Terry L. Murray; Initial Comments of the PACE Coalition at 39-54.

As noted above, *USTA II* does not bar the FCC from using state-generated data and analysis by the FCC. 359 F.3d at 566. *See supra* p.29. To the contrary, the Court's insistence that the FCC conduct a nuanced inquiry compels the agency to consider all credible market-specific data regardless of its source. Thus, the FCC's conclusion, based on cursory analysis, that some mass market local switching impairment may exist, *See Order* ¶ 220, and its obligation to weigh the advantages and disadvantages of a "more nuanced alternative[]" to a nationwide

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[24/] It is not inconsequential to consider that the ILECs had the incentive in state proceedings to disclose their best data concerning actual marketplace activity since such data could have resulted in the award of unbundling relief.

finding of non-impairment, *USTA II*, 359 F3d at 570, render the adoption of a nationwide non-impairment determination for mass market local switching arbitrary and capricious.

B. The Market-Specific Data Gathered In State Evidentiary Proceedings Proves The Unlawfulness Of The Commission's Nationwide Finding Of Non-Impairment

The FCC held that "actual competitive deployment is the best indicator that requesting carriers are not impaired," *TRO* ¶ 410, yet the Commission now ignores irrefutable empirical evidence from the states showing the absence of actual competition in the mass market utilizing competitively-provided local switching. The most basic fact before the FCC was that the ILECs never challenged mass market local switching impairment in a number of states. *See* PACE Coalition ex parte at 2. In at least six states, the ILECs conceded impairment existed in the entire state. *See id.* Even in those markets where the ILECs claimed that sufficient actual competitive activity existed to justify a non-impairment finding, the ILECs' own data proved the opposite. No matter how the market is defined, the data collected in state proceedings demonstrated that there was no significant mass market competition using ILEC loops in conjunction with competitively-provided switching. *See, e.g.*, Staff Report at 8; Initial PACE Coalition Comments at Tables E-G, Exhibits 11, 12. Further, the record data collected in the states proved without exception that only competition utilizing unbundled local switching fit the competitive profile for mass market competition. *See* Initial PACE Coalition Comments at Exhibit 21. None of this data is addressed in the *Order*.

In addition, the ILECs did not name a single wholesale provider of mass market local switching in any market in any state. *See* Initial PACE Coalition Comments at 53. The absence of a wholesale local switching market confirmed that the impairment that prevented carriers from using their own switches to serve mass market customers had also prevented a wholesale market from developing. The absence of a wholesale market is particularly noteworthy in light of the

FCC's previous reliance on that criterion as an indicator of impairment. *See, e.g., TRO* ¶¶ 504-05.

Notwithstanding the straightforward empirical data from the state evidentiary proceedings, the FCC chooses to accept at face value the representations made by the ILECs regarding actual competition. The FCC's finding of "significant nationwide deployment of switches by competitive providers," *Order* ¶ 205, and, more importantly, its conclusion that "those switches are being used to serve some mass market customers," *Order* ¶ 206 n.543, are based exclusively on the submissions made by the ILECs to the FCC.[25/]

At the same time, in tacit recognition that the evidence does not support a non-impairment finding on the basis of actual competition utilizing competitively provided switching, the FCC holds that "it is feasible for competitive LECs to use competitively deployed switches to serve mass market customers throughout the nation." *Order* ¶ 204. The FCC's "potential deployment" basis for a nationwide non-impairment finding likewise fails to take into account the data developed in the states. BellSouth conducted a potential deployment analysis for each of the nine states in its incumbent operating territory, which showed that a statewide finding of non-impairment could not be justified in any of those states. *See* PACE Coalition ex parte at 2. Thus, the ILEC's own analysis offered no rational basis for a national finding of non-impairment based on potential competition.[26/]

[25/] *See, e.g., Order* ¶ 206 n.542 (citing SBC "evidence" of competitive switch deployment in Illinois, Texas, California, Kansas, Indiana, and Wisconsin, and Verizon "examples" of competitive activity in Massachusetts, Pennsylvania, and Rhode Island, without any reference to or discussion regarding data gathered in evidentiary proceedings in those states).

[26/] Interestingly, Verizon chose not to attempt to prove non-impairment on the basis of potential deployment of competitive switching to serve mass market customers in any market in any of the states in its incumbent operating territory.

The FCC's decision to ignore contrary evidence, particularly when such evidence was gained through an evidentiary process which included sworn testimony and cross examination before a neutral decision-maker, and its reliance instead on the self-serving representations of parties with a very significant economic stake in the outcome of the process, renders its decision regarding mass market local switching arbitrary and capricious.

C. The Commission's Reliance On 'Reasonable Inferences' To Justify Its Nationwide Non-Impairment Finding Is Flawed

The FCC attempts to justify its otherwise unsupported national non-impairment finding by "draw[ing] reasonable inferences regarding the prospects for competition in other, similar markets." *Order* ¶ 22 (quoting *USTA II*, 359 F.3d at 575). The Commission cites *USTA II* as authority for its conclusion that "it is feasible for competitive LECs to use competitively deployed switches to serve mass market customers throughout the nation," *Id.* ¶ 204, notwithstanding the fact that CLECs were not actually doing so to any appreciable extent. The Commission's reliance on *USTA II* is misplaced.

In *USTA II*, the Court held that the Commission could not "simply ignore facilities deployment" along "similar" dedicated transport routes when assessing impairment. 359 F.3d at 575. The Court agreed with the Commission that competition on one route "should not be sufficient to establish competition" on the other route, but the Court rejected the Commission's "*implicit decision to treat competition on one route as irrelevant to the existence of impairment on the other.*" *Id.* (emphasis in original). The Court's assessment was predicated on the understanding that the "similar routes" were "all in the same geographic market and [were] similarly situated with regard to the barriers to entry that the Commission says are controlling." *Id.*

A straightforward review of this standard should have sufficed for the FCC to conclude that it could not use "reasonable inferences" to support a national finding of non-impairment for mass market local switching. The Court was clear that competition in one market is not enough, in and of itself, to justify a non-impairment finding in a second market, even when the two markets are similarly situated in terms of entry barriers. Yet that is precisely the basis on which the FCC grounds its national non-impairment finding for local switching. *Order* ¶ 199.

The Commission takes notice of the fact that significant numbers of competitive switches had been deployed by CLECs and concludes, without further analysis, that competitive switches can be deployed to serve all mass market customers in all geographic areas in the nation on a practical and economically-viable basis. The Commission ignores voluminous evidence that the competitive switches in operation are not being utilized to any appreciable extent to serve mass market customers. *See, e.g.*, Initial Comments of the NJDRA at 16-17; Initial Comments of MCI at 110. The evidence adduced in the state proceedings showed that while there may have been some analog loops being leased by CLECs for use with competitively-provided local switching, the pattern of entry was not consistent with viable mass market competition and that the trivial levels of activity were consistent only with incidental activity to enterprise services or legacy evidence of abandoned business plans. *See* Initial PACE Coalition Comments at 46; PACE Coalition Reply Comments at 5-7.

Clearly, the enterprise market (the market being served by competitive switching) and the mass market are not similarly situated in terms of entry barriers. *See TRO* ¶¶ 451-53, 459; Initial Comments of MCI at 110-112. The Commission is not at liberty to "proceed by very broad national categories where there is evidence that markets vary decisively." *USTA II*, 359 F.3d at 570 (citing *USTA I*, 290 F.3d at 425-26). The Commission's decision to ignore reasonable

differences between the enterprise market and the mass market, therefore, render its impairment determination legally flawed.

D. The Commission Fails To Explore Alternatives To A Nationwide Non-Impairment Finding

The Court in *USTA II* held that a rule is "irrational . . . if a party has presented to the agency a narrower alternative that has all the same advantages and fewer disadvantages, and the agency has not articulated any reasonable explanation for rejecting the proposed alternative." 359 F.3d at 571. Several parties presented the FCC with narrower alternatives to a national non-impairment rule that provided for unbundling only in the particular circumstances where impairment was known to exist. *See* ALTS Comments at 93-98; Initial Comments of NYSDPS at 6-12. A broad-based coalition of CLECs that utilize ILEC-provided local switching to serve mass market customers proposed two alternative approaches designed to limit unbundling to situations where carriers cannot practically and economically utilize competitively-provided switching. *See* Initial PACE Coalition Comments at 82-91 (proposing a density-based impairment standard and a "universal competitor" approach to impairment). The *Order* proffered alternatives.

The Commission's failure to consider any of the alternatives to a national non-impairment finding proposed by the parties, particularly in light of its candid acknowledgement that some impairment may exist, *See Order* ¶ 204, constitutes arbitrary and capricious decision-making that must be vacated by the Court.

E. The Commission's Exercise Of Its 'At A Minimum' Authority Is Arbitrary And Capricious

In a last ditch attempt to justify its nationwide non-impairment finding for mass market local switching, the Commission invokes the "at a minimum" language of section 251(d)(2). 47 U.S.C. §251(d)(2). The Commission concludes "not to unbundle pursuant to section 251(d)(2)'s

'at a minimum' authority," finding that any impairment carriers may still face was outweighed by the "significant costs in the form of decreased investment incentives" that unbundling would impose. *Order* ¶ 199. The Commission's reliance on the "at a minimum" clause to justify its blanket non-impairment finding is neither supported by the statute nor the Court's prior decisions.

The standard articulated by the Court for use of the "at a minimum" language of section 251(d)(2) is a narrow one. Use of "at a minimum" to justify a refusal to unbundle in the face of some impairment must be based on a reasonable conclusion that "*such unbundling would pose excessive impediments to infrastructure investment.*" *USTA II*, 359 F3d at 580 (emphasis added). The Commission is not free to invoke the "at a minimum" language to trump impairment merely to give effect to a policy preference for one form of competition over another. Yet that is precisely what the FCC does in refusing to require unbundling of mass market local switching in any geographic market in any circumstance. The FCC elevates its policy preference for facilities deployment above all other considerations, failing to take into account *inter alia* the benefits of unbundling.

The FCC bases its conclusion that the availability of unbundled local switching impedes facilities deployment on the ground that CLECs "have not rebutted the evidence of commenters" purportedly showing that CLECs have made unbundled local switching based UNE-P their mass market business plan in recognition "that facilities based carriers could not compete with TELRIC-based UNE-P." *Order* ¶ 220. The FCC's twisted logic and mischaracterization of CLEC submissions constitute the essence of arbitrary and capricious decision-making.

As an initial matter, the Commission's inference that "too low" TELRIC-based local switching rates were to blame for CLECs' reliance on ILEC-provided local switching to serve

mass market customers, *Order* ¶ 220, ignore unchallenged record evidence showing that rates for unbundled local switching are not "too low" by any standard. *See* PACE Coalition Reply Comments at 13. The record demonstrated that the TELRIC rates in effect were at the upper end (or beyond) of the just and reasonable range. *Id.* Moreover, ILEC claims that the Commission's TELRIC rates underestimate actual costs do not apply to local switching, where the Commission's rules require that switching costs be calculated based on the ILECs' actual switching topography. *See* 47 C.F.R. § 51.505(b)(1).

The absence of appreciable mass market competition relying on CLEC-provided switching is not the result of rates for ILEC-provided local switching that are too low to justify use of alternative switching capability, it is a consequence of the impairments faced by CLECs attempting to serve the mass market with their own switches.[27] Indeed, CLECs and numerous state commissions presented extensive unrebutted evidence that CLECs could not practically and economically compete in the mass market using non-ILEC facilities, thereby proving the opposite of what the FCC concludes. *See* Initial Comments of the PACE Coalition et al. at 39-53. The lack of facilities deployment in the mass market proves that CLECs are impaired from competing in the mass market without unbundled local switching and that removal of the unbundling obligation for mass market local switching would result in less competition for mass market customers, and not that unbundled local switching availability is hindering the

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[27] The FCC's data demonstrates the independence of UNE-L (loops without ILEC-provided unbundled local switching) and UNE-P (loops with ILEC-provided unbundled local switching) based competition. From June 2004 to December 2004, the ILECs reported declines in *both* UNE-L and UNE-P lines. *See* Local Telephone Competition Report at Table 4. Prior to this period, UNE-P and UNE-L lines increased together for 10 of 11 semi-annual reports. These trends are inconsistent with the claim that one method of competitive entry occurs at the expense of the other.

deployment of facilities to serve the mass market.[28/] The result of the FCC's flawed decision-making is that CLECs must deploy facilities to serve the mass market where they continue to encounter impairments to their using those switches to actually serve mass market customers or, alternatively, CLECs must exit the mass market.

Further, the record evidence before the FCC actually showed that the availability of mass market unbundled local switching spurred, rather than hindered, telecommunications infrastructure investment. *See, e.g.*, Phoenix Center Paper. Indeed, the revenues generated through the provision of mass market service using UNEs provided CLECs with the financial wherewithal to deploy advanced services in connection with their basic service offerings. *See* Initial PACE Coalition Comments at 22-25. As the FCC and this Court have both recognized, investment in advanced services is a separate and distinct goal of the statute. *See USTA II*, 359 F.3d at 579. *See also* 47 U.S.C. § 706. Yet the FCC utterly fails to consider the impact of local switching unbundling on investment decisions in the next-generation advanced services market, instead focusing exclusively on the possible impact on investment in the legacy POTS market.[29/]

28/ The decision also mischaracterizes CLEC statements about deployment of switches, citing a 2001 ex parte letter submitted on behalf of Birch Telecom, a CLEC serving mass market customers using ILEC-provided local switching and enterprise customers using self-provisioned switching. *See Order* ¶ 220 n.602. *See also* Birch ex parte at 1. The Commission cited only this letter as authority for the proposition that a number of CLECs "ha[d] no interest in deploying facilities." *Order* ¶ 220 n.602. But the letter merely indicates that, while Birch would prefer to utilize its own switching and other facilities to serve mass market customers, it is not practically and economically feasible for it to do so. The FCC is not free to rewrite the record to support its conclusions. It must base its conclusions on the record as it exists.

29/ The FCC is attempting to rewrite history to now claim that it expressed a preference for facilities deployment at all costs in its 1999 UNE Remand Order. *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket 96-98 (rel. Nov. 5, 1999). In adopting an unbundling framework in that order, the Commission recognized that the continued availability of UNEs was "integral to achieving Congress' objective of promoting rapid competition to all consumers in the local telecommunications market," 1999 UNE Remand Order at 3700, and it cited with approval "Congress' expectation

The Court expressly directed the Commission to balance the costs and the benefits of unbundling. *USTA II*, 359 F3d at 579-80. And in balancing costs and benefits, the Commission was obligated to consider Congress' interest in ensuring the availability of unbundled local switching. Congress included local switching as a network element the BOCs must make available in return for the right to enter the long distance market in their incumbent operating territory. *See* 47 U.S.C. § 271(c)(2)(B)(vi). The requirement that the BOCs offer unbundled local switching is particularly relevant to an analysis of the costs of unbundling because each of the BOCs that has sought and received in-region long distance operating authority must have already absorbed the costs of unbundling into its business plan. The FCC's failure to conduct an inquiry that considered all factors impacting the costs and benefits of unbundling rendered its blanket non-impairment finding unlawful.

IV. THE COMMISSION'S LOCAL SWITCHING RATE INCREASE IS ARBITRARY AND CAPRICIOUS

The FCC authorized the ILECs, including the BOCs, to increase local switching prices by $1 per month per line for existing customers for twelve months upon the effective date of the *Order*.[30/] *See Order* ¶ 228. Importantly, section 271 requires the BOCs to offer certain network elements, including unbundled local switching, at rates that are just, reasonable, nondiscriminatory and provide competitors meaningful access to compete. 47 U.S.C. §271(c)(2)(B)(vi); *TRO* ¶ 656. The FCC orders the $1 increase without conducting any analysis

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that new competitors would use unbundled elements from the incumbent LEC until it was practical and economically feasible to construct their own networks." *Id.* at 3701. The Court in *USTA I* and *USTA II* did not endorse a regulatory regime that places facilities deployment above any and all other factors when considering unbundling. To the contrary, this Court consistently has held that the FCC must carefully weigh all benefits and costs of unbundling that are relevant to achievement of any of the statute's goals. *See USTA II*, 359 F.3d at 572, 580.

30/ The Commission did not address the pricing for local switching used to serve new customers or the pricing that would apply at the end of twelve months.

that the resulting prices for local switching would remain just and reasonable, and failed to address unchallenged evidence that they would not. Accordingly, the FCC's decision is arbitrary and capricious and should be reversed.

The special circumstances of the BOCs caused Congress to subject such entities to two distinct unbundling obligations.[31/] The first, addressed directly by the *TRO*, concerns unbundled network elements for which the Commission has found impairment under section 251. In addition, however, the BOCs voluntarily agreed to *additional* unbundling obligations in exchange for authority to provide in-region long distance services. 47 U.S.C. § 271(c)(2)(B). The Commission consistently has held that "the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling obligation under section 251." *TRO* ¶ 653. The Court has confirmed the Commission's reading of the statute. *USTA II*, 359 F.3d at 589.

Where the unbundling requirements of sections 251 and 271 differ, however, concerns the pricing standard by which rates are judged. The prices for network elements offered in compliance with section 251 are established according to the Commission's TELRIC standard, while the prices for elements required by section 271 must satisfy a just, reasonable and nondiscriminatory standard that provides competitors meaningful access to compete. The Commission has described the section 271 pricing standard as follows:

> Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and

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31/ The Commission has explained that "[t]hese additional requirements reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market . . . If the BOC is unwilling to open its local telecommunications markets to competition or apply for relief, the interexchange market remains protected because the BOC will not receive section 271 authorization." *TRO* ¶ 655.

> 202 . . . . Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements. *TRO* ¶ 663 (footnotes omitted).

The FCC's conclusions regarding application of the just and reasonable pricing standard were affirmed by the Court in *USTA II*. *See USTA II*, 359 F3d at 589-90. The Court "s[aw] nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment." *Id.* at 589 (citation omitted).

In the *Order*, the Commission creates the very condition that it discussed in the *TRO* – that is, unbundled local switching would no longer be required under section 251, *See Order* ¶ 199, but the BOCs still would be required to offer competitors meaningful access to unbundled local switching at rates that are just and reasonable to remain in compliance with section 271. Importantly, however, the *Order* authorizes the BOCs to impose a $1 per month per line increase in local switching rates without conducting *any* analysis to determine whether the resulting rates would remain just and reasonable, non-discriminatory, and provide competitors with meaningful access to compete. The Commission does so despite unchallenged evidence demonstrating that the existing TELRIC-based rates were already at the high end (if not exceeding) the just and reasonable range. *See* PACE Coalition Reply Comments at 11-14. The record showed that the existing TELRIC rates were more than four times higher than the BOCs' actual switching expenses, while the average markup for the BOCs was only 1.8 times cost.[32/] The $1 increase

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[32/] The just and reasonable standard has traditionally relied upon historical costs to judge prices. *See Order* ¶ 51. The analysis conducted by the PACE Coalition et al. compared the average price to the actual Central Office Switching Expense reported by each BOC to the FCC for 2003 (last available data). Because this measure does not include investment costs or a contribution to common costs, the analysis compared the average "markup" (i.e., revenue above expense) for local switching to the average markup for the BOCs' other services. Thus, the analysis provided a benchmark to compare the relationship between the rate for local switching in relation to actual switching expenses, and that same ratio for the BOCs' services more generally.

authorized by the FCC resulted in an average markup of *five* times actual cost, far in excess of the markup above expenses for the BOCs' services overall. PACE Coalition Reply Comments at 12. At no point did the BOCs rebut the evidence that "the existing rates are at the upper end (or beyond) of the just and reasonable range." *Id.* at 14. Further, the Commission ignored the analysis in deciding to increase local switching rates by $1.[33/]

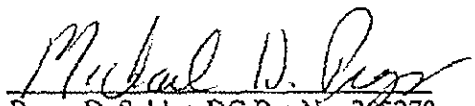
The issue is not whether the analysis presented to the Commission is the only way to evaluate the just and reasonableness of the higher rates authorized in the *Order*. The fact is that the Commission conducts *no* analysis of the relationship between the new higher rates that it was authorizing and historical costs (or any other measure of just and reasonableness) and fails to address the merits of the evidence before it. The Commission's adoption of a $1 increase in rates therefore is arbitrary and capricious and should be reversed.

33/ The Commission's sole mention of the PACE Coalition study concerned only that aspect addressing market evidence of impairment. *See Order* ¶ 220 n.605.

CONCLUSION

The Court should grant the instant petitions for review.

Respectfully submitted,



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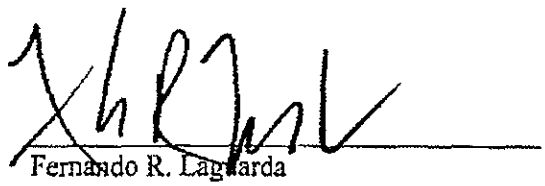
July 26, 2005

34/ FDN Communications does not join Sections III and IV of the Brief.

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the foregoing Opening Brief of CLEC Petitioners and Intervenor In Support is proportionately spaced, has a typeface of at least 11 points in height, and contains 13, 430 words (as measured by the word count of the word-processing program used to prepare this brief).



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CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of July 2005, I caused copies of the foregoing Opening Brief of CLEC Petitioners and Intervenor In Support to be served upon the parties on the attached service list via electronic service and first-class mail, postage prepaid.

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ADDENDUM

ADDENDUM A
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United States Code

TITLE 5 - GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I - THE AGENCIES GENERALLY

CHAPTER 7 - JUDICIAL REVIEW

Section 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

United States Code

TITLE 47 - TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5 - WIRE OR RADIO COMMUNICATION

SUBCHAPTER II - COMMON CARRIERS

PART I - COMMON CARRIER REGULATION

Section 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complaint.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1)or(2) shall be a final order and may be appealed under section 402(a)of this title.

United States Code

TITLE 47 - TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5 - WIRE OR RADIO COMMUNICATION

SUBCHAPTER II - COMMON CARRIERS

PART II - DEVELOPMENT OF COMPETITIVE MARKETS

Section 251. Interconnection

(a) General duty of telecommunications carriers
Each telecommunications carrier has the duty -

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers
Each local exchange carrier has the following duties:

(1) Resale
The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability
The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity
The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way
The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation
The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers
In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate
The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection
The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access
The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale -
The duty -
(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes
The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation
The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general
Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards
In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether -

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations
In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that -

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction
The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs
The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number
The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies
(A) Exemption
Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule
The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption
The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers
A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification -

(A) is necessary -

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements
On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) ''Incumbent local exchange carrier'' defined

(1) Definition

For purposes of this section, the term ''incumbent local exchange carrier'' means, with respect to an area, the local exchange carrier that -

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if -

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

United States Code

TITLE 47 - TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5 - WIRE OR RADIO COMMUNICATION

SUBCHAPTER II - COMMON CARRIERS

PART II - DEVELOPMENT OF COMPETITIVE MARKETS

Section 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning -

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph(1) shall provide a copy of the petition and any documentation to the other party

or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond
A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate
The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration
In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall -

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section -

(A) shall be -

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless -

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed -

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records

with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services
For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required
Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection
The State commission may only reject -

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that -

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority
Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision
If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this

section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act
If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions
In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general
A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review
A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review
The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission -

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review;

or

(B) permit such statement to take effect.

(4) Authority to continue review
Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected
The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings
Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required
A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers
A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) ''Incumbent local exchange carrier'' defined
For purposes of this section, the term ''incumbent local exchange carrier'' has the meaning provided in section 251(h) of this title.

TITLE 47--TELECOMMUNICATION

CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION (CONTINUED)

PART 51 - INTERCONNECTION--Table of Contents

Subpart D - Additional Obligations of Incumbent Local Exchange Carriers

Sec. 51.309 Use of unbundled network elements.

(a) Except as provided in Sec. 51.318, an incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements for the service a requesting telecommunications carrier seeks to offer.

(b) A requesting telecommunications carrier may not access an unbundled network element for the sole purpose of providing non-qualifying services.

(c) A telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. A telecommunications carrier's purchase of access to an unbundled network element does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element.

(d) A requesting telecommunications carrier that accesses and uses an unbundled network element pursuant to section 251(c)(3) of the Act and this part to provide a qualifying service may use the same unbundled
network element to provide non-qualifying services.

(e) Except as provided in Sec. 51.318, an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled
network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

(f) Upon request, an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC.

(g) An incumbent LEC shall not deny access to an unbundled network element or a combination of unbundled network elements on the grounds that one or more of the elements:

(1) Is connected to, attached to, linked to, or combined with, a facility or service obtained from an incumbent LEC; or

(2) Shares part of the incumbent LEC's network with access services or inputs for non-qualifying services.

TITLE 47--TELECOMMUNICATION

CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION (CONTINUED)

PART 51 - INTERCONNECTION--Table of Contents

Subpart D - Additional Obligations of Incumbent Local Exchange Carriers

Sec. 51.316 Conversion of unbundled network elements and services.

(a) Upon request, an incumbent LEC shall convert a wholesale service, or group of wholesale services, to the equivalent unbundled network element, or combination of unbundled network elements, that is available to the requesting telecommunications carrier under section 251(c)(3) of the Act and this part.

(b) An incumbent LEC shall perform any conversion from a wholesale service or group of wholesale services to an unbundled network element or combination of unbundled network elements without adversely affecting the service quality perceived by the requesting telecommunications carrier's end-user customer.

(c) Except as agreed to by the parties, an incumbent LEC shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing a service for the first time, in connection with any conversion between a wholesale service or group of wholesale services and an unbundled network element or combination of unbundled network elements.

[68 FR 52294, Sept. 2, 2003]

TITLE 47--TELECOMMUNICATION

CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION (CONTINUED)

PART 51 - INTERCONNECTION--Table of Contents

Subpart D - Additional Obligations of Incumbent Local Exchange Carriers

Sec. 51.318 Eligibility criteria for access to certain unbundled network elements.

(a) Except as provided in paragraph (b) of this section, an incumbent LEC shall provide access to unbundled network elements and combinations of unbundled network elements without regard to whether the requesting telecommunications carrier seeks access to the elements to establish a new circuit or to convert an existing circuit from a service to unbundled network elements.

(b) An incumbent LEC need not provide access to an unbundled DS1 loop in combination, or commingled, with a dedicated DS1 transport or dedicated DS3 transport facility or service, or to an unbundled DS3 loop in combination, or commingled, with a dedicated DS3 transport facility or service, or an unbundled dedicated DS1 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled dedicated DS3 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled DS3 loop or a DS3 channel termination service, unless the requesting telecommunications carrier certifies that all of the following conditions are met:

(1) The requesting telecommunications carrier has received state certification to provide local voice service in the area being served or, in the absence of a state certification requirement, has complied with registration, tariffing, filing fee, or other regulatory requirements applicable to the provision of local voice service in that area.

(2) The following criteria are satisfied for each combined circuit, including each DS1 circuit, each DS1 enhanced extended link, and each DS1-equivalent circuit on a DS3 enhanced extended link:

(i) Each circuit to be provided to each customer will be assigned a local number prior to the provision of service over that circuit;

(ii) Each DS1-equivalent circuit on a DS3 enhanced extended link must have its own local number assignment, so that each DS3 must have at least 28 local voice numbers assigned to it;

(iii) Each circuit to be provided to each customer will have 911 or E911 capability prior to the provision of service over that circuit;

(iv) Each circuit to be provided to each customer will terminate in a collocation arrangement that meets the requirements of paragraph (c) of this section;

(v) Each circuit to be provided to each customer will be served by an interconnection trunk that meets the requirements of paragraph (d) of this section;

(vi) For each 24 DS1 enhanced extended links or other facilities having equivalent capacity, the requesting telecommunications carrier will have at least one active DS1 local service interconnection trunk that meets the requirements of paragraph (d) of this section; and

(vii) Each circuit to be provided to each customer will be served by a switch capable of switching local voice traffic.

(c) A collocation arrangement meets the requirements of this paragraph if it is:

(1) Established pursuant to section 251(c)(6) of the Act and located at an incumbent LEC premises within the same LATA as the customer's premises, when the incumbent LEC is not the collocator; and

(2) Located at a third party's premises within the same LATA as the customer's premises, when the incumbent LEC is the collocator.

(d) An interconnection trunk meets the requirements of this paragraph if the requesting telecommunications carrier will transmit the calling party's number in connection with calls exchanged over the trunk.

[68 FR 52295, Sept. 2, 2003, as amended at 68 FR 64000, Nov. 12, 2003]

TITLE 47--TELECOMMUNICATION

CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION (CONTINUED)

PART 51 - INTERCONNECTION--Table of Contents

Subpart D - Additional Obligations of Incumbent Local Exchange Carriers

Sec. 51.319 Specific unbundling requirements.

(a) Local loops. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the local loop on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part and as set forth in paragraphs (a)(1) through (a)(9) of this section. The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises. This element includes all features, functions, and capabilities of such transmission facility, including the network interface device. It also includes all electronics, optronics, and intermediate devices (including repeaters and load coils) used to establish the transmission path to the end-user customer premises as well as any inside wire owned or controlled by the incumbent LEC that is part of that transmission path.

(1) Copper loops. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the copper loop on an unbundled basis. A copper loop is a stand-alone local loop comprised entirely of copper wire or cable. Copper loops include two-wire and four-wire analog voice-grade copper loops, digital copper loops (e.g., DS0s and integrated services digital network lines), as well as two-wire and four-wire copper loops conditioned to transmit the digital signals needed to provide digital subscriber line services, regardless of whether the copper loops are in service or held as spares. The copper loop includes attached electronics using time division multiplexing technology, but does not include packet switching capabilities as defined in paragraph (a)(2)(i) of this section. The availability of DS1 and DS3 copper loops is subject to the requirements of paragraphs (a)(4)and (a)(5) of this section.

(i) Line sharing. Beginning on the effective date of the Commission's Triennial Review Order, the high frequency portion of a copper loop shall no longer be required to be provided as an unbundled network element, subject to the transitional line sharing conditions in paragraphs (a)(1)(i)(A) and (a)(1)(i)(B) of this section. Line sharing is the process by which a requesting telecommunications carrier rovides digital subscriber line service over the same copper loop that the incumbent LEC uses to provide voice service, with the incumbent LEC using the low frequency portion of the loop and the requesting telecommunications carrier using the high frequency portion of the loop. The high frequency portion of the loop consists of the frequency range on the copper loop above the range that carries analog circuit-switched voice transmissions. This portion of the loop includes the features, functions, and capabilities of the loop that are used to establish a complete transmission path on the high frequency range between the incumbent LEC's distribution frame (or its equivalent) in

its central office and the demarcation point at the end-user customer premises, and includes the high frequency portion of any inside wire owned or controlled by the incumbent LEC.

(A) Line sharing customers before the effective date of the Commission's Triennial Review Order. An incumbent LEC shall provide a requesting telecommunications carrier with the ability to engage in line sharing over a copper loop where, prior to the effective date of the Commission's Triennial Review Order, the requesting Telecommunications carrier began providing digital subscriber line service to a particular end-user customer and has not ceased providing digital subscriber line service to that customer. Until such end-user customer cancels or otherwise discontinues its subscription to the digital subscriber line service of the requesting telecommunications carrier, or its successor or assign, an incumbent LEC shall continue to provide access to the high frequency portion of the loop at the same rate that the incumbent LEC charged for such access prior to the effective date of the Commission's Triennial Review Order.

(B) Line sharing customers on or after the effective date of the Commission's Triennial Review Order. An incumbent LEC shall provide a requesting telecommunications carrier with the ability to engage in line sharing over a copper loop, between the effective date of the Commission's Triennial Review Order and three years after that effective date, where the requesting telecommunications carrier began providing digital subscriber line service to a particular end-user customer on or before the date one year after that effective date. Beginning three years after the effective date of the Commission's Triennial Review Order, the incumbent LEC is no longer required to provide a requesting telecommunications carrier with the ability to engage in line sharing for this end-user customer or any new end-user customer. Between the effective date of the Commission's Triennial Review Order and three years after that effective date, an incumbent LEC shall provide a requesting telecommunications carrier with access to the high frequency portion of a copper loop in order to serve line sharing customers obtained between the effective date of the Commission's Triennial Review Order and one year after that effective date in the following manner:

(1) During the first year following the effective date of the Commission's Triennial Review Order, the incumbent LEC shall provide access to the high frequency portion of a copper loop at 25 percent of the state-approved monthly recurring rate, or 25 percent of the monthly recurring rate set forth in the incumbent LEC's and requesting telecommunications carrier's interconnection agreement, for access to a copper loop in effect on that date.

(2) Beginning one year plus one day after the effective date of the Commission's Triennial Review Order until two years after that effective date, the incumbent LEC shall provide access to the high frequency portion of a copper loop at 50 percent of the state-approved monthly recurring rate, or 50 percent of the monthly recurring rate set forth in the incumbent

LEC's and requesting telecommunications Carrier's interconnection agreement, for access to a copper loop in effect on the effective date of the Commission's Triennial Review Order.

(3) Beginning two years plus one day after effective date of the Commission's Triennial Review Order until three years after that effective date, the incumbent LEC shall provide access to the high frequency portion of a copper loop at 75 percent of the state-approved monthly recurring rate, or 75 percent of the monthly recurring rate set forth in the incumbent LEC's and requesting telecommunications carrier's interconnection agreement, for access to a copper loop in effect on the effective date of the Commission's Triennial Review Order.

(ii) Line splitting. An incumbent LEC shall provide a requesting telecommunications carrier that obtains an unbundled copper loop from the incumbent LEC with the ability to engage in line splitting arrangements with another competitive LEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent. Line splitting is the process in which one competitive LEC provides narrowband voice service over the low frequency portion of a copper loop and a second competitive LEC provides digital subscriber line service over the high frequency portion of that same loop.

(A) An incumbent LEC's obligation, under paragraph (a)(1)(ii) of this section, to provide a requesting telecommunications carrier with the ability to engage in line splitting applies regardless of whether the carrier providing voice service provides its own switching or obtains local circuit switching as an unbundled network element pursuant to paragraph (d) of this section.

(B) An incumbent LEC must make all necessary network modifications, including providing nondiscriminatory access to operations support systems necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements.

(iii) Line conditioning. The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop under paragraph (a)(1) of this section, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop. If the incumbent LEC seeks compensation from the requesting telecommunications carrier for line conditioning, the requesting telecommunications carrier has the option of refusing, in whole or in part, to have the line conditioned; and a requesting telecommunications carrier's refusal of some or all aspects of line conditioning will not diminish any right it may have, under paragraphs (a) and (b) of this section, to access the copper loop, the high frequency portion of the copper loop, or the copper subloop.

(A) Line conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders.

(B) Incumbent LECs shall recover the costs of line conditioning from the requesting telecommunications carrier in accordance with the Commission's forward-looking pricing principles promulgated pursuant to section 252(d)(1) of the Act and in compliance with rules governing nonrecurring costs in Sec. 51.507(e).

(C) Insofar as it is technically feasible, the incumbent LEC shall test and report troubles for all the features, functions, and capabilities of conditioned copper lines, and may not restrict its testing to voice transmission only.

(D) Where the requesting telecommunications carrier is seeking access to the high frequency portion of a copper loop or copper subloop pursuant to paragraphs (a) or (b) of this section and the incumbent LEC claims that conditioning that loop or subloop will significantly degrade, as defined in Sec. 51.233, the voiceband services that the incumbent LEC is currently providing over that loop or subloop, the incumbent LEC must either:

(1) Locate another copper loop or copper subloop that has been or can be conditioned, migrate the incumbent LEC's voiceband service to that loop or subloop, and provide the requesting telecommunications carrier with access to the high frequency portion of that alternative loop or subloop; or

(2) Make a showing to the state commission that the original copper loop or copper subloop cannot be conditioned without significantly degrading voiceband services on that loop or subloop, as defined in Sec. 51.233, and that there is no adjacent or alternative copper loop or copper subloop available that can be conditioned or to which the end-user customer's voiceband service can be moved to enable line sharing.

(E) If, after evaluating the incumbent LEC's showing under paragraph (a)(1)(iii)(D)(2) of this section, the state commission concludes that a copper loop or copper subloop cannot be conditioned without significantly degrading the voiceband service, the incumbent LEC cannot then or subsequently condition that loop or subloop to provide advanced services to its own customers without first making available to any requesting telecommunications carrier the high frequency portion of the newly conditioned loop or subloop.

(iv) Maintenance, repair, and testing. (A) An incumbent LEC shall provide, on a nondiscriminatory basis, physical loop test access points to a requesting telecommunications carrier at the splitter, through a cross-connection to the requesting telecommunications carrier's collocation space, or through a standardized interface, such as an intermediate distribution frame or a test access server, for the purpose of testing, maintaining, and repairing copper loops and copper subloops.

(B) An incumbent LEC seeking to utilize an alternative physical access methodology may request approval to do so from the state commission, but must show that the proposed alternative method is reasonable and nondiscriminatory, and will not disadvantage a requesting telecommunications carrier's ability to perform loop or service testing, maintenance, or repair.

(v) Control of the loop and splitter functionality. In situations where a requesting telecommunications carrier is obtaining access to the high frequency portion of a copper loop either through a line sharing or line splitting arrangement, the incumbent LEC may maintain control over the loop and splitter equipment and functions, and shall provide to the requesting telecommunications carrier loop and splitter functionality that is compatible with any transmission technology that the requesting telecommunications carrier seeks to deploy using the high frequency portion of the loop, as defined in paragraph (a)(1)(i) of this section, provided that such transmission technology is presumed to be deployable pursuant to Sec. 51.230.

(2) Hybrid loops. A hybrid loop is a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant.

(i) Packet switching facilities, features, functions, and capabilities. An incumbent LEC is not required to provide unbundled access to the packet switched features, functions and capabilities of its hybrid loops. Packet switching capability is the routing or forwarding of packets, frames, cells, or other data units based on address or other routing information contained in the packets, frames, cells or other data units, and the functions that are performed by the digital subscriber line access multiplexers, including but not limited to the ability to terminate an end-user customer's copper loop (which includes both a low-band voice channel and a high-band data channel, or solely a data channel); the ability to forward the voice channels, if present, to a circuit switch or multiple circuit switches; the ability to extract data units from the data channels on the loops; and the ability to combine data units from multiple loops onto one or more trunks connecting to a packet switch or packet switches.

(ii) Broadband services. When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide the requesting telecommunications carrier with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that

hybrid loop, including DS1 or DS3 capacity (where impairment has been found to exist), on an unbundled basis to establish a complete

transmission path between the incumbent LEC's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the hybrid loop that are not used to transmit packetized information.

(iii) Narrowband services. When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of narrowband services, the incumbent LEC may either:

(A) Provide nondiscriminatory access, on an unbundled basis, to an entire hybrid loop capable of voice-grade service (i.e., equivalent to DS0 capacity), using time division multiplexing technology; or

(B) Provide nondiscriminatory access to a spare home-run copper loop serving that customer on an unbundled basis.

(3) Fiber-to-the-home loops. A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, and serving an end user's customer premises.

(i) New builds. An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop on an unbundled basis when the incumbent LEC deploys such a loop to an end user's customer premises that previously has not been served by any loop facility.

(ii) Overbuilds. An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop on an unbundled basis when the incumbent LEC has deployed such a loop parallel to, or in replacement of, an existing copper loop facility, except that:

(A) The incumbent LEC must maintain the existing copper loop connected to the particular customer premises after deploying the fiber-to-the-home loop and provide nondiscriminatory access to that copper loop on an unbundled basis unless the incumbent LEC retires the copper loop pursuant to paragraph (a)(3)(iii) of this section.

(B) An incumbent LEC that maintains the existing copper loop pursuant to paragraph (a)(3)(ii)(A) of this section need not incur any expenses to ensure that the existing copper loop remains capable of transmitting signals prior to receiving a request for access pursuant to that paragraph, in which case the incumbent LEC shall restore the copper loop to serviceable condition upon request.

(C) An incumbent LEC that retires the copper loop pursuant to paragraph (a)(3)(iii) of this section shall provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the fiber-to-the-home loop on an unbundled basis.

(iii) Retirement of copper loops or copper subloops. Prior to retiring any copper loop or copper subloop that has been replaced with a fiber-to-the-home loop, an incumbent LEC must comply with:

(A) The network disclosure requirements set forth in section

251(c)(5) of the Act and in Sec. 51.325 through Sec. 51.335; and

(B) Any applicable state requirements.

(4) DS1 loops.

(i) An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS1 loop on an unbundled basis except where the state commission has found, through application of the competitive wholesale facilities trigger in paragraph (a)(4)(ii) of this section, that requesting telecommunications carriers are not impaired without access to a DS1 loop at a specific customer location. A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services.

(ii) Competitive wholesale facilities trigger for DS1 loops. A state commission shall find that a requesting telecommunications carrier is not impaired without access to a DS1 loop at a specific customer location where two or more competing providers not affiliated with each other or with the incumbent LEC, including intermodal providers of service comparable in quality to that of the incumbent LEC, each satisfy the conditions in paragraphs (a)(4)(ii)(A) and (a)(4)(ii)(B) of this section:

(A) The competing provider has deployed its own DS1 facilities, and offers a DS1 loop over its own facilities on a widely available wholesale basis to other carriers desiring to serve customers at that location. For purposes of this paragraph, the competing provider's DS1 facilities may use dark fiber facilities that the competing provider has obtained on an unbundled, leased, or purchased basis if it has attached its own optronics to activate the fiber.

(B) The competing provider has access to the entire customer location, including each individual unit within that location.

(5) DS3 loops. Subject to the cap in paragraph (a)(5)(iii), an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS3 loop on an unbundled basis except where the state commission has found, through application of either paragraph (a)(5)(i) of this section or the potential deployment analysis in paragraph (a)(5)(ii) of this section, that requesting telecommunications carriers are not impaired without access to a DS3 loop at a specific customer location. A DS3 loop is a digital local loop having a total digital signal speed of 44.736 megabytes per second.

(i) Triggers for DS3 loops. A state commission shall find that a requesting telecommunications carrier is not impaired without access to unbundled DS3 loops at a specific customer location where two or more competing providers not affiliated with each other or with the incumbent LEC, including intermodal providers of service comparable in quality to that of the incumbent LEC, satisfy either paragraph (a)(5)(i)(A) or paragraph (a)(5)(i)(B) of this section:

(A) Self-provisioning trigger for DS3 loops. To satisfy this trigger, a state commission must find that each competing provider has either deployed its own DS3 facilities at that specific customer location and is serving customers via those facilities at that location, or has deployed DS3 facilities by attaching its own optronics to activate dark fiber transmission facilities obtained under a long-term indefeasible right of use and is serving customers via those facilities at that location.

(B) Competitive wholesale facilities trigger for DS3 loops. To satisfy this trigger, a state commission must find that each competing provider satisfies the conditions in paragraphs (a)(5)(i)(B)(1) and (a)(5)(i)(B)(2) of this section.

(1) The competing provider has deployed its own DS3 facilities, and offers a DS3 loop over its own facilities on a widely available wholesale basis to other competing providers seeking to serve customers at the specific customer location. For purposes of this paragraph, the competing provider's DS3 facilities may use dark fiber facilities that the competing provider has obtained on an unbundled, leased, or purchased basis if it has attached its own optronics to activate the fiber.

(2) The competing provider has access to the entire customer location, including each individual unit within that location.

(ii) Potential deployment of DS3 loops. Where neither trigger in paragraph (a)(5)(i) of this section is satisfied, a state commission shall consider whether other evidence shows that a requesting telecommunications carrier is not impaired without access to an unbundled DS3 loop at a specific customer location. To make this determination, a state must consider the following factors: evidence of alternative loop deployment at that location; local engineering costs of building and utilizing transmission facilities; the cost of underground or aerial laying of fiber or copper; the cost of equipment needed for transmission; installation and other necessary costs involved in setting up service; local topography such as hills and rivers; availability of reasonable access to rights-of-way; building access restrictions/costs; and availability/feasibility of similar quality/reliability alternative transmission technologies at that particular location.

(iii) Cap on unbundled DS3 circuits. A requesting telecommunications carrier may obtain a maximum of two unbundled DS3 loops for any single customer location where DS3 loops are available as unbundled loops.

(6) Dark fiber loops. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a dark fiber loop on an unbundled basis except where a state commission has found, through application of the self-provisioning trigger in paragraph (a)(6)(i) of this section or the potential

deployment analysis in paragraph (a)(6)(ii) of this section, that requesting telecommunications carriers are not impaired without access to a dark fiber loop at a specific customer location. Dark fiber is fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services.

(i) Self-provisioning trigger for dark fiber loops. A state commission shall find that a requesting telecommunications carrier is not impaired without access to a dark fiber loop at a specific customer location where two or more competing providers not affiliated with each other or with the incumbent LEC, have deployed their own dark fiber facilities at that specific customer location. For purposes of making this determination, a competing provider that has obtained those dark fiber facilities under a long-term indefeasible right of use shall be considered a competing provider with its own dark fiber facilities. Dark fiber purchased on an unbundled basis from the incumbent LEC shall not be considered under this paragraph.

(ii) Potential deployment of dark fiber loops. Where the trigger in paragraph (a)(6)(i) of this section is not satisfied, a state commission shall consider whether other evidence shows that a requesting telecommunications carrier is not impaired without access to an unbundled dark fiber loop at a specific customer location. To make this determination, a state must consider the following factors: evidence of alternative loop deployment at that location; local engineering costs of building and utilizing transmission facilities; the cost of underground or aerial laying of fiber; the cost of equipment needed for transmission; installation and other necessary costs involved in setting up service; local topography such as hills and rivers; availability of reasonable access to rights-of-way; building access restrictions/costs; and availability/feasibility of similar quality/reliability alternative transmission technologies at that particular location.

(7) State commission proceedings. A state commission shall complete the proceedings necessary to satisfy the requirements in paragraphs (a)(4), (a)(5), and (a)(6) of this section in accordance with paragraphs (a)(7)(i) and (a)(7)(ii) of this section.

(i) Initial review. A state commission shall complete any initial review applying the triggers and criteria in paragraphs (a)(4), (a)(5), and (a)(6) of this section within nine months from the effective date of the Commission's Triennial Review Order.

(ii) Continuing review. A state commission shall complete any subsequent review applying these triggers and criteria within six months of the filing of a petition or other pleading to conduct such a review.

(8) Routine network modifications.

(i) An incumbent LEC shall make all routine network modifications to unbundled loop facilities used by requesting telecommunications carriers where the requested loop facility has already been constructed. An incumbent LEC shall perform these routine network modifications to unbundled loop facilities in a nondiscriminatory fashion, without regard to whether the loop facility being accessed was constructed on behalf, or in accordance with the specifications, of any carrier.

(ii) A routine network modification is an activity that the incumbent LEC regularly undertakes for its own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to activate such loop for its own customer. They also include activities needed to enable a requesting telecommunications carrier to obtain access to a dark fiber loop. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the construction of a new loop, or the installation of new aerial or buried cable for a requesting telecommunications carrier.

(9) Engineering policies, practices, and procedures. An incumbent LEC shall not engineer the transmission capabilities of its network in a manner, or engage in any policy, practice, or procedure, that disrupts or degrades access to a local loop or subloop, including the time division multiplexing-based features, functions, and capabilities of a hybrid loop, for which a requesting telecommunications carrier may obtain or has obtained access pursuant to paragraph (a) of this section.

(b) Subloops. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to subloops on an unbundled basis in accordance with section 251(c)(3) of the Act and this part and as set forth in paragraph (b) of this section.

(1) Copper subloops. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a copper subloop on an unbundled basis. A copper subloop is a portion of a copper loop, or hybrid loop, comprised entirely of copper wire or copper cable that acts as a transmission facility between any point of technically feasible access in an incumbent LEC's outside plant, including inside wire owned or controlled by the incumbent LEC, and the end-user customer premises. A copper subloop includes all intermediate devices (including repeaters and load coils) used to establish a transmission path between a point of technically feasible access and the demarcation point at the end-user customer premises, and includes the features, functions, and capabilities of the copper loop. Copper subloops include two-wire and four-wire analog voice-grade subloops as

well as two-wire and four-wire subloops conditioned to transmit the digital signals needed to provide digital subscriber line services, regardless of whether the subloops are in service or held as spares.

(i) Point of technically feasible access. A point of technically feasible access is any point in the incumbent LEC's outside plant where a technician can access the copper wire within a cable without removing a splice case. Such points include, but are not limited to, a pole or pedestal, the serving area interface, the network interface device, the minimum point of entry, any remote terminal, and the feeder/distribution interface. An incumbent LEC shall, upon a site-specific request, provide access to a copper subloop at a splice near a remote terminal. The incumbent LEC shall be compensated for providing this access in accordance with Sec. Sec. 51.501 through 51.515.

(ii) Rules for collocation. Access to the copper subloop is subject to the Commission's collocation rules at Sec. Sec. 51.321 and 51.323.

(2) Subloops for access to multiunit premises wiring. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the subloop for access to multiunit premises wiring on an unbundled basis regardless of the capacity level or type of loop that the requesting telecommunications carrier seeks to provision for its customer. The subloop for access to multiunit premises wiring is defined as any portion of the loop that it is technically feasible to access at a terminal in the incumbent LEC's outside plant at or near a multiunit premises. One category of this subloop is inside wire, which is defined for purposes of this section as all loop plant owned or controlled by the incumbent LEC at a multiunit customer premises between the minimum point of entry as defined in Sec. 68.105 of this chapter and the point of demarcation of the incumbent LEC's network as defined in Sec. 68.3 of this chapter.

(i) Point of technically feasible access. A point of technically feasible access is any point in the incumbent LEC's outside plant at or near a multiunit premises where a technician can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within to access the wiring in the multiunit premises. Such points include, but are not limited to, a pole or pedestal, the network interface device, the minimum point of entry, the single point of interconnection, and the feeder/distribution interface.

(ii) Single point of interconnection. Upon notification by a requesting telecommunications carrier that it requests interconnection at a multiunit premises where the incumbent LEC owns, controls, or leases wiring, the incumbent LEC shall provide a single point of interconnection that is suitable for use by multiple carriers. This obligation is in addition to the incumbent LEC's obligations, under paragraph (b)(2) of this section, to provide nondiscriminatory access to a subloop for access to multiunit premises wiring, including any inside wire, at any technically feasible point.

If the parties are unable to negotiate rates, terms, and conditions under which the incumbent LEC will provide this single point of interconnection, then any issues in dispute regarding this obligation shall be resolved in state proceedings under section 252 of the Act.

(3) Other subloop provisions--

(i) Technical feasibility. If parties are unable to reach agreement through voluntary negotiations as to whether it is technically feasible, or whether sufficient space is available, to unbundle a copper subloop or subloop for access to multiunit premises wiring at the point where a telecommunications carrier requests, the incumbent LEC shall have the burden of demonstrating to the state commission, in state proceedings under section 252 of the Act, that there is not sufficient space available, or that it is not technically feasible to unbundle the subloop at the point requested.

(ii) Best practices. Once one state commission has determined that it is technically feasible to unbundle subloops at a designated point, an incumbent LEC in any state shall have the burden of demonstrating to the state commission, in state proceedings under section 252 of the Act, that it is not technically feasible, or that sufficient space is not available, to unbundle its own loops at such a point.

(c) Network interface device. Apart from its obligation to provide the network interface device functionality as part of an unbundled loop or subloop, an incumbent LEC also shall provide nondiscriminatory access to the network interface device on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part. The network interface device element is a stand-alone network element and is defined as any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose. An incumbent LEC shall permit a requesting telecommunications carrier to connect its own loop facilities to on-premises wiring through the incumbent LEC's network interface device, or at any other technically feasible point.

(d) Local circuit switching. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to local circuit switching, including tandem switching, on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part and as set forth in paragraph (d) of this section.

(1) Definition. Local circuit switching is defined as follows:

(i) Local circuit switching encompasses all line-side and trunk-side facilities, plus the features, functions, and capabilities of the switch. The features, functions, and capabilities of the switch shall include the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks.

(ii) Local circuit switching includes all vertical features that the switch is capable of providing, including custom calling, custom local area signaling services features, and Centrex, as well as any technically feasible customized routing functions.

(2) DS0 capacity (i.e., mass market) determinations. An incumbent LEC shall provide access to local circuit switching on an unbundled basis to a requesting telecommunications carrier serving end users using DS0 capacity loops except where the state commission has found, in accordance with the conditions set forth in paragraph (d)(2) of this section, that requesting telecommunications carriers are not impaired in a particular market, or where the state commission has found that all such impairment would be cured by implementation of transitional unbundled local circuit switching in a given market and has implemented such transitional access as set forth in paragraph (d)(2)(iii)(C) of this section.

(i) Market definition. A state commission shall define the markets in which it will evaluate impairment by determining the relevant geographic area to include in each market. In defining markets, a state commission shall take into consideration the locations of mass market customers actually being served (if any) by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets profitably and efficiently using currently available technologies. A state commission shall not define the relevant geographic area as the entire state.

(ii) Batch cut process. In each of the markets that the state commission defines pursuant to paragraph (d)(2)(i) of this section, the state commission shall either establish an incumbent LEC batch cut process as set forth in paragraph (d)(2)(ii)(A) of this section or issue detailed findings explaining why such a batch process is unnecessary, as set forth in paragraph (d)(2)(ii)(B) of this section. A batch cut process is defined as a process by which the incumbent LEC simultaneously migrates two or more loops from one carrier's local circuit switch to another carrier's local circuit switch, giving rise to operational and economic efficiencies not available when migrating loops from one carrier's local circuit switch to another carrier's local circuit switch on a line-by-line basis.

(A) A state commission shall establish an incumbent LEC batch cut process for use in migrating lines served by one carrier's local circuit switch to lines served by another carrier's local circuit switch in each of the markets the state commission has defined pursuant to paragraph (d)(2)(i) of this section. In establishing the incumbent LEC batch cut process:

(1) A state commission shall first determine the appropriate volume of loops that should be included in the ``batch.''

(2) A state commission shall adopt specific processes to be employed when performing a batch cut, taking into account the incumbent LEC's particular network design and cut over practices.

(3) A state commission shall evaluate whether the incumbent LEC is capable of migrating multiple lines served using unbundled local circuit switching to switches operated by a carrier other than the incumbent LEC for any requesting telecommunications carrier in a timely manner, and may require that incumbent LECs comply with an average completion interval metric for provision of high volumes of loops.

(4) A state commission shall adopt rates for the batch cut activities it approves in accordance with the Commission's pricing rules for unbundled network elements. These rates shall reflect the efficiencies associated with batched migration of loops to a requesting telecommunications carrier's switch, either through a reduced per-line rate or through volume discounts as appropriate.

(B) If a state commission concludes that the absence of a batch cut migration process is not impairing requesting telecommunications carriers' ability to serve end users using DS0 loops in the mass market without access to local circuit switching on an unbundled basis, that conclusion will render the creation of such a process unnecessary. In such cases, the state commission shall issue detailed findings regarding the volume of unbundled loop migrations that could be expected if requesting telecommunications carriers were no longer entitled to local circuit switching on an unbundled basis, the ability of the incumbent LEC to meet that demand in a timely and efficient manner using its existing hot cut process, and the non-recurring costs associated with that hot cut process. The state commission further shall explain why these findings indicate that the absence of a batch cut process does not give rise to impairment in the market at issue.

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

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

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

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

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

(1) Evidence of actual deployment. The state commission shall consider whether switches actually deployed in the market at issue permit competitive entry in the absence of unbundled local circuit switching. Specifically, the state commission shall examine whether, in the market at issue, there are either two wholesale providers or three self-provisioners of local switching not affiliated with each other or the incumbent LEC, serving end users using DS1 or higher capacity loops in the market at issue; or there is any carrier, including any intermodal provider of service comparable in quality to that of the incumbent LEC, using a self-provisioned switch to serve end users using DS0 capacity loops. If so, and if the state commission determines that the switch or switches identified can be used to serve end users using DS0 capacity loops in that market in an economic fashion, this evidence must be given substantial weight.

(2) Operational barriers. The state commission also shall examine the role of potential operational barriers in determining whether to find ``no impairment'' in a given market. Specifically, the state commission shall examine whether the incumbent LEC's performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent LEC's wire center render entry uneconomic for requesting telecommunications carriers in the absence of unbundled access to local circuit switching.

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

(4) Multi-line DS0 end users. As part of the economic analysis set forth in paragraph (d)(2)(iii)(B)(3) of this section, the state commission shall establish a maximum number of DS0 loops for each geographic market that requesting telecommunications carriers can serve through unbundled switching when serving multiline end users at a single location. Specifically, in establishing this ``cutoff,'' the state commission shall take into account the point at which the increased revenue opportunity at a single location is sufficient to overcome impairment and the point at which multiline end users could be served in an economic fashion by higher capacity loops and a carrier's own switching and thus be considered part of the DS1 enterprise market.

(C) Transitional use of unbundled switching. If the triggers described in paragraph (d)(2)(iii)(A) of this section have not been satisfied with regard to a particular market and the analysis described in paragraph (d)(2)(iii)(B) of this section has resulted in a finding that requesting telecommunications carriers are impaired without access to local circuit switching on an unbundled basis in that market, the state commission shall consider whether any impairment would be cured by transitional (``rolling'') access to local circuit switching on an unbundled basis for a period of 90 days or more. ``Rolling'' access means the use of unbundled local circuit switching for a limited period of time for each end-user customer to whom a requesting telecommunications carrier seeks to provide service. If the state commission determines that transitional access to unbundled local circuit switching would cure any impairment, it shall require incumbent LECs to make unbundled local circuit switching available to requesting telecommunications carriers for 90 days or more, as specified by the state commission. The time limit set by the commission shall apply to each request for access to unbundled local circuit switching by a requesting telecommunications carrier on a per customer basis.

(iv) DS0 capacity end-user transition. If a state commission finds that no impairment exists in a market or that any impairment could be cured by transitional access to unbundled local circuit switching, all requesting telecommunications carriers in that market shall commit to an implementation plan with the incumbent LEC for the migration of the embedded unbundled switching mass market customer base within 2 months of the state commission determination. A requesting telecommunications carrier may no longer obtain access to unbundled local circuit switching 5 months after the state commission determination, except, where applicable, on a transitional basis as described in paragraph (d)(2)(iii)(C) of this section.

(A) Transition timeline. Each requesting telecommunications carrier shall submit the orders necessary to migrate its embedded base of end-user customers off of the unbundled local circuit switching element in accordance with the following timetable, measured from the day of the state commission determination.

For purposes of calculating the number of customers who must be migrated, the embedded base of customers shall include all customers served using unbundled switching that are not customers being served with transitional unbundled switching pursuant to paragraph (d)(3)(iii)(C) of this section.

(1) Month 13: Each requesting telecommunications carrier must submit orders for one-third of all its unbundled local circuit switching end-user customers;

(2) Month 20: Each requesting telecommunications carrier must submit orders for half of its remaining unbundled local circuit switching end-user customers, as calculated pursuant to paragraph (d)(2)(iv)(A)(1) of this section; and

(3) Month 27: Each requesting telecommunications carrier must submit orders for its remaining unbundled local circuit switching end-user customers.

(B) Operational aspects of the migration. Requesting telecommunications carriers and the incumbent LEC shall jointly submit the details of their implementation plans for each market to the state commission within two months of the state commission's determination that requesting telecommunications carriers are not impaired without access to local circuit switching on an unbundled basis. Each requesting telecommunications carrier shall also notify the state commission when it has submitted its orders for migration. Each incumbent LEC shall notify the state commission when it has completed the migration.

(3) DS1 capacity and above (i.e., enterprise market) determinations. An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS1 capacity and above loops except where the state commission petitions this Commission for waiver of this finding in accordance with the conditions set forth in paragraph (d)(3)(i) of this section and the Commission grants such waiver.

(i) State commission inquiry. In its petition, a state commission wishing to rebut the Commission's finding should petition the Commission to show that requesting telecommunications carriers are impaired without access to local circuit switching to serve end users using DS1 capacity and above loops in a particular geographic market as defined in accordance with paragraph (d)(2)(i) of this section if it finds that operational or economic barriers exist in that market.

(A) In making this showing, the state commission shall consider the following operational characteristics: incumbent LEC performance in provisioning loops; difficulties associated with obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC; and the difficulties associated with obtaining cross-connects in the incumbent LEC's wire center.

(B) In making this showing, the state commission shall consider the following economic characteristics: the cost of entry into a particular market, including those caused by both operational and economic barriers to entry; requesting telecommunications carriers' potential revenues from serving enterprise customers in that market, including all likely revenues to be gained from entering that market; the prices requesting telecommunications carriers are likely to be able to charge in that market, based on a consideration of the prevailing retail rates the incumbent LEC charges to the different classes of customers in the different parts of the state.

(ii) Transitional four-line carve-out. Until the state commission completes the review described in paragraph (b)(2)(iii)(B)(4) of this section, an incumbent LEC shall comply with the four-line ``carve-out'' for unbundled switching established in Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3822-31, paras. 276-98 (1999), reversed and remanded in part sub. nom. United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002).

(A) DS1 capacity and above end-user transition. Each requesting telecommunications carrier shall transfer its end-user customers served using DS1 and above capacity loops and unbundled local circuit switching to an alternative arrangement within 90 days from the end of the 90-day state commission consideration period set forth in paragraph (d)(5)(i), unless a longer period is necessary to comply with a ``change of law'' provision in an applicable interconnection agreement.

(4) Other elements to be unbundled. Elements relating to the local circuit switching element shall be made available on an unbundled basis as set forth in paragraphs (d)(4)(i) and (d)(4)(ii) of this section.

(i) An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to signaling, call-related databases, and shared transport facilities on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, to the extent that local circuit switching is required to be unbundled by a state commission. These elements are defined as follows:

(A) Signaling networks. Signaling networks include, but are not limited to, signaling links and signaling transfer points.

(B) Call-related databases. Call-related databases are defined as databases, other than operations support systems, that are used in signaling networks for billing and collection, or the transmission, routing, or other provision of a telecommunications service. Where a requesting telecommunications carrier purchases unbundled local circuit switching from an incumbent LEC, an incumbent LEC shall allow a requesting telecommunications carrier to use the incumbent LEC's service control point element in the same manner, and via the same signaling links, as the incumbent LEC itself.

(1) Call-related databases include, but are not limited to, the calling name database, 911 database, E911 database, line information database, toll free calling database, advanced intelligent network databases, and downstream number portability databases by means of physical access at the signaling transfer point linked to the unbundled databases.

(2) Service management systems are defined as computer databases or systems not part of the public switched network that interconnect to the service control point and send to the service control point information and call processing instructions needed for a network switch to process and complete a telephone call, and provide a telecommunications carrier with the capability of entering and storing data regarding the processing and completing of a telephone call. Where a requesting telecommunications carrier purchases unbundled local circuit switching from an incumbent LEC, the incumbent LEC shall allow a requesting telecommunications carrier to use the incumbent LEC's service management systems by providing a requesting telecommunications carrier with the information necessary to enter correctly, or format for entry, the information relevant for input into the incumbent LEC's service management system, including access to design, create, test, and deploy advanced intelligent network-based services at the service management system, through a service creation environment, that the incumbent LEC provides to itself.

(3) An incumbent LEC shall not be required to unbundle the services created in the advanced intelligent network platform and architecture that qualify for proprietary treatment.

(C) Shared transport. Shared transport is defined as the transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network.

(ii) An incumbent LEC shall provide a requesting telecommunications carrier nondiscriminatory access to operator services and directory assistance on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, to the extent that local circuit switching is required to be unbundled by a state commission, if the incumbent LEC does not provide that requesting telecommunications carrier with customized routing, or a compatible signaling protocol, necessary to use either a competing provider's operator services and directory assistance platform or the requesting telecommunications carrier's own platform. Operator services are any automatic or live assistance to a customer to arrange for billing or completion, or both, of a telephone call. Directory assistance is a service that allows subscribers to retrieve telephone numbers of other subscribers.

(5) State commission proceedings. A state commission shall complete the proceedings necessary to satisfy the requirements in paragraphs (d)(2) and (d)(3) of this section in accordance with paragraphs (d)(5)(i) and (d)(5)(ii) of this section.

(i) Timing. A state commission shall complete any initial review applying the triggers and criteria in paragraph (d)(2) of this section within nine months from the effective date of the Commission's Triennial Review Order. A state commission wishing to rebut the Commission's finding of non-impairment for DS1 and above enterprise switches must file a petition with the Commission in accordance with paragraph (d)(3) of this section within 90 days from that effective date.

(ii) Continuing review. A state commission shall complete any Subsequent review applying these triggers and criteria within six months of the filing of a petition or other pleading to conduct such a review.

(e) Dedicated transport. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part and as set forth in paragraph (e)(1) through (e)(5) of this section. As used in those paragraphs, a `route'' is a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (e.g., wire center or switch ``A'' and wire center or switch ``Z'') may pass through one or more intermediate wire centers or switches (e.g., wire center or switch ``X''). Transmission paths between identical end points (e.g., wire center or switch ``A'' and wire center or switch ``Z'') are the same ``route,'' irrespective of whether they pass through the same intermediate wire centers or switches, if any.

(1) Dedicated DS1 transport. (i) An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated DS1 transport on an unbundled basis except where the state commission has found, through application of the competitive wholesale facilities trigger in paragraphs (e)(1)(ii) of this section, that requesting telecommunications carriers are not impaired without access to dedicated DS1 transport along a particular route. Dedicated DS1 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 1.544 megabytes per second and are dedicated to a particular customer or carrier.

(ii) Competitive wholesale facilities trigger for dedicated DS1 transport. A state commission shall find that a requesting telecommunications carrier is not impaired without access to dedicated DS1 transport along a particular route where two or more competing providers not affiliated with each other or with the incumbent LEC, including intermodal providers of service comparable in quality to that of the incumbent LEC, each satisfy the conditions in paragraphs (e)(1)(ii)(A) through (e)(1)(ii)(D) of this section.

(A) The competing provider has deployed its own transport facilities and is operationally ready to use those facilities to provide dedicated DS1 transport along the particular route. For purposes of this paragraph,

the competing provider's DS1 facilities may use dark fiber facilities that the competing provider has obtained on an unbundled, leased, or purchased basis if it has attached its own optronics to activate the fiber.

(B) The competing provider is willing immediately to provide, on a widely available basis, dedicated DS1 transport along the particular route.

(C) The competing provider's facilities terminate in a collocation arrangement at each end of the transport route that is located at an incumbent LEC premises and in a similar arrangement at each end of the transport route that is not located at an incumbent LEC premises.

(D) Requesting telecommunications carriers are able to obtain reasonable and nondiscriminatory access to the competing provider's facilities through a cross-connect to the competing provider's collocation arrangement at each end of the transport route that is located at an incumbent LEC premises and though a similar arrangement at each end of the transport route that is not located at an incumbent LEC premises.

(2) Dedicated DS3 transport. Subject to the cap in paragraph (e)(2)(iii) of this section, an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated DS3 transport on an unbundled basis except where the state commission has found, through application of either paragraph (e)(2)(i) of this section or the potential deployment analysis in paragraph (e)(2)(ii) of this section, that requesting telecommunications carriers are not impaired without access to dedicated DS3 transport along a particular route. Dedicated DS3 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 44.736 megabytes per second and are dedicated to a particular customer or carrier.

(i) Triggers for dedicated DS3 transport. A state commission shall find that a requesting telecommunications carrier is not impaired without access to unbundled dedicated DS3 transport along a particular route where either of the triggers in paragraphs (e)(2)(i)(A) or (e)(2)(i)(B) of this section is satisfied.

(A) Self-provisioning trigger for dedicated DS3 transport. To satisfy this trigger, a state must find that three or more competing providers not affiliated with each other or with the incumbent LEC, including intermodal providers of service comparable in quality to that of the incumbent LEC, each satisfy the conditions in paragraphs (e)(2)(i)(A)(1) and (e)(2)(i)(A)(2) of this section.

(1) The competing provider has deployed its own transport facilities and is operationally ready to use those transport facilities to provide dedicated DS3 transport along the particular route. For purposes of this paragraph,

the competing provider's DS3 transport facilities may use dark fiber facilities that the competing provider has obtained on a long-term, indefeasible-right of use basis and that it has deployed by attaching its own optronics to activate the fiber.

(2) The competing provider's facilities terminate at a collocation arrangement at each end of the transport route that is located at an incumbent LEC premises and in a similar arrangement at each end of the transport route that is not located at an incumbent LEC premises.

(B) Competitive wholesale facilities trigger for dedicated DS3 transport. To satisfy this trigger, a state must find that two or more competing providers not affiliated with each other or with the incumbent LEC, including intermodal providers of service comparable in quality to that of the incumbent LEC, each satisfy the conditions in paragraphs (e)(2)(i)(B)(1) through (e)(2)(i)(B)(4) of this section.

(1) The competing provider has deployed its own transport facilities, including transport facilities that use dark fiber facilities that the competing provider has obtained on an unbundled, leased, or purchased basis if it has attached its own optronics to activate the fiber, and is operationally ready to use those facilities to provide dedicated DS3 transport along the particular route.

(2) The competing provider is willing immediately to provide, on a widely available basis, dedicated DS3 transport along the particular route.

(3) The competing provider's facilities terminate in a collocation arrangement at each end of the transport route that is located at an incumbent LEC premises and in a similar arrangement at each end of the transport route that is not located at an incumbent LEC premises.

(4) Requesting telecommunications carriers are able to obtain reasonable and nondiscriminatory access to the competing provider's facilities through a cross-connect to the competing provider's collocation arrangement at each end of the transport route that is located at an incumbent LEC premises and though a similar arrangement at each end of the transport route that is not located at an incumbent LEC premises.

(ii) Potential deployment of dedicated DS3 transport. Where neither trigger in paragraph (e)(2)(i) of this section is satisfied, a state commission shall consider whether other evidence shows that a requesting telecommunications carrier is not impaired without access to unbundled dedicated DS3 transport along a particular route. To make this determination, a state must consider the following factors: local engineering costs of building and utilizing transmission facilities; the cost of underground or aerial laying of fiber or copper; the cost of equipment needed for transmission; installation and other necessary costs involved in setting up service; local topography such as hills and rivers; availability of reasonable access to rights-of-way;

availability/feasibility of similar quality/reliability alternative transmission technologies along the particular route; customer density or addressable market; and existing facilities-based competition.

(iii) Cap on unbundled DS3 circuits. A requesting telecommunications carrier may obtain a maximum of 12 unbundled dedicated DS3 circuits for any single route for which dedicated DS3 transport is available as unbundled transport.

(3) Dark fiber transport. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dark fiber transport on an unbundled basis except where the state commission has found, through application of either paragraph (e)(3)(i) of this section or the potential deployment analysis in paragraph (e)(3)(ii) of this section, that requesting telecommunications carriers are not impaired without access to unbundled dark fiber transport along the particular route. Dark fiber transport consists of unactivated optical interoffice transmission facilities.

(i) Triggers for dark fiber transport. A state commission shall find that a requesting telecommunications carrier is not impaired without access to dark fiber transport along a particular route where either of the triggers in paragraph (e)(3)(i)(A) or paragraph (e)(3)(i)(B) of this section is satisfied.

(A) Self-provisioning trigger for dark fiber transport. To satisfy this trigger, a state commission must find three or more competing providers not affiliated with each other or with the incumbent LEC, each satisfy paragraphs (e)(3)(i)(A)(1) and (e)(3)(i)(A)(2) of this section.

(1) The competing provider has deployed its own dark fiber facilities, which may include dark fiber facilities that it has obtained on a long-term, indefeasible-right of use basis.

(2) The competing provider's facilities terminate in a collocation arrangement at each end of the transport route that is located at an incumbent LEC premises and in a similar arrangement at each end of the transport route that is not located at an incumbent LEC premises.

(B) Competitive wholesale facilities trigger for dark fiber transport. To satisfy this trigger, a state commission must find that two or more competing providers not affiliated with each other or with the incumbent LEC, each satisfy paragraphs (e)(3)(i)(B)(1) through (e)(3)(i)(B)(4) of this section. In applying this trigger, the state commission may consider whether competing providers have sufficient quantities of dark fiber available to satisfy current demand along that route.

(1) The competing provider has deployed its own dark fiber, including dark fiber that it has obtained from an entity other than the incumbent LEC, and is operationally ready to lease or sell those facilities for the provision of fiber-based transport along the particular route.

(2) The competing provider is willing immediately to provide, on a widely available basis, dark fiber along the particular route.

(3) The competing provider's dark fiber terminates in a collocation arrangement at each end of the transport route that is located at an incumbent LEC premises and in a similar arrangement at each end of the transport route that is not located at an incumbent LEC premises.

(4) Requesting telecommunications carriers are able to obtain reasonable and nondiscriminatory access to the competing provider's dark fiber through a cross-connect to the competing provider's collocation arrangement at each end of the transport route that is located at an incumbent LEC premises and though a similar arrangement at each end of the transport route that is not located at an incumbent LEC premises.

(ii) Potential deployment of dark fiber transport. Where neither trigger in paragraph (e)(3)(i) of this section is satisfied, a state commission shall consider whether other evidence shows that a requesting telecommunications carrier is not impaired without access to unbundled dark fiber transport along a particular route. To make this determination, a state must consider the following factors: local engineering costs of building and utilizing transmission facilities; the cost of underground or aerial laying of fiber; the cost of equipment needed for transmission; installation and other necessary costs involved in setting up service; local topography such as hills and rivers; vailability of reasonable access to rights-of-way; availability/feasibility of similar quality/reliability alternative transmission technologies along the particular route; customer density or addressable market; and existing facilities-based competition.

(4) State commission proceedings. A state commission shall complete the proceedings necessary to satisfy the requirements in paragraphs (e)(1), (e)(2), and (e)(3) of this section in accordance with paragraphs (e)(4)(i) and (e)(4)(ii) of this section.

(i) Initial review. A state commission shall complete any initial review applying the triggers and criteria in paragraphs (e)(1), (e)(2), and (e)(3) of this section within nine months from the effective date of the Commission's Triennial Review Order.

(ii) Continuing review. A state commission shall complete any subsequent review applying these triggers and criteria within six months of the filing of a petition or other pleading to conduct such a review.

(5) Routine network modifications. (i) An incumbent LEC shall make all routine network modifications to unbundled dedicated transport facilities used by requesting telecommunications carriers where the requested dedicated transport facilities have already been constructed. An incumbent LEC shall perform all routine network modifications to unbundled dedicated transport facilities in a nondiscriminatory fashion, without regard to

whether the facility being accessed was constructed on behalf, or in accordance with the specifications, of any carrier.

(ii) A routine network modification is an activity that the incumbent LEC regularly undertakes for its own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; installing a repeater shelf; and deploying a new multiplexer or reconfiguring an existing multiplexer. They also include activities needed to enable a requesting telecommunications carrier to light a dark fiber transport facility. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the installation of new aerial or buried cable for a requesting telecommunications carrier.

(f) 911 and E911 databases. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to 911 and E911 databases on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part.

(g) Operations support systems. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to operations support systems on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part. Operations support system functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information. An incumbent LEC, as part of its duty to provide access to the pre-ordering function, shall provide the requesting telecommunications carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent LEC.

[68 FR 52295, Sept. 4, 2003, as amended at 68 FR 64000, Nov. 12, 2003]

Effective Date Note: At 69 FR 54591, Sept. 9, 2004, Sec. 51.319 was amended by revising paragraph (a)(3) introductory text, effective Oct. 12, 2004. For the convenience of the user, the revised text is set forth as follows:

Sec. 51.319 Specific unbundling requirements.

(a) * * *

(3) Fiber-to-the-home loops. A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end user's customer premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the multiunit premises' minimum point of
entry (MPOE).

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