BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

PETITION FOR RECONSIDERATION

Birch Telecom, Inc.
BridgeCom International, Inc.
Broadview Networks
Eschelon Telecom, Inc.
NuVox Communications, Inc.
SNiP LiNK, LLC
XO Communications, Inc.
Xspedius Commmunications, Inc.

Brad E. Mutschelknaus
Steven A. Augustino
Scott A. Kassman*
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036
(202) 955-9600

Their Attorneys

Date: March 28, 2005

* Not admited in D.C. Practice limited to matters and proceedings before federal courts and agencies.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

SUMMARY

Joint Petitioners urge the Commission on reconsideration to make the following modifications to the rules and policies adopted in the Order on Remand ("*TRRO*") in this proceeding.

DS1 caps: The Commission should eliminate the cap on the number of DS1 transport circuits that a requesting carrier may obtain on a route.

EEL eligibility criteria: In the *TRRO*, the Commission, for the first time adopts a direct prohibition on the use of UNEs exclusively for the provision of long distance services. This new rule, which the Commission stated "already prevent[s]" most special access circuits from being converted to UNEs, has another, more far reaching effect not discussed in the *TRRO*. This rule directly prohibits the use that its EEL rules were designed to restrict, namely the use of UNE combinations to replace long distance special access circuits. The Commission's rule thus renders the EEL eligibility criteria wholly unnecessary and, to the extent that the criteria preclude services for which the Commission otherwise finds impairment, contrary to Section 251 of the Act. Therefore, on reconsideration, the Commission should eliminate the EEL-specific criteria in favor of application of its impairment criteria to the individual network elements that comprise an EEL.

Business line counts: The FCC's line count rules systematically overstate the presence of facilities based competition in the wire centers. The Commission should clarify or revise its rules to eliminate the overcount of DS1 and DS3 UNEs caused by the counting of 24 business lines for each DS1 of capacity. In addition, other adjustments to the ARMIS reporting criteria inflate the number of business lines counted for the impairment criteria. The Commission should eliminate these adjustments and require incumbent LECs to report business lines using solely the ARMIS criteria, which are uniform, closely scrutinized and more readily

verifiable than the line count methodology described in the *TRRO*. If it does not use ARMIS criteria exclusively, the Commission should permit CLECs to report actual voice switched access lines as a replacement for the adjustments that are made.

FCC transport impairment criteria: The FCC arbitrarily subjects its transport impairment test to a more lenient standard than is used for unbundled loops. As a result, as many as 40 percent of the Tier 1 transport wire centers are found erroneously to be non-impaired. On reconsideration, the Commission should require both the designated number of business lines and the presence of the specified number of fiber based collocators in order to conclude that requesting carriers are not impaired on a transport route.

Definition of affiliated carrier: The *TRRO* states that fiber based collocator counts should not include collocation by affiliates of the ILEC, and that collocations maintained by two or more affiliates should be counted as one collocator. At the time the Commission made these rulings, the possibility that the largest ILECs would acquire the two largest facilities based CLECs was not contemplated. However, the recent agreements by SBC to acquire AT&T and by Verizon to acquire MCI fundamentally change the competitive landscape and require the Commission to re-examine the basis on which it evaluates impairment for high capacity loops and transport. The changes necessary as a result of this seismic shift are far reaching, but the Commission can begin to address these changes by immediately re-examining the definition of fiber based collocator used in the rules. Because the collocator counts are supposed to identify locations where competitive facilities exist, and where unaffiliated carriers can maintain facilities without reliance on the incumbent LEC, the acquisitions of AT&T and MCI require the Commission to exclude AT&T and MCI facilities from its analysis by counting those carriers as affiliates of the respective incumbent LECs. The Commission should therefore amend its

definition of fiber based collocator to state that a company will be considered an ILEC affiliate if it has a pending application with the FCC that would, if approved, result in the company satisfying the definition of affiliate provided in Section 3 of the Act.

Changes in circumstances: The *TRRO* rules fail to account for material changes in circumstances, such as the recent agreements by the largest IXCs to be acquired by incumbent LECs. The *TRRO* unjustifiably "freezes" a finding of non-impairment once certain criteria are met, even if subsequently those criteria cease to be met. This one-sided analysis flatly contradicts the impairment analysis required by Section 252 of the Act. Therefore, on reconsideration, the Commission should permit periodic revisions to account for changes establishing impairment as well as non-impairment.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

PETITION FOR RECONSIDERATION

Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Eschelon Telecom, Inc., NuVox Communications, Inc., SNiP LiNK LLC, XO Communications, Inc. and Xspedius Communications, Inc. (collectively, "Joint Petitioners"), pursuant to 47 C.F.R. §1.429, by their attorneys, respectfully petition the Federal Communications Commission ("FCC" or "Commission") for reconsideration of certain aspects of its *Order on Remand* ("*TRRO*"),[1] released on February 4, 2005 in the above-captioned proceedings.

In this petition, Joint Petitioners seek clarification or correction of a number of aspects of the unbundling rules adopted in the *TRRO*. In so doing, Joint Petitioners seek to harmonize the Commission's rules with the objectives stated in the *TRRO*, and to revise or eliminate rules that are unsupported by the record or serve no legitimate purpose in light of other Commission findings. Joint Petitioners wish to make clear, however, that they believe many aspects of the *TRRO* are unlawful, contrary to Section 251 of the Act or otherwise arbitrary and capricious. Joint Petitioners expect that other parties may seek appellate review of these aspects

---

1 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*") ("*TRRO*").

of the Commission's decision. Nothing herein should be construed as agreement that the Commission's rules are lawful. To the contrary, Joint Petitioners reserve all rights to contest the FCC rules as intervenors in any appeals that may be filed. This petition is submitted solely to correct errors that are present in the analysis used by the Commission.

DISCUSSION

I. THE COMMISSION SHOULD ELIMINATE THE CAP ON DS1 DEDICATED TRANSPORT

At the outset, it is not clear just what cap the FCC adopted for DS1 transport. In the text of the order, the Commission held, "[o]n routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits."[2] Based on this statement, the DS1 transport cap would apply only where requesting carriers were found to be non-impaired for DS3 transport. That is, there would be no limit on DS1 transport on any route where DS3s remained a UNE (*i.e.*, where competitors face impairment in the provision of DS3s).[3] Although the Commission does not say this explicitly, it appears that the rationale for such a limit would be to maintain consistency with the finding of non-impairment for DS3 transport. That is, a limit of 10 DS1s per route is "consistent with the pricing efficiencies of aggregating traffic,"[4] and therefore apparently stands for the point at which a requesting carrier would transition to DS3 transport facilities, where it would no longer face impairment.

---

2 *TRRO* at ¶128 (emphasis added)

3 For example, a CLEC could order DS1s without a cap on routes between two Tier 3 wire centers, between a Tier 2 wire center and a Tier 3 wire center, and between a Tier 1 wire center and a Tier 3 wire center. On each of these routes, DS3 transport remains available as a UNE.

4 *Id.*

Some ILECs have taken the position that the Commission limited DS1 transport on all routes, regardless of whether the Commission found impairment or non-impairment for DS3 transport. Verizon, for example, filed tariff revisions in many of its states that would limit CLECs to 10 DS1s on any route. When challenged by CLECs on this point, Verizon contended that paragraph 128 of the *TRRO* conflicts with the rule as it appears in Appendix B.[5] Rule 51.319(e)(ii)(B) provides that "[a] requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 transport is available on an unbundled basis."[6] The rule, as interpreted by Verizon, caps DS1 transport on every DS1 route, regardless of whether impairment is found for DS3 transport. If this were the Commission's intent, however, paragraph 128 of the *TRRO* would have no meaning. At a minimum, the Commission should correct the ILECs' misinterpretation and clarify its intent in adopting the DS1 transport rule.

A. There Is No Rational Basis for the DS1 Transport Cap

Regardless of whether the DS1 cap applies to all transport routes or only some routes, there is simply no rational basis for the DS1 transport cap.

If the cap applies to all routes, as Verizon has contended, it is overbroad and irrational.[7] There does not appear to be any legitimate reason to limit DS1 transport on every

---

5 *See, e.g., Reply Comments of Verizon New York in Support of its Tariff Filing Implementing the Triennial Review Remand Order*, NY PSC Case No. 05-C-0203, March 8, 2005, at ¶ 2 (arguing that paragraph 128 conflicts with rule 51.319(e)).

6 *TRRO* at p. 150; 47 C.F.R. §51.319(e)(ii)(B) (emphasis added).

7 Further, a rule adopted without any explanation would be arbitrary and capricious for that reason alone. *See Johnson v. Ashcroft*, 286 F.3d 696, 700 (3d Cir. 2002), *quoting Fertilizer Inst. v. Browner*, 163 F.3d 774, 778 (3d Cir. 1998) ("[a]lthough an agency can change or adapt its policies, it acts arbitrarily if it departs from its established precedents without 'announcing a principled reason' for the departure."); cf. *Communications and Control, Inc. v. FCC*, 374 F.3d 1329 (D.C. Cir. 2004) *citing PanAmSat Corp v. FCC*, 198 F.3d 890, 897 (D.C. Cir. 1999), *quoting Graceba Total Communications, Inc. v. FCC*,

route. Indeed, without any explanation from the Commission, it is hard to imagine the rationale that could possibly be offered for limiting on every route in the nation the quantity of UNEs that a requesting carrier can obtain. No such limit applies for DS0 loops, for example, even though higher capacity loops are available in some locations and not available in others.

Moreover, if the DS1 transport cap applied in this way, it would conflict with the DS3 transport cap. Rule 51.319(e)(iii)(B) provides that "a requesting telecommunications carrier may obtain a maximum of 12 unbundled DS3 dedicated transport circuits on each route where DS3 dedicated transport is available on an unbundled basis." If requesting carriers can obtain 12 DS3s -- the equivalent of 336 DS1s of capacity -- on a single transport route, there is no basis for limiting carriers to 10 individual DS1 circuits on that same route. While the Commission has acknowledged that it engaged in "in an act of line-drawing" with respect to the DS3 cap[8], a line that permits fewer DS1 capacity transport circuits than DS3 transport circuits is patently irrational.

If the DS1 transport cap is intended to apply only where DS3 transport has been de-listed, as paragraph 128 states, the cap is inappropriate. Paragraph 128 justifies a cap on the ground that it "is consistent with pricing efficiencies of aggregating traffic."[9] In support of this assertion, the Commission cites to three comparisons of DS1 and DS3 UNE prices, concluding that it is efficient to substitute DS3 transport for multiple DS1s.[10] The Commission's reasoning

---

115 F. 3d 1038, 1041 (D.C. Cir. 1997)("[w]e do not ordinarily consider agency reasoning that 'appears nowhere in the [agency's] order'").

8 *TRO* at ¶388.

9 *TRRO* at ¶ 128.

10 *Id.* at n. 358. The Commission's price comparison assumes that DS3 UNEs are available. Yet, where the Commission finds non-impairment for DS3 transport, the ILECs' UNE obligation ends, and the DS3 rate comparison no longer is valid. A more appropriate comparison would compare the DS1 UNE rate to a non-UNE rate for DS3 transport.

is insufficient. While it may be that a DS3 UNE is cheaper than multiple DS1s at a certain crossover point, it does not follow that this price difference alone dictates whether to use DS1 or DS3 transport. For most CLECs, DS1 transport is used for circuits that are dedicated to an individual customer. They are not multiplexed, and do not aggregate traffic among multiple users. DS3 transport, on the other hand, typically is used to aggregate traffic from multiple customers, and may carry different types of services at the DS1 level (e.g., voice, data, private lines, etc.). DS3 transport is most often used by carriers that are collocated at one or both wire centers on the routes. If a carrier were to substitute a DS3 for multiple DS1 transport links, it would be required to install multiplexing equipment at both ends of the route or purchase multiplexing from the ILEC or another source. In addition, it likely would need to collocate at both ends of the route, an expensive and time consuming endeavor. As a result, it does not necessarily follow that it will be more efficient to substitute a DS3 simply because the carrier has a specified number of DS1 circuits.

B. Application Of A DS1 Transport Cap To DS1 EELs Would Undermine The Use Of EELs

DS1 transport is used most often in connection with a DS1/DS1 EEL. In such a configuration, the CLEC purchases a UNE loop and UNE transport (where impairment exists) in order to serve a particular customer located at a point beyond the CLEC's network. The EEL, like its name implies, is in this configuration an "extended loop." As such, it already is subjected to the loop impairment rules, include the limit on the number of DS1 loops that can be obtained at a particular customer location. If the dedicated transport cap also were to apply to these EELs, it would substantially undermine the availability of non-multiplexed DS1 EELs.

The Commission has previously found that EELs are efficient network arrangements which extend the reach of requesting carriers' networks, save collocation space

and reduce collocation costs, thereby allowing carriers to serve customers they otherwise may be unable to serve.[11] The Commission has also found that EELs promote innovation by allowing carriers to offer advanced services over those combinations.[12] Application of the DS1 dedicated transport cap to DS1/DS1 EELs will undermine the Commission's goal of promoting this form of facilities-based competition.

If the transport cap applied, it would render the DS1 loop cap superfluous. If a requesting carrier were limited to 10 DS1 transport circuits per route, then it would not be able to provision more than 10 DS1/DS1 EELs to customers served by any given wire center. This in effect would limit the requesting carrier to 10 DS1 loops in the entire wire center, rather than 10 loops per customer location. No reading of impairment could justify limiting requesting carrier to only 10 DS1 EELs per wire center, however. Indeed, if this restriction applied, the primary benefits of EELs would be lost. Carriers would have to establish hundreds of additional collocations, at significant time and expense. Incumbent LECs may again face the possibility of collocation exhaust, as carriers would be forced to replace their efficient EEL arrangements with loop plus collocation arrangements instead.

One solution to this problem would be to eliminate the cap on DS1 dedicated transport when a requesting carrier provides non-multiplexed DS1 EELs. That is, an order for a non-multiplexed DS1 EEL would be subject to any caps applicable to DS1 loops. It should not also be subject to a cap on the number of transport arrangements available.

---

11 *TRO* at ¶576.

12 *Id.*

II. THE COMMISSION SHOULD ELIMINATE THE EEL ELIGIBILITY CRITERIA

A. Reconsideration of the EEL Eligibility Criteria is Appropriate

In the *TRO*, the Commission adopted new eligibility criteria for CLECs seeking to obtain access to EELs. These eligibility criteria consisted of a series of "architectural" requirements intended to ensure that a requesting carrier used EELs to provide a "significant amount of local service" over the facility. In *USTA II*, the court did not vacate this determination, but it remanded the eligibility criteria for the Commission's consideration in light of the court's vacatur of the "qualifying services" requirement.[13]

In the *TRRO*, the Commission re-adopted the EEL eligibility criteria without change. The Commission specifically noted that it "[did] not disturb" its EEL rules and declined "to make any changes [to the EEL rules] at this time."[14] Further, the Commission considered the certification and auditing rules governing access to EELs and decided to retain those requirements.[15]

These decisions to re-adopt the EEL architectural criteria are appropriate for reconsideration at this time.

B. The *TRRO* Removed the Need for the EEL Eligibility Criteria

In the *TRRO*, the Commission for the first time adopts a direct prohibition on the use of UNEs exclusively for the provision of long distance services.[16] This new rule, which the Commission stated "already prevent[s]" most special access circuits from being converted to

---

13 *USTA II*, 359 F.3d at 590-93 (remanding EEL rules for further consideration in light of the court's order.

14 *TRRO* at nn. 244, 644.

15 *Id.* at n. 659.

16 *TRRO* at ¶ 36.

UNEs, has another, more far reaching effect not discussed in the *TRRO*. This rule directly prohibits the use that its EEL rules were designed to restrict, namely the use of UNE combinations to replace long distance special access circuits. The Commission's rule thus renders the EEL eligibility criteria wholly unnecessary and, to the extent that it precludes services for which the Commission otherwise finds impairment, renders the rules contrary to Section 251 of the Act. Therefore, on reconsideration, the Commission should eliminate the EEL-specific criteria in favor of application of its impairment criteria to the individual network elements that comprise an EEL.

At the time the EEL eligibility criteria were first adopted, they were justified as necessary to protect against the substitution of special access used by IXCs to provide long distance services.[17] In the *TRO*, the Commission concluded that additional EEL eligibility criteria were necessary to prevent "gaming" by providers of non-qualifying services.[18] The Commission explained that by "gaming" it meant "the case of *a provider of exclusively non-qualifying service* obtaining UNE access in order to obtain favorable rates or otherwise engage in regulatory arbitrage." (emphasis added).[19] The non-qualifying service to which the Commission referred was long distance service.

---

17 *See, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98 (rel. June 2, 2002) ("*Supplemental Order Clarification*") at ¶2 *citing, UNE Remand Order* at ¶¶485-489 (concerns that universal service could be harmed if we were to allow interexchange carriers to use the incumbent's network without paying their assigned share of the incumbent's costs normally recovered through access charges).

18 *TRO* at ¶591.

19 *Id.* (the Commission determining that it was "under no obligation to make any changes to them at this time").

In response to the *USTA II* remand, the Commission has now prohibited directly the use of any UNE to provide exclusively long distance service.[20] This rule eliminates the need for an EEL eligibility standard in addition to Rule 51.309(b). The Commission confirmed as much when it denied ILEC requests to prohibit all conversions of special access to UNEs.[21] In paragraph 230 of the *TRRO*, the Commission stated that "the rules we adopt today already prevent the use of UNEs...where carriers would use them exclusively to provide long distance services or mobile wireless services."[22] This finding, the Commission ruled, means that the special access circuits that the ILECs cited "are therefore largely shielded already from potential conversion to UNEs."[23] These same conclusions show that the EEL eligibility criteria are superfluous and should be eliminated.

C. Retention of the EELs Eligibility Criteria Harms Requesting Carriers

Continued retention of the EEL eligibility criteria harms requesting carriers. The criteria are detailed, multi-part "architectural" restrictions which assume a certain configuration for the CLEC's provision of service. These criteria, though intended to be an improvement over the "intrusive [and] unworkable" safe harbor restrictions,[24] still present significant compliance issues.

Joint Petitioners note that they have not yet agreed on contractual revisions implementing the architectural restrictions. Negotiations to implement these rules have led to significant disputes as to the language appropriate to implement the Commission's rules. These

---

20 *TRRO* at ¶ 36; 47 C.F.R. §51.309(b).

21 *See TRRO* ¶ 230.

22 *Id.*. (emphasis added)

23 *Id.*.

24 *See USTA II*, 359 F.3d at 591 (characterizing the Commission's replacement of the safe harbor rules).

contractual disputes are only the beginning of the costs that are imposed by the continued application of any EEL-specific eligibility criteria. Application of the rules will impose costs on carriers and ILECs alike in terms of ordering procedures and audits of possible compliance. Indeed, some of the Joint Petitioners already have expended considerable resources in audits initiated by incumbent LECs. Although those audits have not identified any use of EELs for exclusively long distance services, the audits have diverted company resources and imposed substantial cost. If this past practice is a guide, compliance with the architectural criteria also will carry significant burdens for ILECs and CLECs alike.

Moreover, the EEL criteria at best were designed to prevent the use of UNEs for long distance service. Now that this use has been prohibited directly, the criteria either are entirely unnecessary (preventing the same uses that Rule 51.309(b) prevents) or act to prevent the use of UNEs in ways for which requesting carriers are impaired. In either instance, the criteria serve no legitimate purpose and should be eliminated.

III. THE LINE COUNT RULES ERRONEOUSLY OVERSTATE THE NUMBER OF BUSINESS LINES IN A WIRE CENTER

The *TRRO* makes extensive use of business line counts in its analysis of impairment for loops and transport. The Commission reasoned that business line density "is an administrable proxy for determining where significant revenues are available sufficient for competitors to deploy transport facilities."[25] It defined a "business line" for these purposes as ARMIS 43-08 business lines, plus business UNE-P, plus UNE loops.[26]

Although the Commission used ARMIS rules as the starting point for its business line counts, the rules adjust ARMIS data in ways that erroneously inflate the number of business

---

25 TRRO ¶ 103; *see id.* at ¶ 161 (loops).

26 *Id.* at ¶ 105.

lines reported in each wire center. These errors in turn overstate the number of wire centers that meet one or more of the FCC's impairment criteria and result in greater restrictions on UNE availability than are warranted.

A. The Commission Erred by Counting DS1s and other Digital Lines on a per 64 kbps-equivalent basis

The most egregious over counting of business lines results from the Commission's treatment of digital access lines. Rule 51.5 states that business line tallies "shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line." Thus, a DS1 is counted as 24 "lines;" a DS3 is counted as 672 "lines," etc.

This seemingly innocuous adjustment has had a profound impact on the ILECs' claimed lists of non-impaired wire centers. For example, on December 8, 2004, BellSouth reported business lines to the Commission using the ARMIS methodology.[27] In that filing, BellSouth reported 3 wire centers with greater than 60,000 business access lines.[28] On February 18, 2005, however, BellSouth reported wire centers using the new methodology described in the *TRRO*.[29] In that filing, the number of wire centers exceeding 60,000 business access lines skyrocketed to 24.[30] Whereas BellSouth previously listed its largest wire center as having 81,282 business lines, its post-*TRRO* list identifies this wire center as having 152,484 lines – an

---

27 Letter from Bennett L. Ross, BellSouth, to Marlene H. Dortch, WC Docket No. 04-313, filed Dec. 7, 2004, *corrected by errata*, Dec. 10, 2004.

28 *Id.* at Att. 1, p. 1. The three central offices were reported to have business line counts of: 81,282, 64,906, and 63,929 lines.

29 Letter from Bennett L. Ross, BellSouth, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313, filed February 18, 2005.

30 *Id.* at Ex. 1. The wire centers exceeding 60,000 lines are indicated by an "X" in the column marked "High Capacity Loops: No Impairment for DS1." After numerous inquiries from CLECs, BellSouth provided comparisons of its December 7 and February 18 filings. *See* BellSouth Carrier Notification, SN 91085065, March 11, 2005 ("March 11 Notification").

increase of over 71,000 lines.[31] In all, 30 of the wire centers reported by BellSouth doubled or more than doubled in size between the December 7 filing and the February 18 wire center list.[32]

Now, we understand that the degree of this inflation may have been overstated. In an *ex parte* letter filed with the Commission on March 23, BellSouth states that it "recently discovered an error in the mathematical formula that was used to count retail digital access lines on a per 64 kbps-equivalent basis."[33] BellSouth admits that as a result of this error, the number of business lines was overstated and "thus the wire centers meeting the Commission's nonimpairment thresholds were not correctly identified."[34] This mathematical error is not explained, nor is the magnitude of the incorrect identification disclosed by BellSouth. Moreover, although it asserts that the mathematical error did not affect the count of UNE-L loops, BellSouth offers no explanation of the methodology used to count such loops.

BellSouth is not the only ILEC whose line counts are inflated by the 64 kbps-equivalents rule. SBC also filed lists that include an inordinate quantity of UNE-L lines.[35] SBC

---

31 *March 11 Notification* at Att. 2 (WC CLLI ATLNGACS (Courtland Street)).

32 *March 11 Notification* at Att. 2. The wire centers that doubled in line counts were: ATLNGAPP, BRHMALMT, CHRLNCCA, CLMASCSN, DNWDGAMA, GNVLSCDT, JCSNMSCP, JCVLFLCL, MIAMFLGR, NRCRGAMA, SMYRGAPF, ATLNGASS, BTRGLAGW, CHMBGAMA, SHPTLAMA, SVNHGABS, ATHNGAMA, CHRLNCLP, CHRLNCRE, CHRLNCUN, JCVLFLSM, MACNGAMT, NDADFLGG, BRHMALOX, KNNRLABR, LKCHLADT, LLBNGAMA, MNPLSCES, MTGMALDA, and NSVLTNBW.

33 Letter from Bennett L. Ross, BellSouth, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313, March 23, 2005 ("March 23 Error Notification").

34 *Id.*

35 *See* Letter from James C. Smith, SBC, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313, February 18, 2005. SBC claimed 207 wire centers meeting the Tier 1 threshold for dedicated transport and 108 wire centers meeting the Tier 2 transport threshold. *Id.* at Att. A and B. It also claimed 28 wire centers meeting the DS1 loop thresholds and 82 wire centers meeting the DS3 loop thresholds. *Id.* at Att. C and D.

made limited supporting data available to CLECs.[36] That data is designated as confidential, so Joint Petitioners will avoid disclosing the details of its analysis here. However, based on counsel's review of the data, we estimate that 43 percent of the Tier 1 loop wire centers (12 of the 28 claimed) and 25 percent of the Tier 1 transport wire centers (53 of 207) are claimed to meet the threshold solely as a result of the 64 kbps-equivalents rule.

1. The 64 kbps-equivalents rules is inaccurate.

The 64 kbps-equivalents rules counts every DS1 provided by CLECs as 24 business lines. This assumption dramatically overstates the number of business lines served by CLECs.

First 24 "lines" represents the maximum number of channels supported by a DS1. Few, if any, DS1s will utilize all of the available channels for voice grade switched access lines. Some channels are used for signaling and control functions for the traffic. Some channels are used for data services such as Internet bandwidth. Some DS1s are not channelized at all, or contain multiple unused channels.

Moreover, the 64 kbps-equivalents rule assumes that a DS1 UNE always is used for switched access services. Yet, CLECs can and do use DS1 UNEs for non-switched private line services. CLECs also sometimes use a full DS1 UNE to provide Internet bandwidth, which also is not a switched access service. Such services are not to be included in the business line

---

[36] SBC claimed that its supporting data was subject to the protective order in this proceeding, and that the data was "copy prohibited" material. *See* Letter from Thomas F. Hughes, SBC, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313, March 3, 2005. Therefore, parties had to examine the data at the offices of SBC's outside counsel. Counsel was prohibited by SBC from making any copies for later examination, thereby making it harder to analyze the data provided.

counts at all, according to the definition contained in Section 51.5 of the rules.[37] But, the 64 kbps-equivalents rule results in the inclusion of these "lines" when provided by a CLEC over UNE facilities.

2. The ARMIS rules do not count digital lines using the 64 kbps-equivalents rule.

For ARMIS reporting purposes, the Commission does not use the 64 kbps-equivalents rule. In the "main access line" category, ARMIS instructions require reporting carriers to identify both analog and digital switched access lines they provide to end users. The count of digital switched access lines includes "digital switched access lines provided over 64 kbps, 56 kbps or ISDN B channels or other equivalent communications channels that are circuit-switched and can carry either voice or data." Notably, this definition excludes channels that are not circuit-switched and channels that carry data only. Further, BellSouth confirms that ARMIS requires the reporting of activated channels only; unactivated channel capacity is not counted for ARMIS purposes.[38]

3. Carriers may not assess end user charges using the 64 kbps-equivalents rule.

The 64 kbps-equivalents rule also is not used as a means to bill end user charges. For example, in the case of the subscriber line charge, the Commission's rules permit carriers to assess a multi-line SLC on customers receiving ISDN PRI services. The multi-line SLC is capped at a maximum of 5 lines, even though these services can carry up to 24 64 kbps-

---

37 47 C.F.R. § 51.5 ("business line tallies (1) shall include only those access lines connecting end user customers with incumbent LEC end offices for switched services, (2) shall not include non-switched special access lines ...").

38 *March 11 Notification*, at n.3 ("For ARMIS reporting purposes, the FCC requires an adjustment factor be applied to Basic Rate and Primary Rate ISDN lines. However, no similar adjustment factor is applied to other digital switched access lines for purposes of ARMIS reporting *and only activated capacity for such digital lines is reported in ARMIS*") (emphasis added).

equivalent channels.[39] The same limitation applies to Primary Interexchange Carrier Charges ("PICCs") for these services.[40] Similarly, the Commission's proposed new Form 525, which will be used for the reporting of end user lines served by eligible telecommunications carriers ("ETCs"), proposes that carriers report ISDN PRI circuits as 5 lines.[41]

B. Other Adjustments Also Inflate the ARMIS Line Counts

In addition to the 64 kbps-equivalents rule, other adjustments made, or the elimination of ARMIS adjustments, act to increase the number of business lines counted for purposes of the impairment tests. First, the ARMIS rules exclude non-switched retail lines,[42] but the Commission counts all UNE-L lines provided to CLECs. This would include UNE loops used for non-switched access purposes, such as Internet access or local private lines. Second, the Commission separately counts business access lines and residential lines in the ARMIS data.[43] All UNE-L lines are included, however, regardless of whether they are used to serve business or residential customers. According to the FCC's most recent Form 477 data, 65 percent of CLEC lines are used to serve residential and small business customers.[44] The ILEC line counts erroneously include UNE-L lines that are used to serve residential customers.

---

39 *See* 47 C.F.R. § 69.104(p). ISDN BRI service is limited to one SLC. *Id.*

40 47 C.F.R. § 69.153(d). For Centrex lines, local exchange carriers may assess no more than 9 PICCs. *Id.*, § 69.153(e).

41 FCC Form 525, Instructions (draft) at 8 (limiting Column 31, multi-line business lines, to the number of lines assessed end user common line charges pursuant to 47 C.F.R. § 69.104).

42 FCC Report 43-08 – Report Definition, December 2004, at 18 (limiting lines reported to switched access lines).

43 *Id.* at 21. Rule 51.5 counts only business access lines for the impairment criteria.

44 FCC Local Competition Data, December 2004 release (data as of June 30, 2004) at Table 11.

C. The Commission Should Compute Lines Based only on ARMIS Methodology

As shown above, the Commission's adjustments to ARMIS data substantially inflate the number of business access lines reported in each wire center. Solutions to these errors would require the Commission to adopt new proxies, to consider new data sources or to obtain additional information from ILECs and/or CLECs. Any of these solutions could require the collection of extensive new evidence and may require additional procedures before the Commission could implement a correction.

All of that could be avoided, however, if the Commission eliminates the reliance on non-ARMIS data to obtain business access line counts. The Commission should eliminate the erroneous adjustments and require incumbent LECs to report business lines using solely the ARMIS criteria. This solution furthers the Commission's goal of using easy to administer proxies to analyze impairment. The ARMIS data are collected and reported using uniform rules, have been closely scrutinized by the Commission for over a decade and as a result are more predictable than the adjustments made by the Commission. Further, the ARMIS data are more readily verifiable by CLECs than the line count methodology described in the *TRRO*. If the Commission were to use ARMIS data, CLECs could quickly and easily verify that information by comparing it to other reported data using the same methodology.

Moreover, this solution would avoid the errors such as those recently disclosed by BellSouth. In its March 23 letter to Jeff Carlisle, BellSouth disclosed that it had discovered an "error in the mathematical formula" used to convert ARMIS data to count retail digital access lines.[45] The cause and extent of this mathematical error is unknown at this time. However, if the Commission were to eliminate its adjustments entirely, the computation that BellSouth was

---

[45] *March 23 Error Notification* at 1.

making would not have been necessary, and, more importantly, CLECs would not be required to examine and verify BellSouth's methodologies.

If it does not use ARMIS criteria exclusively, the Commission should permit CLECs to report actual voice switched access circuits as a replacement for the adjustments that are made. This process could be modeled on other instances of data exchange between carriers, such as occurred in the payphone compensation context for calls routed by facilities-based carriers to switch-based resellers. For a time under those rules, facilities-based carriers required their reseller customers to report the number of completed calls that resulted from the call attempts transferred by the facilities-based carrier to the reseller. Using that as a model, the ILEC could report to each CLEC the number of UNE-L lines that are provided to the CLEC by wire center. The CLEC then could identify the number of channels that were used to provide voice switched access services in those wire centers. If a CLEC failed to report, the ILEC would be permitted to use a Commission-approved proxy for the number of lines served using these loops. Such a system, though it imposes a burden on the CLEC, would be preferable to the gross over counting that results from the Commission's use of the 64 kbps-equivalents rule and other adjustments.

IV. ONLY A TEST THAT REQUIRES A MINIMUM NUMBER OF FIBER COLLOCATORS AND A MINIMUM NUMBER OF BUSINESS LINES, AS THE LOOP TESTS REQUIRE, CAN ACCURATELY CAPTURE THE EXISTENCE OR NON-EXISTENCE OF IMPAIRMENT FOR DEDICATED TRANSPORT

The Commission is fundamentally inconsistent in its treatment of inference-based proxies for the unbundling of loops and transport. With respect to dedicated transport, the Commission establishes a test that permits a finding of non-impairment based on either (a) a certain number of fiber based collocators or (b) a certain number of business lines in the wire center. Rule 51.319(e)(3)(i) establishes "Tier 1" wire centers for transport as "those incumbent

LEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both."[46] Similarly, Rule 51.319(e)(3)(ii) provides that "Tier 2 wire centers are those incumbent LEC wire centers that that are not Tier I wire centers, but contain at least 3 fiber-based collocators, at least 24,000 business line, or both."[47] In other words, satisfaction of either criterion will be enough to find non-impairment.

The Commission took the opposite approach to the same question with respect to unbundled loops. The Commission's loop impairment test "requires both a minimum number of business lines served by a wire center and the presence of a minimum number of fiber based collocators to show that requesting carriers are not impaired."[48] The FCC explained that "high business line counts and the presence of fiber-based collocators, when evaluated in conjunction with one another, are likely to correspond with actual self-deployment of competitive LEC loops or to indicate where deployment would be economic and potential deployment likely."[49]

The Commission acknowledges this disparity in treatment between loops and transport. But, its rationale for distinguishing between the two is self-contradictory. In the case of transport, the Commission explained that "[a]lthough in many instances, wire centers will satisfy or fail to satisfy both [the collocator and business line] thresholds, we conclude that applying these measures in a disjunctive tandem [*i.e.*, either fiber based collocators or business

---

46 47 C.F.R. §51.319(e)(3)(i).

47 47 C.F.R. §51.319(e)(3)(ii).

48 *Id.* at ¶168 (emphasis added). *See* 47 C.F.R. §51.319(a)(4)(i) ("an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS1 loop on an unbundled basis to any building not served by a wire center with at least 60,000 business lines and at least four fiber-based collocators"); *see also* 47 C.F.R. §51.319(a)(5)(i) ("an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS3 loop on an unbundled basis to any building not served by a wire center with at least 38,000 business lines and at least four fiber-based collocators").

49 *Id.* at ¶167.

lines] will better capture actual and potential deployment that any single measure."[50] It relies squarely on the potential deployment rationale as the reason for rejecting proposals to analyze transport in the conjunctive (i.e., requiring both collocators and business lines). Under these tests, the Commission claimed, "the ability to capture wire centers with a high potential for competitive entry would be lost."[51]

In the case of unbundled loops, on the other hand, the Commission does not claim that its test fails to account for potential deployment. In fact, it claims that it *must* require both fiber based collocators and a minimum number of business lines precisely because it needs to capture the potential for loop deployment. The Commission explained that both fiber based collocators and business lines were required for its loop test because the alternative, a disjunctive test (where either one would sufficient) "would not account for both revenue opportunities and the scope of deployment of fiber rings, and therefore would deny unbundling where carriers are impaired...."[52]

Ultimately, a transport test that looks at either fiber-based collocators <u>or</u> business lines, but not both in tandem, cannot adequately predict where requesting carriers are not impaired. As the Commission explained in discussing its loop test, either element in isolation fails to consider all of the factors affecting impairment. A high number of collocators but few business lines may indicate that the wire center "does not itself offer revenues sufficient to justify competitive deployment of high capacity loops."[53] Alternatively, a high number of

---

50 *TRRO* at ¶ 94.

51 *Id.* at n. 266.

52 *Id.*

53 *Id.* ¶ 168.

business lines but few fiber based collocators suggests the presence of another factor impeding deployment, such as high costs or the lack of suitable facilities in the area.[54]

The same is the case for transport. A high number of fiber collocators may only indicate that the wire center is close to rights of way or close to other wire centers. It does not say anything about the level of demand for transport to or from that office.[55] A high number of business lines may indicate potential revenue or a potential need for transport, but it does not address whether other factors such as access to rights of way or the cost of deploying fiber impair a CLEC's ability to deploy the needed facilities. This is entirely consistent with the impairment factors the Commission identified for dedicated transport. In the *Triennial Review* proceeding, the Commission found that among the substantial fixed and sunk costs associated with deploying transport were collocation costs, the cost of fiber, the cost of burying fiber or attaching the fiber to poles, the cost of optronics and the cost of obtaining rights of way.[56] As the Commission explained, each of these factors can vary based on the individual situation.[57] Not surprisingly, therefore, the combination of these factors is not captured solely by the presence of fiber based collocators or the existence of a specified number of business lines in a wire center.

Finally, it is not true that a conjunctive test ignores potential deployment. In the context of transport, the Commission seems to believe that business lines alone represent the potential for deployment of transport. But this is not the case. For one thing, the RBOC data submitted to the Commission showed that at levels approximating the FCC's 38,000 line and

---

54 *Id.*

55 More importantly, since the Commission did not require that collocators be "matched" in the wire centers, it could indicate an entirely separate ring that is not connected to other wire centers with the minimum number of collocators.

56 *TRO, ¶ 371.*

57 *Id.*

24,000 line thresholds, a significant number of wire centers still did not have multiple fiber based collocators.[58] Yet, as the Commission recognized with respect to loops, the potential for deployment depends upon a combination of both revenue opportunities and the scope of other facilities already deployed in the area.[59] A test that examines both factors in tandem is the only test that can assess whether it is both desirable and possible to deploy facilities to the wire center.

Indeed, as a result of the Commission's arbitrary "line drawing,"[60] as many as 40 percent of the Tier 1 transport wire centers are found erroneously to be non-impaired. This estimate is based on a review of the evidence submitted on a confidential basis by SBC, which is discussed above. Upon review of the backup data, 76 of the 207 wire centers (36.7 percent) alleged by SBC to meet the Tier 1 transport thresholds qualify solely based on a number of facilities-based collocators; these 76 each have fewer than the threshold number of business access lines. If other RBOC data are consistent with the SBC data, as many as 40 percent of the transport wire centers may qualify solely because the FCC erroneously required satisfaction of only one of its two criteria for determining non-impairment.

---

58 *TRRO,* ¶ 114. This estimate itself proved to overstate the presence of facilities based collocators. As the RBOC filings after the *TRRO* demonstrated, most of the RBOCs counted fiber-based collocations in their December submissions, not fiber-based collocators. *See, e.g.,* Letter from Susanne A. Guyer, Verizon, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, WC Docket 04-313, February 18, 2005 at 1 ("Verizon has amended its count ... to reflect the number of providers rather than the number of collocation arrangements"). Multiple collocations by the same or affiliated carriers thus inflated the data on which the Commission relied.

59 *TRRO*, n. 266.

60 *Id* at ¶169 ("...the Commission may exercise line-drawing discretion when rendering determinations based on agency expertise, our reading of the record before us, and a desire to provide an easily implemented and reasonable bright-line rule to guide the industry.").

V. THE COMMISSION SHOULD REVISE ITS DEFINITION OF FIBER BASED COLLOCATORS TO EXCLUDE ENTITIES THAT HAVE AN AGREEMENT TO BE ACQUIRED BY OR MERGE WITH AN ILEC

At the time the record was compiled in the *Triennial Review Remand*, the possibility of merger agreements like those entered into by AT&T and MCI were not on the radar screen. The *TRRO* established fiber-based collocation as a factor in determining impairment for loops and for transport. A fiber based collocator was defined as any carrier, unaffiliated with the incumbent LEC that maintains a collocation arrangement and meets certain other criteria demonstrating the deployment of non-ILEC fiber to the collocation.[61]

A. The Recent AT&T and MCI Merger Agreements Fundamentally Alter the Landscape of Competitive Facilities Deployment

The *TRRO* states that fiber based collocator counts should not include collocation by affiliates of the ILEC, and that collocations maintained by two or more affiliates should be counted as one collocator.[62] At the time the Commission made these rulings, the possibility that the largest ILECs would acquire the two largest facilities based CLECs was not contemplated. However, the recent agreements by SBC to acquire AT&T and by Verizon to acquire MCI fundamentally change the competitive landscape and require the Commission to re-examine the basis on which it evaluates impairment for high capacity loops and transport. The changes necessary as a result of this seismic shift are far reaching, but the Commission can begin to address these changes by immediately re-examining the definition of fiber based collocator used in the rules.

---

61 47 C.F.R. § 51.5 (definitions); *see TRRO* ¶ 102.

62 47 C.F.R. § 51.5 (definition of fiber based collocator).

B. The Commission's Definition of Affiliate must be Broadened to Include Agreements to Merge as well as Consummated Mergers

The Commission is obligated to take this changed circumstance into account now, and to revise its impairment findings accordingly. The Commission has ruled that affiliates of the incumbent LEC should not count toward the number of fiber based collocators in a wire center. The Commission should further clarify that, in the case of a carrier that has entered into a binding agreement to merge with, acquire or otherwise affiliate with an incumbent LEC, that carrier will be considered an affiliate for purposes of the rule.

This clarification is consistent with the manner in which the Commission treats affiliations in other contexts under its rules. For example, under the competitive bidding rules, AT&T and MCI would be considered ILEC affiliates. Section 1.2110 of rules counts agreements to merge as having a present effect:

> Affiliation arising under stock options, convertible debentures and agreements to merge. Except as set forth in paragraph (c)(2)(ii)(A)(2) of this section, stock options, convertible debentures and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures and agreements are generally treated as though the rights held thereunder had been exercised.[63]

For similar reasons, the AT&T and MCI agreements should constitute a present affiliation under the impairment rules.

The Commission's impairment findings emphasize that its objective in counting fiber based collocators is to identify competitive facilities that are available in the market or potentially could be built. For example, the Commission stated that, it in establishing its DS1 loop impairment test it looked to "whether it is likely that other competitive carriers have already

---

[63] 47 C.F.R. § 1.2110(c)(5)(v).

deployed or will deploy such high-capacity facilities to buildings throughout the wire center serving area, thus making DS1-level use of those deployed facilities potentially viable."[64] As a result of the merger agreements, the Commission can no longer assume that AT&T and MCI facilities are competitive facilities in the market. These facilities no longer will need to be supported solely by competitive services that they could offer to customers in the market. Thus, they become unlike the facilities that CLECs must use to provide service, which must be supported only by the business that CLECs can provide in competition with the ILEC. Further, the assumption that these facilities are available to competitors no longer is valid. Instead, these facilities will become like any other ILEC facility – available only at ILEC-controlled rates and terms.

Because the collocator counts are supposed to identify locations where competitive facilities exist, and where unaffiliated carriers can maintain facilities without reliance on the incumbent LEC, the acquisitions of AT&T and MCI require the Commission to exclude AT&T and MCI facilities from its analysis by counting those carriers as affiliates of the respective incumbent LECs. The Commission should therefore amend its definition of fiber based collocator to state that a company will be considered an ILEC affiliate if it has a pending application with the FCC that would, if approved, result in the company satisfying the definition of affiliate provided in Section 3 of the Act.

VI. THE COMMISSION MUST REVISE ITS IMPAIRMENT ANALYSES TO REFLECT CHANGES, WHETHER THEY INDICATE IMPAIRMENT OR NON-IMPAIRMENT

The *TRRO* fails to account for material changes in circumstances, such as the recent agreements by the largest IXCs to be acquired by incumbent LECs. Failing to account for

64 *Id.*

such significant changes in the telecommunications industry will have a material adverse effect upon requesting carriers' ability to obtain access to ILEC UNEs. The impact will be most evident if the Commission permits Verizon and SBC to count the fiber-based collocations of MCI's and AT&T's local exchange affiliates and then "freeze" such counts before it completes its acquisitions of the carriers.

The *TRRO* unjustifiably "freezes" a finding of non-impairment once the transport criteria are met, even if subsequently those criteria cease to be met. In the *TRRO*, the Commission held that

> once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.[65]

This one-sided analysis flatly contradicts the impairment analysis required by Section 251(d)(2) of the Act. Therefore, on reconsideration, the Commission should (1) treat agreements to become affiliated the same as actual affiliate as of the time the agreement is made and (2) should permit periodic revisions to account for changes establishing impairment as well as non-impairment.

---

[65] 47 C.F.R. § 51.319(e)(3)(i); *see also id.* § 51.319(3)(ii) (Tier 2 transport).

CONCLUSION

In light of the foregoing, Joint Petitioners request that the Commission reconsider those aspects of the *TRRO* provided for herein.

Respectfully submitted,

By: 

Brad E. Mutschelknaus
Steven A. Augustino
Scott A. Kassman*
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 955-9600 (voice)
(202) 955-9792 (facsimile)
BMutschelknaus@KelleyDrye.com
SAugustino@KelleyDrye.com
SKassman@KelleyDrye.com

Dated: March 28, 2005

* Not admited in D.C. Practice limited to matters and proceedings before federal courts and agencies.