Before the
Federal Communications Commission
Washington, D.C. 20554

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

INITIAL COMMENTS AND WAIVER REQUEST OF THE
MICHIGAN PUBLIC SERVICE COMMISSION

The Michigan Public Service Commission respectfully submits these initial comments electronically in response to the August 20, 2004 released *Order and Notice of Proposed Rulemaking* (*Interim Order and NPRM*), FCC 04-179, 69 Federal Register 55128 (September 13, 2004) seeking input on a variety of issues related to the development of final network unbundling rules.

The Michigan Public Service Commission also requests any waivers necessary to file evidence from its State TRO proceeding only in CD-ROM format.

We have included a summary of the evidence presented on the CD-ROM as an appendix to this pleading. A hard copy of this pleading and the record referenced in that summary is being filed separately by CD-ROM.

The CD-ROM will be available for inspection at the FCC's headquarters.

TABLE OF CONTENTS

I. REQUEST FOR WAIVER OF FILING REQUIREMENTS

Due to the voluminous nature of the *TRO* proceedings' records, and the cost and time associated with duplicating and filing same, the Michigan Public Service Commission respectfully requests a waiver pursuant to FCC rule 1.3[1] of the filing requirements in FCC rules 1.51 and 1.419[2] to allow it to file its *TRO* proceedings' records in CD-ROM format only. Finally, and also for the same reasons, the Michigan Public Service Commission requests a waiver of paragraph 33 of the *NPRM* in order to allow it to file its comments using the FCC's ECFS system, but without having to upload and attach all of the documents on the CDs.

Pursuant to FCC rule 1.3, the Commission may waive its rules for good cause. Good cause may be found when special circumstances exist to warrant a deviation from the general rule[3], or where circumstances make strict compliance inconsistent with the public interest.[4] In this matter, good cause exists simply based on the sheer volume, time, and expense involved with submitting Michigan's *TRO* proceedings' records in paper format. Moreover, the Michigan Public Service Commission spent considerable time in compiling the CDs and ensuring that they accurately represent the record from each *TRO* proceeding. Finally, by allowing Michigan to submit its records on CD, the Commission avoids the prospect of being inundated with such records in piecemeal fashion by the participating parties. This is not to say that Michigan does not expect parties to provide comments to the *NPRM* and to include therein additional comments on Michigan's *TRO* proceedings.

---

[1] 47 C.F.R. § 1.3 (2004).

[2] 47 C.F.R. §§ 1.51 and 1.419 (2004).

[3] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert denied* 409 U.S. 1027 (1972).

[4] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166.

II. COMMENTS ON THE NOTICE OF PROPOSED RULEMAKING

On August 20, 2004, the Federal Communications Commission (FCC) issued a Notice of Proposed Rulemaking (Notice) to solicit comments on alternative rules that will implement the obligations of section 251(c)(3) of the Communications Act of 1934, as amended, in a manner consistent with the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *United States Telecom Assn* v *FCC*. In par. 15 of the FCC's Notice, the FCC provides guidance on how the state commissions can provide the extensive information that the states have gathered in their own state proceedings relevant to this inquiry.

The FCC in par. 15 states:

> Given that our inquiry raises complex issues, and proceedings that state commissions initiated to implement the Triennial Review Order developed voluminous records containing information potentially relevant to our inquiry, we anticipate that parties might wish to submit much of that same factual evidence to support their positions here. To be sure, the state commissions' dedication in executing the difficult tasks set out for them in our Triennial Review Order was impressive, and we appreciate their efforts. To make the records from state proceedings more usable, we encourage state commissions and other parties to file summaries of the state proceedings, especially highlighting factual information that would be relevant under the guidance of USTA II. Similarly, we encourage state commissions and other parties to summarize state commission efforts to develop batch hot cut processes.

The Michigan Commission offers the following information that it has gathered relevant to this docket. The Michigan Commission has been conducting proceedings for well over a year and has issued an order on October 7, 2003 in the 90-day proceeding concerning impairment in the enterprise switching market in Case No. U-13895 (Attachment A). We submit that order into the record here. The Michigan Commission initiated Case No. U-13796 to gather information in order to render a decision related to mass market switching, loops, and transport issues. The record in that proceeding is very voluminous and the parties conducted discovery, submitted

testimony, and participated in hearings. This resulted in a recommendation by the Administrative Law Judge (ALJ) that was filed on May 10, 2004, just prior to this Commission granting a motion to dismiss the case as a result of the D.C. Circuit Court ruling. The complete public record was transmitted to the FCC on June 29, 2004 by this Commission. The Michigan Commission will retransmit the record here today with the ALJ's Proposal for Decision attached separately to this filing as a document that represents a summary of the facts in this case (Attachment B). The ALJ's recommendation not only summarizes the facts, but also addresses "which specific network elements" the FCC should require incumbent local exchange carriers to make available as unbundled network elements (UNEs), in "which specific markets." (Par. 11 of Notice). The ALJ found that mass market switching, high-capacity loops, and dedicated transport should continue to be provided as UNEs, except for three locations that meet the DS3 self-provisioning trigger. Further, the ALJ found that wire centers were the appropriate geographic markets for analysis of mass market switching.

This Commission also has been continuing with a docket to study and issue a recommendation related to a batch hot cut process in Case No. U-13891. On June 29, 2004 the Commission issued an order adopting an interim batch hot cut process and directed the parties to participate in collaborative discussions related to developing a test plan and conducting a test prior to the Commission adopting a final order on a batch hot cut process. The order is attached here as a summary of the case (Attachment C). The complete record in Case No. U-13891, containing all of the parties' filings, will also be transmitted as a resource to the underlying information and filings this Commission has relied on. Subsequent orders issued in Case No. U-13891 will be forwarded when they become available.

Finally, the Michigan Commission is resubmitting comments previously submitted in CC Docket No. 01-338.

The Michigan Commission has conducted extensive proceedings in the dockets that were initiated in Michigan pursuant to the FCC's Triennial Review Proceeding and offers this information to the FCC to assist in the development of permanent rules.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION

_____

J. Peter Lark, Chair

_____

Robert B. Nelson, Commissioner

_____

Laura Chappelle, Commissioner

_____

Mary Jo Kunkle, Executive Secretary

Dated: October 4, 2004

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to open a docket and to establish a deadline for telecommunications providers to petition the Commission for a determination to rebut the national finding of non-impairment for unbundled local circuit switching in the enterprise market.	)	Case No. U-13895

At the November 25, 2003 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER CLOSING DOCKET

On February 20, 2003, the Federal Communications Commission (FCC) announced that it was adopting rules in its Triennial Review proceeding[1] that will affect how incumbent local exchange carriers (ILECs) meet their statutory obligations to make unbundled network elements available to new entrants.

In an order issued on May 28, 2003 in Case No. U-13796, the Commission commenced a proceeding to facilitate the implementation of the FCC's anticipated Triennial Review Order

[1] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147.

(TRO) by soliciting input from stakeholders. In so doing, the Commission requested comments on certain specific issues.

On August 21, 2003, the FCC released the text of its TRO, which was published in the Federal Register on September 2, 2003 and which became effective on October 2, 2003. Among other things, the TRO sought to determine on a national basis whether competitive local exchange carriers (CLECs) are impaired in the market without access to certain elements of an ILEC's network. In so doing, the FCC made a national finding that telecommunications carriers requesting interconnection are not impaired in the enterprise market without access to local circuit switching to serve customers using DS1 capacity and above.

The FCC provided that states may rebut this finding within 90 days of the effective date of the TRO. The FCC gave the states an opportunity to conduct a more granular analysis of the markets subject to their jurisdiction and to determine whether CLECs are impaired competitively without access to those network elements in certain geographic areas or to specific end users. The FCC order also provided that, if a state commission fails to exercise its authority in this regard, a party may petition the FCC to step into the role of the state commission and the FCC may assume responsibility for conducting the proceeding.

As of October 7, 2003, the Commission had received no indication of claimed impairment without access to local switching for carriers serving enterprise market customers using DS-1 capacity and above. However, because such a determination must be made, if at all, within 90 days of the effective date of the TRO (or by January 1, 2004), the Commission issued an order opening this docket and established a deadline for parties interested in this issue to file a statement of position, with prepared direct testimony and supporting documentation, including the designation of all geographic areas encompassed by the filing. The filing deadline was

October 20, 2003. By that date no party filed a statement of position or prepared direct testimony as required by the October 7 order. However, LDMI Telecommunications, Inc., (LDMI) filed a motion to stay the proceedings on that date.[2]

On November 5, 2003, Quick Communications and Superior Spectrum, Inc., (collectively, Quick) filed a motion to revise the schedule established in the October 7 order. Quick also filed a statement of position and prepared direct testimony in support of its contention that CLECs in Michigan's Upper Peninsula are impaired if they do not have access to unbundled local DS-2 enterprise switching.

On November 5, 2003, TelNet Worldwide, Inc., filed a statement of position and prepared direct testimony in support of its contention that it would be impaired if unbundled DS-1 or above enterprise switching is not available in the service territory of Verizon North, Inc. and Contel of the South, Inc. d/b/a Verizon North Systems (Verizon). With regard to SBC's service territory, TelNet took the position that impairment regarding DS-1 or above enterprise switching should be determined on a CLEC by CLEC basis, with the Commission reviewing the economic situation of each CLEC. According to TelNet, this review could be conducted when a CLEC makes application to the Commission and demonstrates impairment if access to such switching were not available.

On November 12, 2003, SBC filed an answer in opposition to the motion to revise the schedule set in the October 7 order.

On November 20, 2003, Verizon filed a motion to strike TelNet's statement of position and prepared direct testimony.

[2] On October 28, 2003, SBC Michigan (SBC) filed an answer in opposition to LDMI's motion, which it supplemented on November 5, 2003.

The Commission finds that the filings submitted by LDMI, Quick, and TelNet should be rejected and that the docket in this proceeding should be closed. These filings all made reference to the existence of a stay issued by the Second Circuit Court of Appeals. However, that stay is no longer in effect and did not bind this Commission in any event. Moreover, because the filings submitted by LDMI, Quick, and TelNet failed to comply with the requirements of the October 7 order, the Commission finds that the filings should be rejected. Therefore, the Commission concludes that this docket should be closed.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.; and 47 USC 251 and 252.

b. The filings submitted by LDMI, Quick, and TelNet failed to comply with the requirements of the October 7 order and should be rejected.

c. This docket should be closed.

THEREFORE, IT IS ORDERED that:

A. The filings submitted by LDMI Telecommunications, Inc., Quick Communications and Superior Spectrum, Inc., and TelNet Worldwide, Inc., are rejected.

B. This docket is closed.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chair

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of November 25, 2003.

/s/ Robert W. Kehres
Its Acting Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

_____
Chair

_____
Commissioner

_____
Commissioner

By its action of November 25, 2003.

_____
Its Acting Executive Secretary

In the matter, on the Commission's own motion, to open a docket and to establish a deadline for telecommunications providers to petition the Commission for a determination to rebut the national finding of non-impairment for unbundled local circuit switching in the enterprise market.	)	Case No. U-13895

Suggested Minute:

"Adopt and issue order dated November 25, 2003 closing the docket in this proceeding, as set forth in the order."

In the matter, on the Commission's own motion, to open a docket and to establish a deadline for telecommunications providers to petition the Commission for a determination to rebut the national finding of non-impairment for unbundled local circuit switching in the enterprise market.	)	Case No. U-13895

Suggested Minute:

"Adopt and issue order dated October 7, 2003 to open a docket and to establish a deadline for telecommunications providers to petition the Commission for a determination to rebut the national finding of non-impairment for unbundled local circuit switching in the enterprise market, as set forth in the order."

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to facilitate the implementation of the Federal Communication Commission's Triennial Review determination in Michigan.	)))))	Case No. U-13796

PROPOSAL FOR DECISION

This proceeding arises out of the Federal Communication Commission's (FCC) *Triennial Review Order* (*TRO*)[1] and Orders dated May 28, August 26 and September 30, 2003, of the Michigan Public Service Commission (Commission) implementing the TRO.

Notices of Intent to Participate have been submitted on behalf of the following:

AARP
ACN Communications, Inc. (ACN)
Allegiance Telecom, Inc. (Allegiance)
AT&T Communications of Michigan, Inc. (AT&T)
Attorney General
Brooks Fiber Communications of Michigan, Inc (Brooks)
Bullseye Telecom, Inc. (Bullseye)
CenturyTel Midwest-Michigan, Inc., CenturyTel of Northern Michigan, Inc., and CenturyTel of Upper Michigan, Inc. (collectively CenturyTel)
Climax Telephone Company (Climax)
CMC Telecom, Inc. (CMC)
Competitive Local Exchange Carriers Association of Michigan (CLECA)
Covad Communications Company (Covad)

[1] *See Review of the section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003), *corrected by Errata*, 18 FCC Rcd 19020 (2003) (collectively "*TRO*"), *reversed and remanded*, *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases) (decided Mar. 2, 2004).

Focal Communications Corporation of Michigan (Focal)
grid4 Communication, Inc. (grid4)
KMC Telecom III, LLC (KMC)
LDMI Telecommunications, Inc. (LDMI)
MCImetro Access Transmission Services LLC, MCI WorldCom Communications, Inc. (collectively MCI)
McLeodUSA Telecommunications Services, Inc. (McLeod)
Michigan Bell Telephone Company d/b/a/ SBC Michigan (SBC)
Michigan Public Service Commission Staff (Staff)
Quick Communications, Inc. (Quick)
Sage Telecom, Inc. (Sage)
Save American Free Enterprise in Telecommunications (SAFE-T) Coalition
Sprint Communications Company L.P. (Sprint)
Superior Spectrum, Inc. (Superior)
Talk America Inc. (Talk America)
TCG Detroit (TCG)
TDS Metrocom, LLC (TDS)
TelNet Worldwide, Inc. (TelNet)
Verizon North Inc. and Contel of the South, Inc. d/b/a Verizon North Systems (Verizon)
Winn Telephone Company (Winn)
XO Michigan, Inc. (XO)
Zenk Group Ltd., d/b/a Planet Access (Planet Access)
Z-Tel Communications (Z-Tel)

Sage and Winn subsequently withdrew from the proceeding.

The schedule established for the proceeding provide for the filing of Direct, Reply and Response testimony and exhibits. Hearings in this matter took place on October 13 and December 4, 2003; and March 15 through 19, 2004. In all the testimony of 36 witnesses was bound into the record.

Briefs have been filed by AARP, ACN, AT&T, the Attorney General, Bullseye, Covad, MCI, the Michigan Based CLEC Coalition (CLEC Coalition), SBC,[2] Talk America, TCG, and Z-Tel. Reply Briefs have been filed by ACN, AT&T, the Attorney

[2] SBC filed separate Briefs and Reply Briefs addressing Mass Market Switching, High-Capacity Loops and Dedicated Transport. AT&T, TCG, MCI, Brooks, Covad, TDS, XO, Focal and KMC jointly filed a separate Brief addressing High-Capacity Loops and Dedicated Transport. With the exception of TDS, these same parties jointly filed a Reply Brief addressing High-Capacity Loops and Dedicated Transport. TDS filed a separate Reply Brief addressing Dedicated Transport.

General, Bullseye, MCI, the Michigan Based CLEC Coalition (CLEC Coalition), SBC, Staff, Talk America, TCG, and Z-Tel.

MASS MARKET SWITCHING

In the *TRO*, the FCC established specific rules for states to apply to determine whether and where the FCC's provisional national finding of impairment with respect to local switching to serve mass market customers does not apply. The FCC held that there is no impairment in those geographic markets where any one of three tests is met. In this case SBC has limited its presentation to one of the three tests, the self-provisioning trigger test.

Under the self-provisioning trigger test, the Commission is required to find non-impairment where "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."[3]

The Geographic Market

The first issue presented in this mass market switching case is to determine the geographic area of the markets to be analyzed. SBC takes the position that the appropriate geographic market for analyzing mass market switching impairment is SBC's service territory within the Metropolitan Statistical Area (MSA). The federal Office of Management and Budget defines an MSA as a county or group of counties with (1) a city of population 50,000 or more or (2) an urbanized area (as defined by the

[3] 47 C.F.R. § 51.319(d)(2)(iii)(A)(1).

Census Bureau) of population at least 50,000, consisting of one or more counties. SBC states an MSA is a county or group of counties having a large clustered population, including adjacent areas having a high degree of community of interest with the core population center. SBC represents the MSA satisfies the FCC's criteria[4] for defining the geographic market and also comport with the FCC's directive that the markets not be defined "so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market."[5]

In support of its position, SBC maintains that MSAs best account for the locations of mass market customers already served by competitors, reflect the variation in factors affecting competitors' ability to serve customers, and demonstrate competitors' ability to target and serve specific markets profitably and efficiently. In addition, SBC asserts the service territory within each MSA reflects the economic markets in which competitors serve customers using their own switches, in light of the efficiencies of scale and scope available from serving markets of that geographic scope.

AT&T and Bullseye recommend that the Commission use LATA boundaries for defining geographic markets. These parties contend that LATAs provide a comprehensive market definition with every area in Michigan assigned to a market. AT&T and Bullseye state that wire center boundaries conform to LATA boundaries, eliminate the need to arbitrarily assign wire centers that straddle the border into/out-of an MSA, and avoid the orphaned market issue. The requirement that the "locations of mass market customers actually being served (if any) by competitors" is thereby satisfied. Finally, AT&T and Bullseye state LATA boundaries are well understood in the

[4] *Id.*, § 51.319(d)(2)(i)
[5] *TRO*, ¶ 495.

industry and were originally designed as a best estimate of the geographic boundary of the exchange market.

AARP and the Attorney General propose that the Commission define the geographic market for the Lansing MSA based on certain wire center "clusters" identified by AARP witness Dr. Ben Johnson. These parties state data for wire centers in the Lansing area was analyzed in order to identify homogeneous geographic markets. A multi-step process followed, starting with quantitative data for each wire center in the Lansing MSA. Each wire center was ranked with respect to the following factors: total number of lines, the ratio of enterprise lines to total lines, the number of lines per square mile (density), and the number of carriers collocated at the wire center. These rankings were combined by giving them equal weight in the form of an index value. These index values were then used, in conjunction with information concerning airline distances, UNE rate zones, and other factors, in identifying contiguous groups of wire centers with reasonably homogeneous characteristics. Exhibit I-198, Map 4, shows the groups of wire centers that AARP and the Attorney General are recommending be identified as separate markets.

MCI, ACN, Talk America, and Staff take the position that the Commission should define each individual SBC wire center as a separate geographic market. It is asserted that this approach best satisfies the various "must" and "should" factors established by the FCC in the *TRO*. These parties maintain the geographic market specifications set forth in the *TRO* are designed to identify areas where actual deployment of competitive facilities has occurred to serve mass market customers. It is asserted a wire center approach to market definition is perfectly tied to the locations of customers actually

being served by competitors. The CLECs and Staff maintain that self-provision switches have an addressable market that matches the SBC wire centers in which they have collocated, regardless of the ultimate capacity of a switch. Consumer choice similarly varies by wire center, and many CLECs market services at or below the wire center level (e.g., NPA-NXX code, residential only, business only). In addition, for CLECs that utilize self-provisioned switches, the operational and economic impairment faced by carriers with regard to mass market switching varies by wire center.

The FCC did not adopt a particular market definition in making its determinations with respect to mass market switching. Instead, the FCC codified the principles the Commission must apply in defining the geographic market for mass market switching in its rules:

> 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.[6]

The *TRO* enumerates a series of "must" and "should" factors for State Commissions to consider in defining markets for the *TRO* impairment analysis. The *TRO* provides at ¶ 495 the following:

> [S]tate commissions must define each market on a granular level, and in doing so they must take into consideration the locations of 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 economically and efficiently using currently available technologies. While a more granular analysis is generally preferable, states should not define the market so

[6] 47 C.F.R. § 51.319(d)(2)(i).

> narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market. State Commissions should consider how competitors' ability to use self-provisioned switches or switches provided by a third-party wholesaler to serve various groups of customers varies geographically and should attempt to distinguish among markets where different impairments are likely.

Based upon the record presented the Administrative Law Judge recommends that the Commission adopt the proposal of MCI, the Joint CLECs and Staff and define the geographic market in Michigan for determining non-impairment for unbundled local switching at the wire center level. Of the various proposals under consideration, the writer is persuaded the wire center level analysis presented in this case is the most appropriate and most closely follows the patterns of expansion and competitive development reflected in the record. This analysis also gives appropriate consideration to the economics and marketing involved in the various carriers' deployment and expansion of their competitive networks.

The record shows that the MSA and LATA proposals are less desirable. This finding is the result of the inability to show that competitors have been able to serve mass market customers across wire center boundaries. The evidence shows only the incidental serving of DS0 loops across MSAs or LATAs.

Other problems have also been demonstrated. If SBC is correct in its assertion that the trigger analysis is purely a counting exercise, then there could be large areas of actual impairment in a MSA or LATA that would be deemed unimpaired. Such a result is inapposite with the goal of the *TRO* to identify genuine areas of non-impairment. If, on the other hand, ATT and Bullseye are correct that the trigger analysis is not purely a counting exercise and that significant activity needs to be shown, then a finding of

non-impairment might not occur until long after much of the area encompassed by the MSA or LATA is actually non-impaired. The Administrative Law Judge finds that these are the basic flaws in the MSA and LATA proposals.

In addition, the Administrative Law Judge finds that the use of the MSA presents additional problems. MSAs do not include all wire centers within the state. AT&T has shown that MSAs exclude 124 of the 336 wire centers in which CLECs offer competitive services. Evidence offered by the Attorney General demonstrates that MSAs improperly lump together potentially disparate groups. The record reflects there are significant disparities between economic and demographic conditions in counties within an MSA and between the various MSAs. It has been noted that even SBC, with all its existing embedded facilities, brand name awareness, market power, and economies of scale and scope at its disposal, does not serve the entirety of all thirteen of the MSAs in Michigan where it has a presence. It seems unlikely then that competitors would do what SBC cannot or does not desire to do.

The Administrative Law Judge is persuaded that the use of the wire center as the geographic market avoids these flaws. Establishing the wire center as a geographic market for purposes of an impairment analysis will allow the Commission to make a determination of non-impairment when it is appropriate while at the same time preventing the application of the non-impairment decision to areas where impairment continues to exist.

Finally, the Administrative Law Judge finds the evidence demonstrates the current technology does not allow for the use of a competitive switch to provide mass market analog service in any ILEC wire center in which a CLEC is not collocated.

Customers are being served based on the location of competitive collocation arrangements and not based upon the location of the CLEC switch. From an operational standpoint then, the wire center is directly tied to the "location of customers actually being served," and accordingly supports the decision that the wire center is the proper geographic area for the mass market switching analysis. It has been shown that there are operational and economic impairments that do in fact vary by wire center. Giving then consideration to the variety of factors specified by the FCC for the Commission to utilize in defining the geographic market, the evidence taken as a whole shows that of the proposals offered, the wire center best satisfies those factors.

The DS0 Cut-off

The FCC has defined mass market customers as "analog voice customers that purchase only a limited number of POTS lines, and can only be economically served via DS0 lines."[7] Mass market customers are typically residential and small business customers that rely on traditional POTS for their telecommunications needs.

Enterprise customers require a level of service and capacity, particularly for data services, that exceeds that of mass market customers. Enterprise customers typically need service that exceeds the capabilities of the POTS (and DS0 lines) provided to mass market customers. The FCC stated: "DS1 enterprise customers are characterized by relatively intense, often data centric, demand for telecommunications services sufficient to justify service via high-capacity loops at the DS1 capacity and above."[8] The FCC, however, includes in the enterprise market those customers for whom "it is economically feasible for a competitive carrier to provide voice service with

[7] *TRO*, ¶ 497.
[8] *Id.*, ¶ 451.

its own switch using a DS1 or above loop."[9] Enterprise customers therefore include both "customers that are served by the competing carrier using a DS1 or above loop and multi-line customers for whom "it makes economic sense . . . to be served via a DS1 loop."[10]

The FCC has delegated to the Commission the task of determining the maximum number of DS0 lines a customer may use before it "makes economic sense" to use a DS1 line (thereby rendering it an enterprise customer). This "DS0 cut-off" – *i.e.*, the cross-over point – thus establishes the "upper bound" of the mass market.

The parties have presented a wide range of cross-over points. SBC has determined the cross-over point to be 4 DS0 lines (anything over 3 lines). AT&T and AARP propose a minimum of 12 DS0 lines. The CLEC Coalition proposes a cross-over of at least 22 DS0 lines, with a 20% contingency factor. The remaining parties believe the Commission should set a cross-over point that is determined by what the customer orders. If the customer is a single-location customer with only DS0 lines, then the customer is a mass market customer no matter how many DS0 lines they have. If the customer has any DS1 lines, then the customer is an enterprise customer. This "customer determinative" position was adopted by MCI, the Attorney General and Bullseye.

ACN takes the position a cross-over determination is only required when a potential deployment case is being presented. Since SBC has stated it is only presenting a trigger analysis, ACN asserts a cross-over determination is not required. Bullseye has endorsed ACN's position.

---

[9] *Id.*, ¶ 421, n.1296.
[10] *Id*.

Staff recommends that if the Commission adopts a cross-over point, it adopt the position taken by MCI in these proceedings. Staff notes that MCI's proposal was initially presented by Verizon in California and then revised:

> Verizon's recommendation presumes that each CLEC has made a rational decision as to whether to serve its end-user customer via an analog, voice-grade loop or a DS-1 (or higher capacity) loop, given the specific circumstances for each customer. Hence, Verizon does not attempt to perform its own crossover analysis to replicate the decision analysis of the CLEC. Instead, it merely counts every instance in which a CLEC obtains an analog loop to provide voice-grade service as a mass-market loop. (Murray Response Testimony, p 56, Tr. 2105).

Refining that recommendation, MCI added the condition that any DS1 or higher customer that might also have a DS0 line should be classified as an enterprise customer. (*Id*.)

The parties have expended considerable effort in both supporting the proposals they endorse and critiquing those they oppose. These analyses will not be repeated here for the reason that the Administrative Law Judge agrees with the position put forward by ACN that the Commission is not required to determine a DS0 cut-off in a trigger proceeding.

The FCC has found that on a national basis CLECs are impaired without access to unbundled switching. The FCC specified the granular analysis that must be performed by the Commission in order to find that in a specific geographic market CLECs are not impaired without access to unbundled local circuit switching. The FCC provided:

> (iii) State commission analysis. To determine whether requesting telecommunication 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 to customers serving DS0 capacity loops in that market using their own switches.

(B) Additional state authority. If neither of the triggers 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:

* * *

(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 "cut-off," 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.[11]

SBC is requesting relief in this proceeding under the provisions of the self-provisioning trigger outlined in 47 C.F.R. § 51.319(d)(2)(iii)(A). SBC has not requested relief under the potential deployment provisions. The Administrative Law Judge finds that the clear language of the FCC's rule requires the Commission to establish the DS0 cut-off as a part of "the economic analysis set forth in paragraph (d)(2)(iii)(B)(3) of this section." In addition, the *TRO* provides that, "as part of the economic and operational analysis discussed below, a state must determine the appropriate cut-off for multi-line DS0 customers as part of its more granular review."[12]

SBC grounds its position on the fact that it has submitted evidence pertaining to the DS0 cut-off and as a result the Commission is obligated to apply the DS0 cut-off analysis to that evidence. In this regard SBC relies on the FCC's statement that state commissions have "an affirmative obligation to review the relevant evidence associated with any market submitted by an interested party, and to apply the trigger and any other analysis specified in this Part to such evidence."[13] SBC argues further that the paragraph in the *TRO* where the FCC explains its DS0 cut-off rule (¶ 497) is one of

[11] 47 C.F.R. § 51.319(d)(2)(iii).
[12] *TRO*, ¶ 497.
[13] *Id.*, ¶ 527, n.1612.

three paragraphs under the heading "Defining the Market." The Commission must therefore define the DS0 cut-off in order to establish the geographic markets and apply the trigger test. Finally, SBC maintains that the Commission is required by 47 C.F.R. § 51.319(d)(2)(iii) to perform the inquiry set forth in paragraph (d)(2)(iii)(A) through (d)(2)(iii)(C) and the DS0 cut-off rule is a part this inquiry.

The writer finds this analysis strained and unpersuasive in light of the clear statement by the FCC that the establishment of the DS0 cut-off should be performed as a part of an economic analysis. The issue of the appropriate DS0 cut-off is therefore not within the required scope of the relief requested in this case by SBC. In this case then the Commission may address the DS0 cut-off, but is not required to do so. The Administrative Law Judge does not believe, however, the analysis need be done in light of the findings below that the FCC's self-provisioning trigger is not satisfied in any geographic area.

The Self-provisioning Trigger

SBC takes the position the FCC's self-provisioning trigger test is objective and straightforward. The FCC's mass market switching rule provides

> [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 . . . the self-provisioning trigger . . . is satisfied.[14]

The self-provisioning trigger rule provides:

> [t]o 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

[14] 47 C.F.R. § 51.319(d)(2)(iii)(A).

> the incumbent LEC, each are serving mass market customers in the particular market with the use of their own local switches.[15]

SBC maintains the requirements of the trigger rule are made plain and its purpose is to avoid a complicated, theoretical and subjective impairment analysis of operational and economic barriers. SBC states the purpose of the self-provisioning trigger is to provide the Commission with an "objective," "bright-line" rule for assessing whether CLECs are impaired without access to unbundled mass market switching, not to assess whether each and every mass market customer currently has a choice of at least three switch-based competitive providers.

SBC asserts it has shown the self-provisioning trigger is satisfied in the seven MSAs it has identified. Seven non-affiliated competing providers are serving mass market customers with their own local switches in the Ann Arbor MSA, three in the Battle Creek MSA, nine in the Detroit MSA, four in the Grand Rapids MSA, four in the Holland MSA, three in the Kalamazoo MSA, and four in the Lansing MSA. *See* Ex. A-115 (Lube Ex. JPL-12)[16]. To identify self-provisioners in each geographic market, SBC relied on two sources of data: its own UNE-loop data (for CLECs purchasing unbundled loops) and E911 data (for cable telephony providers).

SBC contends the various CLECs in this proceeding have sought to add a number of additional criteria to the trigger rule in an attempt to make it impossible to satisfy. In response to the CLECs, SBC asserts the trigger rule only requires that a carrier currently serve mass market customers, not all different types of mass market customers (residential and small business).

---

[15] *Id.* § 51.319(d)(2)(iii)(A)(1).

[16] Exhibit A-117 provides a "summary" of SBC's trigger case, lists of the MSAs where SBC seeks relief, and identifies each of SBC's trigger candidates in each MSA. Exhibit A-118 (Confidential) lists the number of purported trigger candidates by MSA by central office.

In addition, SBC states carriers count toward satisfying the trigger that serve mass market customers using their own switches, not mass market switches. SBC contends it is irrelevant if a carrier uses the same switch to serve enterprise customers.

SBC maintains the trigger rule does not require that a carrier serve any particular number of mass market customers, mass market customers in the particular market or customers located ubiquitously throughout the market. SBC contends the trigger rule does not require an operational or economic impairment analysis to determine whether a self-provisioner is "actively providing" and "likely to continue" providing service using its switch.

SBC asserts the trigger rule explicitly counts intermodal providers that self-provision switching, and does not require that a carrier purchase UNE-loops from SBC. Finally, SBC contends the trigger rule requires that a carrier be non-affiliated with the ILEC whose service territory is under consideration, not with all ILECs.

After a thorough review of the positions presented by all parties, the Administrative Law Judge is persuaded that the *TRO* requires the reasonable examination of local conditions and local markets in applying the trigger analysis. A simple counting exercise that only determines if a CLEC has a switch and UNE-loops in a particular geographic area is not sufficient. Support for this view is found in the *TRO.* There the FCC stated:

> We find that giving the state this role [in reviewing triggers and other impairment issues] is most appropriate where, in our judgment, the record before us does not contain sufficiently granular information and the states are better positioned than we are to gather and assess the necessary information.[17]

[17] *TRO*, ¶ 188.

The writer agrees with the Staff and the CLECs that the trigger rule seeks to ascertain whether there are areas in which actual switched-based competition for mass market customers has developed to the extent that the Commission can reasonably find that CLECs have overcome impairment. The FCC stated the purpose of its trigger analysis is to consider whether "actual marketplace evidence shows whether new entrants, as a practical matter, have surmounted barriers to entry in the relevant market," [18] so that "it is feasible to provide service without relying on the incumbent LEC."[19]

The question has been raised whether the use of the CLEC switch should be considered in applying the trigger rule. The Administrative Law Judge finds that the use of the CLEC switch is relevant to the trigger analysis. If the mass market trigger test is to determine whether a CLEC, in a given market, is providing service to mass market customers with its own switch it is reasonable to ascertain whether the CLEC's switch is in fact providing service to mass market customers. The FCC held that "switches serving the enterprise market do not qualify for the triggers" applicable to mass market switching.[20] If an enterprise customer requires a package of services that includes some analog voice lines, this does not tend to show that the switch serves the mass market. The writer finds, therefore, that it is inappropriate to count as "mass market switch triggers" carriers that fundamentally operate "enterprise switches" – i.e., switches that are intended to and that are being used to serve the enterprise market.

SBC has designated the switches used in Michigan by AT&T, MCI, KMC and XO as triggers. The Administrative Law Judge agrees with Staff and the CLECs that these

[18] *Id.*, ¶ 99.
[19] *Id.*, ¶ 93.
[20] *Id.*, ¶ 508.

are all instances of enterprise – and not mass market – switches and thus they do not qualify as triggers.

The *TRO* provides that the CLEC "should be actively providing voice service to mass market customers,"[21] "and are likely to continue to do so."[22] SBC has taken the position that these provisions of the *TRO* do not allow for the examination of a trigger candidate's marketing efforts, business plans or recent customer additions. In this regard SBC relies upon *TRO*, ¶ 520 n.1588 which provides the FCC's "impairment analysis does not entail assessing individual business plans," and "[t]his same analysis applies in the switching section…of this Order." SBC maintains the additional criteria proposed by the CLECs are the sort of factors that might be examined to determine the "financial stability or well-being" or "difficulty in serving the mass market" as a part of the potential deployment analysis. SBC asserts such an endeavor is not part of the self-provisioning trigger analysis.

The issue to be addressed is whether the qualifications of the trigger candidates support the conclusion that impairment has been eliminated or that it can be overcome. The Administrative Law Judge is persuaded that it would be unreasonable to count CLECs that have legacy loops from a failed business plan for purposes of demonstrating that no barriers exist in a market. The FCC stated: "If the triggers are satisfied, the states need not undertake any further inquiry, because no impairment should exist in that market.[23]

It has been shown that some carriers continue to serve a small number of analog loops connected to the switches that they use almost exclusively to serve enterprise

[21] *Id*., ¶ 499
[22] *Id*., ¶ 500
[23] *Id*., ¶ 494

customers. For example, LDMI serves mass market customers via UNE-L only because the loops served by those customers were still attached to some equipment it purchased from a bankrupt switch-based carrier (Mpower Michigan). LDMI does not seek to grow its mass market UNE-L business. Similarly, AT&T, Choice One, Comcast and CTS provided evidence that they have retreated from prior business plans that relied upon UNE-L to serve the mass market customer. In addition, evidence was presented examining the types of loops provisioned to a CLEC switch in the last six month period. What has been shown is that even those CLECs that may have had a historic interest in analog service have essentially shifted to an enterprise mode. Analog activity is in decline, while the lease of high-speed digital facilities is increasing rapidly.[24]

The writer finds that these carriers do not provide support for a determination that they are "actively" serving the mass market using UNE-L and are likely to continue to do so. The term "actively" must be given some effect. A CLEC is not "actively" providing switch-based service simply because it is "currently providing" service. Finally, a CLEC on the verge of exiting the mass market (or that has already left it) is not "likely to continue" providing POTS services to mass market customers. The Administrative Law Judge concludes that these CLECs are not trigger candidates for the self-provisioning mass market switch trigger because each is currently "actively providing" enterprise, rather than mass market, services.

It has been argued that a self-provisioner should not count toward the trigger unless it serves a substantial number of both residential customers and those small business customers that are part of the mass market. SBC takes a contrary view and

[24] Tr. 2484

asserts the trigger rule only requires that the CLEC serve mass market customers and not all different types of mass market customers. In support of this position SBC maintains the FCC's *Errata* to the *TRO* expressly deleted the language in ¶ 499 of the *TRO* that stated a trigger candidate "should be capable of economically serving the entire market, as that market is defined by the state commission." The FCC also deleted the requirement that a self-provisioner "be operationally ready and willing to provide service to all customers in the designated market." *See Errata* at 2. SBC asserts these corrections make clear that state commissions are not allowed to segment the mass market into various sub-classifications when applying the trigger. In further support, SBC cites *TRO*, ¶ 497 n.1546 and states the FCC held that carriers that use their own switches to serve business customers count toward the trigger, as long as those customers fall below the DS0 cut-off.

In response to the assertion that the Commission should ignore any self-provisioners that do not currently serve some minimum number of mass market lines, SBC states there is nothing in the FCC's self-provisioning trigger rule or in the text of the *TRO* discussing the FCC's trigger rule to support this proposal. SBC contends that while the FCC concluded that a 3% market share was insufficient to warrant a nationwide finding of non-impairment with respect to mass market switching, the FCC did not include any market share requirement in its self-provisioning trigger rule.

The FCC has included both residential and small business customers in the mass market.[25]The record shows that region-wide, nearly 70% of the switched voice access lines are purchased by residential customers. In Michigan, the number is even higher. *See* Exhibit I-124 (Confidential). The Administrative Law Judge agrees with

[25] *TRO*, ¶ 127, n. 432.

Staff and the CLECs that a potential trigger candidate cannot qualify as providing mass market service if it does not even offer service to residential customers in that market.

Furthermore, the Administrative Law Judge is persuaded that it would be unreasonable to qualify a self-provisioning trigger candidate who serves so few customers using its own facilities that, under the FCC's own analysis, it would not support the conclusion that impairment in the local exchange has been overcome. The number of UNE-L lines attributed to CLECs in the MSAs designated by SBC in this case amounts to less than 2% of the market. The FCC in the *TRO* found greater levels of facilities-based competition inconsequential and proceeded to reach a national finding of impairment. Given that the FCC refused to find insignificant levels of competitive entry sufficient to support a finding of no impairment, the writer does not believe it would be reasonable for the Commission to arrive at a contrary finding based on the facts in this record.

SBC has taken the position that intermodal carriers count in the trigger analysis in the same manner as other CLECs. SBC states the FCC's self-provisioning trigger rule makes clear that a trigger carrier need not use UNE-loops and expressly counts "intermodal providers of service comparable in quality to that of the incumbent LEC." 47 C.F.R. § 51.319(d)(2)(iii)(A)(1). SBC also cites *TRO*, ¶ 501 n.1560 and asserts the FCC's self-provisioning trigger expressly includes self-provisioners that, like cable telephone providers, use both their own switches and their own loops to provide service to mass market customers.

The CLECs have taken the position that an intermodal carrier like Comcast should be excluded from the trigger analysis in this case. These parties argue that

because the trigger test is an impairment analysis that seeks to ascertain whether CLECs are impaired without access to the ILEC switches and the loops connected to them, a carrier that does not need access to the ILEC switches or loops to provide service does not, therefore, address the issue of whether such impairment has been overcome. Staff supports this view.

The Administrative Law Judge finds that intermodal providers should be included in a Commission's trigger analysis. The question that must be addressed is what weight to give the presence of such a provider. The FCC stated:

> Whether this competitor is using the incumbent's loops or its own loops should bear on how much weight to assign this factor, at least until such time as incumbent loops are no longer required to be unbundled. [26]

In considering an intermodal alternative, the Commission can only deem the provider a trigger CLEC if its service is "comparable in cost, quality, and maturity to ILEC services."[27] The record shows that Comcast, the intermodal provider at issue in this case, does not offer service to all or nearly all of the market. Furthermore, Comcast does not offer service that is comparable in "cost, quality and maturity" to the incumbent's switched mass-market voice services. Comcast has indicated that it has no plans to expand its current services. The Administrative Law Judge finds this demonstrates that in this case cable telephone is not a mature alternative to ILEC services. Finally, Comcast fails to serve the "crucial function" of affording access to the incumbent's loops,[28] and as a result "provides no evidence that competitors have successfully self-deployed switches as a means to access the incumbents' local loops,

[26] *Id*., ¶ 510, n. 1572.
[27] *Id*., ¶ 499, n.1549.
[28] *Id*., ¶ 439.

and have overcome the difficulties inherent in the hot cut process."[29] The Administrative Law Judge therefore finds that Comcast does not qualify as a trigger candidate.

Several CLECs have argued that two of the competing trigger carriers currently providing service to mass market customers with their own switches in SBC's service territory (TDS and CTS) cannot count toward the trigger because they are affiliated with other ILECs operating outside of SBC's service territory. These parties maintain ILEC affiliates have advantages unavailable to even efficient CLECs, such as name recognition as local carriers, as well as switches, transport facilities, and OSS. This is contrary to the FCC requirement[30] which prevents ILECs from "gaming" the trigger criteria. It is asserted the Commission must carefully review any CLEC affiliate of an ILEC serving a territory near Michigan to ensure that it does not enjoy benefits from its affiliation with an incumbent that are not available to other CLECs.

This CLEC position does not comport with the language of the *TRO* and the FCC rule. The FCC's rule states that the self-provisioning trigger is satisfied where "three or more competing providers not affiliated with each other or the incumbent LEC . . . each are serving mass market customers in the particular market with the use of their own local switches."[31] The language of the TRO is identical. The Administrative Law Judge finds that the FCC's choice of language indicates that the relevant issue is whether the competing provider is affiliated with "the" incumbent LEC "in the particular market" under consideration. In this case, that ILEC is SBC. As a result, although CTS and TDS are affiliated with other ILECs, they are not disqualified by this relationship to be considered in the trigger analysis in this case.

[29] *Id*., ¶ 440.
[30] *Id*., ¶ 499.
[31] 47 C.F.R. § 51.319(d)(2)(iii)(A)(1).

SBC employed a strict interpretation and a simple count in applying the provisions of the *TRO* in its trigger analysis. The Administrative Law Judge is persuaded that the CLECs and Staff have presented a more reasonable interpretation and an analysis that reflects the overall directives of the FCC. As a result and based upon the preceding discussion and findings, the Administrative Law Judge concludes that SBC has failed to demonstrate that the trigger has been satisfied in any geographic area. Consequently a finding of non-impairment in any geographic area is not merited at this time.

HIGH-CAPACITY LOOPS

The *TRO* uses the term "high-capacity" loop to refer to loops with transmission capacities greater than the basic DS0. The *TRO* also describes such loops as "enterprise market" loops, because they are typically used to serve "enterprise customers" - medium and large business or government customers. A DS1 loop has capacity equivalent to 24 DS0 voice-grade circuits; a DS3 loop, in turn, has capacity equivalent to 28 DS1 circuits.

High-capacity loops, the DS3 and dark fiber loops that comprise the bulk of loops at issue here, are generally provided via fiber optic facilities. A strand of fiber optic cable has virtually unlimited capacity to carry information. A telecommunications carrier attaches optronic equipment at each end of the cable to transmit information in the form of light-wave pulses between the customer location and the central office or analogous facility. A fiber strand or cable that has been activated by optronic equipment to enable transmission is described as "lit" fiber.

The transmission capacity of a fiber optic facility is defined by the type and capacity of the optronic equipment connected to the fiber. The capacity level is described as OCn: the "OC" stands for "Optical Carrier," and the "n" serves as a placeholder for the applicable transmission level, expressed as a multiple of the DS3 level. Hence, an OC3 fiber optic facility has the capacity equivalent to three DS3's, an OC48 is equivalent to 48 DS3's, and so on. Each OCn facility can be channelized to carry separate DS1 or DS3 channels simultaneously by adjusting the optronic equipment attached to the fiber[32]. Channelizing does not physically divide the fiber optic cable; it simply allocates part of the facility's transmission capacity to a particular customer or purpose[33].

Dark fiber is "unused fiber within an existing fiber optic cable that has not yet been activated" by attaching optronic equipment "to render it capable of carrying communications services."[34] Dark fiber exists because carriers typically place fiber strands in excess of their immediate needs to serve a particular customer location.[35] The primary costs of fiber placement are those associated with physically installing or laying the fiber: for example, the costs of obtaining a right-of-way from local authorities to lay the cable, and the construction costs involved.[36]

The FCC determined that ILECs are required to provide CLECs with access to unbundled loops at the DS1, DS3 capacity levels and dark fiber.[37] Acknowledging that there may be individual customer locations where competing loops have been deployed

[32] Direct Testimony of SBC witness Scott J. Alexander.
[33] *TRO,* ¶ 372.
[34] *Id.,* ¶ 311.
[35] *Id*., ¶ 312.
[36] *Id*.
[37] *Id*., ¶¶ 202, 311, 320, 324.

to such a level that CLECs could be deemed to be non-impaired, the FCC provided in the *TRO* three methods for assessing impairment. The first two methods involve a trigger analysis: a self-provisioning trigger, 47 C.F.R. § 51.319(a)(5)(i)(A), or competitive wholesale facilities trigger, 47 C.F.R. § 51.319(a)(5)(i)(B). The third method provides for a potential deployment analysis, 47 C.F.R. §§ 51.319(a)(5)(ii) and 51.319(a)(6)(ii).

SBC maintains it has demonstrated (i) that the self-provisioning trigger has been satisfied for 39 locations, (ii) that the wholesale trigger has been satisfied for 19 locations, and (iii) that the potential deployment analysis has been satisfied for 186 locations situated within narrow 300-foot bands in two dense urban wire centers where carriers have already deployed their own fiber.

The CLECs agree that 3 locations meet the DS3 self provisioning trigger. *See* Exhibit I-63, Locations 1, 18, and 43 (Confidential). The CLECs dispute SBC's claim of non-impairment for the other 36 DS3 locations. The CLECs also dispute any claimed finding of non-impairment for dark fiber.

The Self-Provisioning Trigger

The self-provisioning trigger applies to only DS3 and dark fiber loops at specific locations. Because little evidence exists regarding the competitive deployment of DS1 facilities, the *TRO* excludes DS1 loops from the self-provisioning trigger analysis.[38] To satisfy the trigger it must be shown that there are two or more competing providers that have deployed their own facilities at the DS3 level and:

- Are not affiliated with each other or SBC;

[38] *Id*., ¶ 334.

- Use their own facilities and not facilities owned or controlled by another competitive provider or SBC; and
- Are serving customers using their own facilities at that location over the relevant capacity level.[39]

As noted above, SBC maintains it has demonstrated that 39 locations satisfy this trigger based upon the CLEC's discovery responses. SBC states that for each of the 39 locations[40] at least two competing providers have deployed OCn facilities. OCn facilities, SBC states, can be channelized into DS3 loops. It is SBC's position that a carrier that has deployed DS3 facilities counts towards the trigger regardless of how many DS3 facilities it has deployed.

In response to the CLEC position that a competing provider counts toward the trigger only if it has deployed only one or two DS3 loops, SBC argues this is not supported by a reading of the FCC rule inasmuch as the rule does not specify any number of DS3 facilities. SBC contends the CLEC interpretation would lead to absurd results by excluding consideration of locations with the most demand for high-capacity loops and large-scale CLEC deployment.

The Administrative Law Judge is persuaded that the CLECs and Staff have presented the more reasonable interpretation of the self-provisioning trigger in this case. CLEC's cannot purchase UNEs to provide more than two DS3s of total demand at a location. The smallest capacity OCn facility serves three DS3s of demand. Thus, if OCn loop facilities are deployed and used to serve that (or a higher) amount of capacity at a location, this is not probative of the question of whether carriers that qualify for UNEs could afford to construct their own facilities.

[39] 47 C.F.R. § 51.319(a)(5)(i)(A).
[40] Exhibit A-38.

The self-provisioning trigger should be applied to determine whether CLECs have deployed their own loop facilities at the levels that would otherwise be available as UNEs. Otherwise, it would allow evidence of what is no impairment (*i.e.*, evidence of carriers that provide three or more DS3s of total demand at a location) to eliminate access to UNEs in cases where the FCC has found that there is impairment (*i.e*., for carriers that need only one or two DS3s of total capacity).

This determination is supported by the *TRO*. The *TRO* selected the two DS3 cap because at the three DS3 level of demand, evidence showed that it is generally "economically feasible" for a CLEC to build its own facilities.[41] The economic decision to build facilities to serve 10 DS3s is therefore different than the economic decision to build facilities to serve just 1 or 2 DS3s of demand because greater demand generally yields greater revenue. Consequently, one CLEC facility that serves three or more DS3s of demand is not a reliable indicator of whether other CLECs could deploy facilities to serve one or two DS3s of demand.

In addition, the FCC was aware that OCn level facilities can be channelized.[42] If, as SBC asserts, the ability to channelize were critical, then the FCC's decision to exclude DS1 loops from the self-provisioning trigger would be unwarranted. Finally, in its discussion of DS1 loops the FCC noted that there was evidence that CLECs had self-deployed DS1 loops. The FCC discounted that evidence because "this evidence of self-provisioning has been possible where that same carrier is already self-provisioning OCn or a 3 DS3 level of loop capacity to that same customer location. Thus, this

[41] *TRO,* ¶ 298 and nn. 860 and 861.
[42] *Id.*, ¶¶ 289, 372, & nn. 633-34.

evidence does not support the ability to self-deploy stand-alone DS1 capacity loops nor does it impact our DS1 impairment finding."[43]

Based upon the foregoing, the Administrative Law Judge finds that the high-capacity loop self-provisioning trigger analysis allows consideration of CLEC-provisioned loop facilities that are used to serve two or fewer DS3s of total demand at a location. SBC counts all OCn level loop facilities deployed by CLECs toward the self-provisioning trigger regardless of the level of demand being served. As a result then of the 36 disputed locations none satisfy the DS3 self-provisioning trigger.

For purposes of assessing dark fiber loops, the self-provisioning trigger is satisfied "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."[44]

SBC is seeking a finding of non-impairment for dark fiber loops at the same 39 locations for which it seeks a finding of non-impairment for DS3 loops. SBC states that the two carriers that comprise the majority of its self-provisioning analysis have both confirmed their deployment of dark fiber through discovery.[45] Carriers A and X have stated that their standard practice is to deploy at least 24 strands of fiber in each cable at a customer location. *See* Exhibits A-91 and A-92. Only four strands are "lit" to provide service. SBC states that as a result, the bulk of the CLEC fiber at these locations is dark fiber. SBC states further that Carrier Y has confirmed its deployment

[43] *Id*., ¶ 325 n. 957.
[44] 47 C.F.R. § 51.319(a)(6)(i).
[45] During the hearing and in an effort to maintain a public record, the parties referred to confidential information in a manner that would not identify the provider of the information. As a result carriers were labeled by letter names (*e.g*., Carrier A, Carrier B, and so on). The parties continued this practice in their Briefs and Reply Briefs. A key for these codes is attached as a Confidential Attachment to the Briefs of both SBC and AT&T.

of dark fiber. *See* Exhibit A-88 at 18 (No. 1.17). SBC argues this result is consistent with industry practice, and with the FCC's acknowledgment that when carriers deploy lit fiber, they "take advantage of the fact that they are already incurring substantial fixed costs to obtain the rights-of way, dig up the streets, and trench the cable, to lay more fiber than they immediately need."[46]

The CLECs take the position SBC's claim that every CLEC should be assumed to have dark fiber at every location at which they have deployed a loop is unwarranted. The CLECs state that many carriers (for example, Carriers A and X) have specifically denied that they have dark fiber available. As a result there are no two CLECs that have deployed dark fiber at any location and consequently SBC has not satisfied the dark fiber self-provisioning loop trigger at any location. Staff concurs with the CLEC position.

The Administrative Law Judge finds that this record does not support the conclusion that because there are extra fiber optic strands in most CLEC loops, every CLEC should be assumed to have dark fiber at every location at which they have deployed a loop. Carrier X stated in data request responses that it does not self-provision dark fiber as that term is used in the *TRO* and any spare capacity it has built is allocated for future use by existing customers. *See* Exhibit I-67 (Confidential). Carrier X stated further that spare fibers do not terminate at its switch or collocation. Thus, these spare fibers fail to create a "loop" that would satisfy the dark fiber loop trigger. Carrier A stated that it does not provision dark fiber. *See* Exhibit I-72, Answer to Request 17 (Confidential). The writer finds that SBC's analysis ignores the data the CLECs presented about their own networks. The Administrative Law Judge finds

[46] *TRO,* ¶ 312.

therefore that there are no locations that satisfy the self-provisioning trigger for dark fiber.

The Wholesale Trigger

The wholesale trigger applies to DS1 and DS3 loops. It requires that two or more competing providers be present at a particular location. The wholesale trigger for DS1 loops is satisfied where each provider (1) "has deployed its own DS1 facilities," (2) offers a DS1 loop over its own facilities on a widely available wholesale basis to other carriers desiring to serve customers at that location, and (3) "has access to the entire customer location, including each individual unit within that location."[47]

The wholesale trigger for DS3 loops is virtually identical.[48] SBC limited its application of the wholesale trigger to DS1 loops inasmuch as it believes every location identified for DS3 loops under the trigger also satisfies the wholesale trigger. Accordingly, SBC relied on the application of the wholesale trigger for DS1 loops, which are not covered under the trigger.

SBC has identified 19 locations that it maintains satisfy the wholesale trigger. *See* Exhibit A-40. SBC states that for each location, at least two competing providers have confirmed in discovery that they have deployed fiber optic facilities and have access to the entire customer location.

There are three carriers that SBC identified as wholesalers of DS1 and DS3 loops: Carrier X, Carrier A, and Carrier Y. The CLECs state that Carrier X, both in discovery responses and testimony, stated that it does not sell wholesale loops to other CLECs. *See* Exhibit I-67 (Confidential). These parties state further that despite various

[47] 47 C.F.R. § 51.319(a)(4)(ii).
[48] *Id*. § 51.319(a)(5)(i)(B).

statements from its website, the website information cannot be dispositive. The CLECs assert none of the references from the website specifically say that Carrier X is willing to provide loops at wholesale to other CLECs.

The CLECs argue SBC has also misapplied the information provided by Carrier A. Carrier A admitted that it provides loops at wholesale at some of the locations identified by SBC, but not at others. *See* Exhibit I-72 (Confidential). SBC, however, counted Carrier A as a triggering carrier at every location where it had loops, despite Carrier A's location specific information.

Finally, the CLECs contend SBC's treatment of Carrier Y is likewise inappropriate. These parties maintain it is impossible at this time to place any reliance on Carrier Y's discovery responses. In response to the Staff's discovery, served in December 2003, Carrier Y did not indicate that it offered any of its loops at wholesale. Carrier X subsequently served discovery on Carrier Y asking it to identify the locations where it offers loops at wholesale. On Friday, March 5, 2004 Carrier Y responded that it did not provide loops at wholesale at any location where it had loop facilities. *See* Exhibit I-76 (Confidential). However, one business day later on Monday, March 8, 2004, Carrier Y served an amended response to the same discovery in which it stated that it offered loops at wholesale at every location where it had loop facilities. *See* Exhibit A-88. The CLECs conclude that when all the data is considered, no locations satisfy the wholesale trigger. *See* Exhibit I-65 (Confidential).

The wholesale trigger is satisfied when it is shown that DS1 loops are being offered by two competing providers on a widely available wholesale basis at a particular location. In this case, Carrier X has represented in both discovery responses and

testimony that it does not provide wholesale loops at any location. The writer finds this more persuasive than what may be inferred from website information and dated press releases. The record shows Carrier A provides wholesale loops in only certain locations. Carrier A may not then be counted, as SBC has, as a trigger carrier at every location. Carrier Y may, or may not, count as a trigger CLEC. The record in this regard is limited to discovery responses that are clearly contradictory and not merely amended. In light of the irreversibility of a non-impairment finding, the Administrative Law Judge believes it would be unreasonable to count Carrier Y toward the wholesale trigger at this time. Carrier Y's activities can be reexamined in a future proceeding. As a result it has not been shown that two competing providers currently provide on a widely available wholesale basis loops at the DS1 or DS3 capacity level to other carriers at any single location. The wholesale trigger has therefore not been satisfied.

The Potential Deployment Test

The FCC's potential deployment analysis applies "[w]here neither trigger . . . is satisfied" and it states the "state commission shall consider whether other evidence shows that a requesting telecommunications carrier is not impaired without access to an unbundled DS3 loop [or dark fiber loop] at a specific customer location." *See* 47 C.F.R. § 51.319(a)(5)(ii) (analysis for DS3), (a)(6)(ii) (analysis for dark fiber). The potential deployment test requires that evidence be presented addressing the following nine factors for each location:

- Evidence of alternative loop deployment at that particular customer 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.[49]

SBC takes the position it has shown that a requesting carrier would not be impaired without unbundled access to DS3 or dark fiber loops at 186 locations. *See* Exhibit A-42 (Confidential). SBC states all of these locations are situated within two narrow geographic bands; one in Southfield's business district, the other in the heart of downtown Detroit. SBC states further all of these locations are within 300 feet of at least one competing provider's fiber "backbone" and each location has an estimated annual telecommunications revenue opportunity of at least $50,000. Because of the short distance from the competing provider's fiber and the evidence of alternative deployment in place, SBC maintains the topographical factors identified by the FCC do not preclude deployment.

SBC relies upon the "Cambridge" study of CLEC loop deployment estimates to develop a $130,000 cost of extending a 500-foot DS3 loop. SBC represents this cost study has been shown to be conservative after having been reviewed by an experienced Michigan engineer, compared with the Commission approved Michigan cost study and with the CLEC's own cost estimates. With regard to the revenue side of the analysis, SBC relied upon data from TNS Telecoms, a nationwide database used by

[49] *TRO,*¶ 335.

carriers to evaluate revenue opportunities. SBC states TNS has compiled a comprehensive database of U.S. businesses and their telecommunications spending habits. SBC contends its $50,000 revenue threshold is also conservative since many of the building locations selected have estimated revenues far greater than $50,000.

In response to the CLEC position that the analysis requires a showing of more than one potential deployer, SBC argues the objective of the impairment analysis is to determine whether "a requesting carrier" would be "impaired" without unbundled access. SBC states it followed the FCC's plain language and its potential deployment analysis considers whether the "potential revenues" from entering each building would exceed the costs of deployment for a single "requesting carrier." SBC contends the rule does not require a showing that multiple suppliers serve the same building.

The CLECs argue the most that can be derived from SBC's potential deployment analysis is that there is a single potential deployer. These parties maintain the purpose of the potential deployment test is to determine whether there are, or could be, multiple competitive suppliers. The CLECs argue further that SBC did not identify the specific costs of deploying facilities to a single one of the 186 locations on its potential deployment list. SBC instead assumed that the Cambridge study's cost assessments were applicable to each of the 186 buildings.

The CLECs assert SBC also failed to consider the engineering and construction factors at each of the 186 locations. It is argued that the typical steps in deploying a loop would necessarily differ to some degree from building to building. The CLECs state further SBC ignored the requirement to consider the costs of obtaining building access in evaluating potential deployment claims.

Finally, the CLECs contend SBC's use of a $50,000 total building telecommunications spending figure as a means to identify buildings for the potential deployment analysis is flawed. The CLECs assert the total telecom spending in a building is a virtually meaningless figure for determining where potential deployment is possible for several reasons. First, large portions of such revenues are routinely committed to existing contracts and thus are not currently available to competing providers at any given location. Second the number of customers at each location and their individual spending must be identified in order for the analysis to be meaningful. The CLECs conclude that the use of an aggregate revenue figure is meaningless and fails to identify potential deployment locations. The Staff has lent its support to the CLEC position.

The FCC's potential deployment rule directs the Commission to consider other evidence of non-impairment where neither trigger has been satisfied using the factors proscribed. Whether it must be shown that one or more providers can be identified is not specifically indicated. The rule merely states the 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."[50] The argument that the use of the singular requesting telecommunications carrier somehow requires a showing of multiple providers to satisfy the potential deployment test has no merit. As the rule is written, the reference to a requesting carrier is to that carrier requesting unbundled access to DS3 or dark fiber loops. The writer finds that it does not in any way define the parameters of the potential deployment analysis and/or

[50] 47 C.F.R. § 51.319(a)(5)(ii).

the number of carriers that must be qualified in assessing "evidence of alternative loop deployment."[51]

The Administrative Law Judge finds that the potential deployment analysis presented by SBC in this case is insufficient. The CLECs and Staff have shown that there are a number of flaws in the analysis that compromises its reliability. First, the analysis is not location specific. Both the *TRO* and the FCC rule require the Commission consider "various factors" "at that particular customer location."[52] In addition, the offered analysis does not take into consideration variations in engineering and construction factors, the availability of building access and its cost. There has been no showing that the 186 locations would have similar deployment costs. The writer is also persuaded that SBC's use of a $50,000 telecommunications spend to identify buildings in the analysis is problematic. As presented, the revenue parameter does not account for the number of potential customers at a location or their current needs.

SBC has attempted in its potential deployment analysis to show evidence of alternative loop deployment in two 300-foot corridors located in dense urban wire centers through the use of cost and revenue assumptions that are not location specific. The Administrative Law Judge is persuaded that the FCC required more granular information on a location specific basis then was presented in this case. This is evidenced by the FCC's requirement that nine factors be considered. Accordingly, the Administrative Law Judge finds the requirements of the potential deployment test have not been satisfied for either DS3 or dark fiber loops and there have been no locations identified as non-impaired.

---

[51] *Id.*
[52] *TRO,* ¶ 335.

DEDICATED TRANSPORT

As with high-capacity loops, the FCC performed separate impairment analyses for OCn, dark fiber, DS3, and DS1 transport. The FCC found that requesting carriers are impaired on a national level without access to unbundled DS1, DS3 and dark fiber transport.[53] The FCC found that there is no impairment for OCn level transport.[54] The FCC identified the following methods by which ILECs could demonstrate to state commissions that CLECs are not impaired without access to transport on particular routes: (a) a self-provisioning trigger, (b) a wholesale trigger, and (c) a potential-deployment test.

The Self-Provisioning Trigger

The FCC's self-provisioning trigger test applies only to DS3 and dark fiber dedicated transport and is not applicable to DS1 dedicated transport.[55] The FCC's self-provisioning trigger for DS3 transport is satisfied where "three or more competing providers not affiliated with each other or with the incumbent LEC" satisfy the following conditions:

- each "competing provider has deployed its own transport facilities" along the route in question;
- each provider "is operationally ready to use those transport facilities to provide dedicated DS3 transport" along that route; and
- each provider's facilities "terminate at a collocation arrangement at each end of the transport route that is located at an incumbent LEC premises.[56]

[53] *Id.*, ¶ 359.
[54] *Id.*
[55] *TRO,* ¶ 409.
[56] 47 C.F.R. § 51.319(e)(2)(1)(A).

The trigger for dark fiber transport is similar, except that it omits requirement (2), that of operational readiness.[57]

SBC takes the position the self-provisioning trigger has been satisfied for 27 routes. SBC states it used two primary sources of information to identify carriers that have deployed transport facilities: (i) its own records of competing carriers that have collocated and deployed fiber transport facilities at SBC central offices, and (ii) information that the competing providers furnished in discovery about their own transport facilities. Exhibit A-18 (Confidential) summarizes the results of SBC's analysis. It shows the central offices on each end of the transport routes identified by SBC, and the competing providers that have deployed transport facilities along those routes.

With regard to dark fiber, SBC represents the standard industry practice is to deploy spare dark fiber when fiber optic cables are installed. SBC states the evidence presented shows Carrier A confirmed that its own fiber optic facilities include spare unlit fiber capacity; Carrier Y confirmed its deployment of dark fiber; and Carrier X confirmed that it deploys 24 strands of fiber (well in excess of the 2 to 4 strands that would be "lit" to provide service) at its "on-net" (on their network) collocations. This, SBC contends, is consistent with industry practice.

SBC asserts it has shown (1) that several competitive providers have collocated at each end of the transport routes identified; (2) that those providers have installed active fiber facilities at those central offices and placed those offices on net; and (3) that at least some of those providers admit to currently providing or being able to provide

[57] *Id*. § 51.319(e)(3)(1)(A).

transport on the routes. SBC maintains this supports the conclusion that each competing carrier has deployed transport facilities on these routes.

In response to the CLEC position that what has been identified is switched transport and not dedicated transport, SBC asserts the deployment of a switch somewhere along a route is irrelevant. SBC states the first paragraph of the rule on dedicated transport provides that a transport "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')," and that "[t]ransmission 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."[58]

With regard to the assertion that transport facilities must be deployed at or below the capacity of 12 DS3 circuits, SBC contends the FCC rule does not have such a requirement. SBC argues the rule only requires that each competing provider has deployed transport facilities and be operationally ready to provide dedicated DS3 transport.

The CLECs take the position that SBC has not satisfied the self-provisioning trigger for the 27 routes at issue. The CLECs contend that SBC wrongly assumes that a dedicated transport route exists between every one of a CLEC's on-net fiber collocations, even where the CLEC does not provide functioning service between the two collocations. This has been referred to by the parties as the connect the dots approach. The CLECs also dispute SBC's assertion that all OCn facilities should be counted in the trigger analysis. Staff supports the CLECs in this regard.

[58] *Id.* § 51.319(e).

The Administrative Law Judge is persuaded that the CLECs and Staff have offered the better reasoned analysis of the self-provisioning trigger test. SBC has relied upon the definition of a route to qualify any transport path even if it passes through intermediate wire centers or switches. The writer has determined that what must be considered in applying the self-provisioning trigger is dedicated transport.[59] Dedicated transport is not switched transport. The record shows that SBC acknowledged this in testimony submitted in Illinois, in which SBC's witness stated that dedicated transport means "that there is no switching interposed along the transport route." *See* Exhibit I-62 (Direct Testimony of J. Gary Smith on Behalf of SBC Illinois). Further support is found in the fact that the dedicated transport UNE that SBC must make available does not include switching. As a result it would be improper to count as dedicated transport routes those routes that contain switching when the purpose of the analysis here is to determine where SBC no longer need provide the UNE.

The FCC's dedicated transport impairment findings were capacity-specific. The FCC determined there was no impairment in the deployment of OCn transport, while at the same time finding that CLECs are impaired on a national basis without access to DS3 dedicated transport. The FCC also capped the number of DS3s available as a dedicated transport UNE at 12 DS3s. The Administrative Law Judge finds therefore that the self-provisioning trigger analysis should address specific capacities. SBC argues that OCn transport can be channelized into smaller units of transport, including DS3 transport, and therefore should count toward satisfying the trigger. The writer disagrees. As with high-capacity loops, the self-provisioning trigger should be applied

[59] *TRO*, ¶ 365.

to determine whether CLECs have deployed their own transport facilities at the levels that would otherwise be available as UNEs. Otherwise, it would allow evidence of what is no impairment to eliminate access to UNEs in cases where the FCC has found that there is impairment.

In addition, the testimony offered by various CLECs demonstrates that their networks are not designed to provide this type of dedicated transport. They are instead designed to provide switched transport. As a result, SBC's assumption that all CLECs with on-net collocations are operationally ready to deploy dedicated transport is not justified.

Furthermore the data responses and testimony offered by a number of CLECs fails to show that they are operationally ready to provide dedicated transport. It has been shown that Carrier A cannot be treated as a self-provider of dedicated transport along any routes other than the ones Carrier A specifically listed. *See* Exh. I-73, Responses to Requests 8 and 9. Carrier C does not provide dedicated transport anywhere in Michigan. As noted above in the discussion of high-capacity loops, the record in this case is not sufficient to qualify Carrier Y under the self-provisioning trigger test.

Exhibit I-64 (Confidential) accounts for the CLECs data responses and applies the self-provisioning trigger. This exhibit shows that while there are certain transport routes along which one or two carriers have self-provided DS3 transport, there is no route along which three carriers have self-deployed facilities and are using them to service less than 12 DS3s of demand.

Based upon the foregoing, the Administrative Law Judge finds that the self-provisioning trigger for DS3 and dark fiber dedicated transport has not been satisfied on any route identified by SBC.

The Wholesale Trigger

The FCC also provided for a competitive wholesale trigger for dedicated transport, which applies to DS1, DS3, and dark fiber transport. In order to establish non-impairment using the wholesale trigger for dedicated transport, it must be shown that:

- Two or more competing providers not affiliated with each other or with SBC are present on the route;
- Each provider has deployed its own transport facilities "and is operationally ready to use those facilities to provide dedicated . . . transport along the particular route;"
- Each provider "is willing immediately to provide, on a widely available basis," dedicated transport to other carriers on that route;
- Each 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;" and
- 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.[60]

SBC states it has identified 49 routes that satisfy the wholesale trigger, based on the presence of at least two unaffiliated alternative wholesale providers. *See* Exhibit A-18. SBC began its analysis by reviewing its collocation records to identify those central offices where competing carriers had extended their fiber transport facilities into their collocation arrangements. SBC states the vast majority of the collocation

[60] 47 CFR § 531.319(e)(1)(ii) [DS1 transport], 51.319(e)(2)(i)(B) [DS3 transport], 51.319(e)(3)(i)(B) [dark fiber transport].

arrangements identified were subsequently confirmed by discovery. SBC represents there is no dispute as to collocation or the availability of cross-connects.

The principal disputed issue is the "willingness" of each wholesale carrier to provide dedicated transport on a widely available basis to other carriers. SBC states the principal wholesale providers are AT&T, MCI, McLeod, US Signal, and XO. The only provider to dispute its wholesale status is AT&T. SBC asserts AT&T does provide some wholesale services – including some that involve transport of traffic on a dedicated, point-to-point basis that appear indistinguishable from dedicated transport. SBC notes the AT&T website boasts a comprehensive portfolio of services offered to other carriers. *See* Exhibits A-9, A-49, A-50 and A-51. SBC states further that carriers in other states have revealed that they obtain wholesale transport from AT&T. Finally, SBC points out that in the FCC proceedings that led to the *TRO,* Allegiance listed AT&T among the "competitive access providers" from which it obtains interoffice transport. *See* Exhibit A-55.

The CLECs take issue with SBC's position and state that the FCC specifically provided that the wholesale transport trigger should be applied to "avoid counting alternative transport facilities owned by competitive carriers not willing to offer capacity on their network on a wholesale basis."[61] The CLECs state some carriers in Michigan confirmed SBC's assumptions that they had deployed dedicated transport between SBC wire centers and were willing to offer such transport on a widely available wholesale basis. But others offered evidence that contradicted SBC's assumptions, stating that they do not offer wholesale dedicated transport. The CLECs assert the Commission should accept the testimony from CLECs about the use and functionality of their own

[61] *TRO,* ¶ 414.

networks and reject SBC's own surmise about how CLECs use their networks. The CLEC evaluation of the evidence presented is set forth in Exhibit I-66 (Confidential) and shows that the wholesale trigger is not satisfied on any of the routes identified by SBC.

The Administrative Law Judge finds that SBC has improperly ignored the data provided by the CLECs concerning how their networks are designed and used. The evidence presented shows that Carrier A offers wholesale dedicated transport on a limited basis, and only along four specific routes. AT&T provided testimony that it does not offer wholesale dedicated transport. The testimony shows that AT&T provides transport in order to backhaul traffic from an SBC collocation to an AT&T switch. The FCC has excluded this type of transport from the definition of "dedicated transport."[62] The writer finds SBC's reliance on website information and statements in other jurisdictions unpersuasive. First, the website does not specifically state that AT&T offers dedicated transport between SBC wire centers. Second, the Allegiance filing before the FCC provided that it applies to markets outside of Michigan. Finally, the writer finds that the contrary representations of Carrier Y are not sufficiently reliable to support a finding of non-impairment.

The willingness of each of the identified carriers to provide dedicated transport on a widely available basis has not been shown. The FCC directed that carriers unwilling to offer capacity on a wholesale basis should not be counted towards the wholesale trigger.[63] The writer is persuaded that the CLEC evaluation of the evidence reflects the proper application of the wholesale trigger. Based upon this analysis, the Administrative

[62] *Id.* ¶¶ 365-67.
[63] *TRO,* ¶ 414.

Law Judge finds that the dedicated transport wholesale trigger has not been satisfied for any of the 49 routes identified by SBC.

Potential Deployment

The FCC's rule on potential deployment states that if neither trigger is satisfied on a given route, "a state commission shall consider whether other evidence shows that a requesting telecommunications carrier is not impaired without access to dedicated [DS3 or dark fiber] transport along a particular route."[64] The factors that the Commission must evaluate are similar to those for high-capacity loops and include the following:

- Local engineering costs of buildings 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;
- The availability or feasibility of alternative transmission technologies with similar quality and reliability;
- Customer density or addressable market; and
- Existing facilities-based competition.[65]

SBC seeks a finding of non-impairment based on potential deployment for the 49 routes already identified under the self-provisioning and wholesale triggers. SBC states it has identified at least two competing providers along all of the routes. SBC asserts

[64] 47 C.F.R. § 51.319(a)(5)(ii).
[65] *TRO*, ¶ 410.

the evidence shows the competing providers have already obtained the necessary rights of way, deployed fiber optic facilities, collocated in the applicable central offices, considered the appropriate customer density and market factors, made a decision to deploy fiber along the routes, and carried out that decision. SBC contends no further showing is required to satisfy the potential deployment analysis.

The CLECs take the position that SBC has failed to present a reviewable potential deployment case for dedicated transport. The CLECs assert that none of the FCC's specific factors have been addressed.

The *TRO* provides the criteria the Commission is required to apply in considering whether the potential deployment test has been satisfied. Nine separate factors are to be evaluated. In this case SBC has failed to provide evidence directly addressing these requirements. There has been considerable disagreement among the parties with respect to the CLECs network architecture and its capabilities. As a result, SBC's failure to specifically present evidence addressing the potential deployment criteria make it impossible to weigh the merits of SBC's potential deployment case. The Administrative Law Judge therefore finds that this record is insufficient to find that the potential deployment test has been satisfied on any particular transport route.

CONCLUSION

The parties to this proceeding have expended great effort in placing before the Commission an enormous amount of information relative to the *TRO* and the FCC's analysis of mass market switching, high-capacity loops and dedicated transport. Time constraints did not permit the writer to thoroughly review in this Proposal for Decision all

that has been presented. The Administrative Law Judge has, however, given careful, thorough and complete consideration to all of the expressed testimony, exhibits and arguments. All significant matters have been specifically addressed. Based upon the foregoing discussion and findings, the Administrative Law Judge recommends that the Commission issue its order adopting the findings and conclusions set forth above.

MICHIGAN PUBLIC SERVICE COMMISSION

_____

James N. Rigas
Administrative Law Judge

May 10, 2004
Lansing, Michigan
dmp

ISSUED AND SERVED: May 10, 2004

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to investigate and to implement, if necessary, a batch cut migration process.	))))	Case No. U-13891

At the June 29, 2004 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER ESTABLISHING BATCH CUT MIGRATION PROCESS

On February 20, 2003, the Federal Communications Commission (FCC) announced that it was adopting rules in its Triennial Review proceeding[1] regarding how incumbent local exchange carriers (ILECs) meet their statutory obligations to make unbundled network elements (UNEs) available to new entrants.

In an order issued on May 28, 2003 in Case No. U-13796, the Commission commenced a proceeding to facilitate the implementation of the FCC's anticipated Triennial Review Order (TRO). In so doing, the Commission requested comments on certain specific issues.

[1]Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147.

On August 21, 2003, the FCC released the text of its TRO, which was published in the Federal Register on September 2, 2003 and which became effective on October 2, 2003. Among other things, the TRO required state commissions to approve, within nine months of the effective date of the TRO, or by July 2, 2004, a batch cut migration process[2] to be implemented by ILECs to address the costs and timeliness of the batch cut process. Alternatively, state commissions were directed to make detailed findings explaining why such a process would not be necessary in a particular market. On August 26, 2003, the Commission sought comments on the TRO implementation, including the batch cut migration process.

As an initial matter, the TRO directed that state commissions should adopt a batch cut-over "increment" for migrating customers served by unbundled loops combined with unbundled local circuit switching to unbundled stand-alone loops. In other words, states were to decide the appropriate volume of loops that should be included in the "batch." In conjunction with ILECs and competitive local exchange carriers (CLECs), states were required to approve specific processes to be employed when performing a batch cut. The FCC anticipated that the processes to be adopted would vary based on the relevant ILEC's particular network design and cut-over practices. However, the FCC expected that these processes would result in efficiencies associated with performing tasks once for multiple lines that would otherwise have to be performed on a line-by-line basis.

In light of the monumental task of implementing the TRO within the timeframe required by the FCC, the Commission found that the batch cut migration process issue should be considered

[2]A batch cut migration process is defined as a process by which the ILEC 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.

separately from the remainder of the TRO issues. Accordingly, on September 30, 2003, the Commission commenced this docket for purposes of addressing the batch cut migration process. The Commission directed all persons desiring to participate in this proceeding to file a notice of intent to participate in this docket by October 9, 2003. Such notices were filed by MCI WorldCom Communications, Inc., and Brooks Fiber Communications of Michigan, Inc. (MCI), Covad Communications Company (Covad), Sage Telecom, Inc. (Sage)[3], LDMI Telecommunications, Inc. (LDMI), the Competitive Local Exchange Carriers Association of Michigan (CLECA), TDS Metrocom, LLC (TDS), XO Michigan, Inc. (XO), Talk America Inc. and Z-Tel Communications, Inc. (Talk/Z-Tel), Bullseye Telecom, Inc. and the Save American Free Enterprise in Telecommunications Coalition (Bullseye and Safe-T), Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (Verizon), SBC Michigan (SBC), AT&T Communications of Michigan, Inc. and TCG Detroit (AT&T), Quick Communications, Inc. (Quick), TelNet Worldwide, Inc. (TelNet), The Winn Telephony Company (Winn)[4], Climax Telephone Company (Climax), Superior Spectrum, Inc. (Superior), CenturyTel of Michigan, Inc., CenturyTel Midwest-Michigan, Inc., CenturyTel of Northern Michigan, Inc., and CenturyTel of Upper Michigan, Inc. (collectively, CenturyTel), McLeodUSA Telecommunications Services, Inc. (McLeodUSA), CMC Telecom, Inc. (CMC), and Allegiance Telecom of Michigan, Inc. (Allegiance). The Commission Staff (Staff) also participated in the proceedings.

On October 13, 2003, Administrative Law Judge James N. Rigas (ALJ) presided over a prehearing conference attended by the parties who provided notice of intent to participate. The

[3]By letter dated April 6, 2004, Sage withdrew from further participation in this proceeding.

[4]By letter dated November 24, 2003, Winn withdrew from further participation in this proceeding.

ALJ set a schedule, which included three rounds of comments followed by cross-examination of witnesses. The remainder of the schedule was left open.

On January 8, 2004, a second prehearing conference was held to consider whether to address the issue of the batch cut migration costs in Case No. U-13531, SBC's pending total service long run incremental cost (TSLRIC) case, or in this proceeding. The ALJ determined that the batch cut migration cost issues should be addressed in Case No. U-13531, whereas the batch hot cut process should be resolved in Case No. U-13891.

On March 9, 2004, SBC filed a motion seeking to temporarily stay further proceedings in the wake of the March 2, 2004 decision of the U.S. Court of Appeals for the D.C. Circuit that several aspects of the FCC's TRO are unlawful, including the FCC's sub-delegation of certain impairment decisions to state commissions.[5] By order issued on March 15, 2004, the Commission found that SBC's motion to temporarily stay this proceeding should be denied.

On March 24, 2004, the ALJ presided over a hearing wherein the parties stipulated that the witnesses and their exhibits should be received into evidence without the necessity of cross-examination. A total of 17 witnesses testified and 39 exhibits were received into evidence before the record was closed. The ALJ also provided for the filing of briefs and reply briefs by April 21 and May 10, 2004, respectively.[6] Finally, the ALJ indicated that the preparation of a Proposal for Decision was not necessary because the Commission had agreed to read the record.

[5]See, United States Telecom Assn v FCC, ___ US App DC___; 359 F3d 554 (2004) (USTA II).

[6]Briefs were filed by SBC, the Staff, TDS, Covad, MCI, and AT&T. Reply briefs were filed by SBC, the Staff, Covad, MCI, and AT&T.

1. Background

a. TRO Provisions

Section 51.319(d)(2)(ii) of the administrative rules promulgated by the FCC to address batch cut migration issues provides as follows:

> 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.

b. SBC's Current Hot Cut Processes

SBC contends that its current hot cut options are likely more than adequate to meet current and future demands. SBC explains that when a mass market customer changes from local exchange service provided by SBC to local exchange service provided by a competing carrier, the connection between the customer's loop and SBC's switch must be physically disengaged and a new connection must be established between the customer's loop and the CLEC's switch. This work is ordinarily performed while the customer's line is in active service or "hot." To make the new connection, the customer's loop is "cut" while it is "hot," which precipitates a short-term outage. Accordingly, the term "hot cut" refers to the process by which the ILEC technician manually disconnects a customer's loop and manually reconnects the loop to the CLEC's switch while simultaneously reassigning the customer's original phone number from the ILEC's switch to the CLEC's switch. TRO ¶ 465 n. 1409.

Subject to two exceptions, SBC has the ability to hot cut any copper DS0 loop within the corresponding central office that houses the loop. However, if the customer is served by an Integrated Digital Loop Carrier (IDLC) system or an Integrated Subscriber Loop Carrier (ISLC) system, then a technician must move the existing fiber facilities to a copper or universal digital loop carrier (UDLC) loop in the field.

SBC currently offers both Frame Due Time (FDT) and Coordinated Hot Cut (CHC) methodologies for non-IDLC loops. The physical steps of both systems are similar; the costs are different. FDT projects are less expensive because they involve fewer resources and less

coordination between SBC and the requesting CLEC. The main difference between the two methods is that with a CHC project, SBC and CLEC personnel communicate with each other on the day of the hot cut, whereas on an FDT project, each carrier's personnel perform their individual functions during a pre-set time frame without interaction.

Both FDT and CHC cutovers may currently be scheduled on a "project" basis, which allows for more than 24 lines that terminate at the same end-user address to be switched. For FDT projects, the CLEC can schedule the cutover during normal business hours at a time negotiated by the parties. For CHC projects, the cutover can be scheduled during normal business hours, off-hours, or Saturdays.

c. SBC's Batch Cut Migration Proposal

SBC urges the Commission to approve its proposed batch cut migration process without modifications. SBC's batch cut migration process proposal is attached to the testimony of Carol A. Chapman, an Associate Director – Local Interconnection Services for SBC, as Exhibit A-13. It consists of a batch cut migration process overview with flow charts, a detailed process description, an incremental hot cut demand analysis, an overview of operational support system (OSS) changes associated with SBC's proposal, and a recommendation to enable CLECs to obtain "real time" hot cut completion notification. SBC proposes three new hot cut options: the Enhanced Daily Process (EDP), the Defined Batch Process (DBP), and the Bulk Project Offering (BPO).

According to SBC, the EDP is designed to support a CLEC's acquisition of *new* customers that the CLEC will serve through use of SBC's UNE loop and the CLEC's or a third party provider's switch. SBC states that the provisioning interval for the EDP will be 3 to 5 days. SBC placed no limit on the number of orders a CLEC may submit.

SBC explains that the primary purpose of the DBP is to allow CLECs to transition their *embedded base* of UNE-P customers to the CLEC's or a third party's switches. Because embedded customers are presumably more indifferent to the timing of the cutover than are new customers, SBC proposes a longer, 13-day provisioning interval.[7] Also, SBC places a limit of 100 cutovers per CLEC per central office per day as well as a maximum limit of 200 cutovers per central office per day.

SBC also proposes the BPO to handle the scheduling of large volumes of hot cuts. For the BPO, the provisioning interval will be subject to negotiations and the size limit will require projects involving 20 or more lines per customer.

2. Positions of the Other Parties

a. TDS

As a facilities-based provider with over 62,000 customers in Michigan, TDS maintains that it currently relies on SBC's existing FDT and CHC processes. TDS reports that it routinely orders cutovers for one or two loops per wire center. While supportive of the creation of an efficient larger-volume batch cut mitigation process, TDS is more interested in ensuring that SBC's existing FDT and CHC processes remain in place without any degradation in service or any increase in cost. TDS states that in Exhibit I-39, which sets forth SBC's response to a data request, SBC anticipated that its current FDT and CHC processes would remain available to all CLECs and that the current pricing of those services would remain unchanged until the Commission decides Case No. U-13531, SBC's pending cost case. TDS urges the Commission to require SBC to fulfill obligations under the current processes without degrading provisioning intervals, time-of-day

[7]SBC maintains that it needs a 13-day provisioning interval to accommodate the scheduling of work assignments in accordance with the terms of its labor contracts.

reservation flexibility for CHC conversions, due date minus two pre-wiring/testing capability, and cost predictability. Additionally, TDS states that the Commission should make it clear that the proposed batch hot cut limitation of 200 cutovers per central office per day will not delay or degrade the current CHC/FDT processes for small volumes of orders.

TDS also asserts that Case No. U-13531 should be the forum where any potential revisions to the current hot cut rates are addressed. In addition, TDS argues that the terms of each CLEC's interconnection agreement should be determinative with regard to the timing and manner in which new hot cut rate revisions become effective. In the interim, TDS insists that the current CHC/FDT hot cut rates remain unchanged, subject to any Commission-ordered discounts adopted in this proceeding. TDS is also concerned about the potential for SBC to seek cost recovery for incremental costs it projects as a result of creating a batch hot cut process in Michigan. TDS maintains that current users of CHC/FDT processes should not be required to pay for the cost of implementing a batch hot cut process that they will not need. Rather, TDS states that such costs should be recovered directly through the rates SBC charges CLECs ordering batch hot cuts and should not be spread over all hot cut rates.

b. Covad

Covad insists that the future of residential telecommunications competition in the Michigan mass market hinges upon the ability of competitors to offer bundled voice and data products in competition with the bundled voice and data products offered by SBC. According to Covad, to provide mass market customers with a bundled voice and data product, two CLECs generally

engage in an arrangement known as line splitting.[8] Covad maintains that, if local circuit switching is eliminated as a UNE, then CLECs need a batch hot cut process that allows CLECs to migrate their embedded base of customers with a voice and data bundle using ILEC switching to a voice and data bundle with CLEC switching.

Covad states that SBC has refused to develop a batch hot cut process to migrate voice plus data loops from ILEC-switching arrangements to CLEC-switching arrangements. According to Covad, absent such a process, there will be no means for CLECs to migrate their embedded base of customers obtaining a voice and data bundle. Therefore, argues Covad, SBC's development of a batch hot cut process is an essential predicate to ensuring that Michigan consumers receive the benefits of competition in the growing market for bundled voice and data products. For this reason, Covad contends that unless the Commission approves an adequate batch hot cut process for voice plus data loops, CLECs will remain impaired without access to unbundled local circuit switching for line splitting arrangements for their embedded base of customers.

Covad stresses that a California administrative law judge has agreed with its position that the TRO requires ILECs to include voice plus data loops in their proposed batch cut migration processes. Likewise, Covad quotes extensively from a transcript of the California proceeding to demonstrate why SBC's position is inconsistent with the TRO. Moreover, Covad insists that voice plus data loop migrations involve batch cut migration processes and that SBC should therefore be required to perform them in the most efficient manner, even if it involves a cross-connection of two CLEC collocation spaces with a jumper on the applicable SBC distribution frame.

[8]Covad explains that in most line splitting arrangements the voice CLEC provides the voice service using unbundled local circuit switching, and the data CLEC provides the data service using its own packet switching network.

Covad argues that requiring CLECs to provision cage-to-cage cross-connects is inefficient and discriminatory. According to Covad, cage-to-cage cross-connects are time consuming, expensive, and result in stranded network capacity. In addition, Covad states that requiring CLECs to provision cage-to-cage cross connects does not allow collocators to use the existing network in as efficient a manner as the incumbent uses it for its own purposes. Specifically, Covad maintains that when SBC and Covad provide an end-user with a voice and data bundle of services, SBC will cross-connect the voice portion of the loop from the splitter to the applicable SBC distribution frame before cross connecting the voice portion of the loop to the SBC switch. However, when AT&T and Covad provide an end-user with a voice and data bundle of services, SBC will not cross-connect the voice portion of the loop from the splitter to the AT&T switch presence. Covad insists that this amounts to discriminatory treatment.

Again, citing the California administrative law judge, Covad argues that the Commission should not address the line splitting issues it seeks to litigate in a collaborative process. According to Covad, a batch cut migration process for voice plus data loops must be approved in this nine month proceeding and should address all of the following matters: pre-ordering, ordering, provisioning, maintenance, costing/pricing, and verification.

Finally, according to Covad, because SBC has not presented any credible evidence that it can process voice plus data loop hot cuts at any volume, much less the volumes that would likely occur if the Commission allows SBC to cease providing UNE switching in areas of Michigan, the Commission must provide for some form of validation of SBC's batch cut migration processes to ensure that SBC is capable of migrating customers from line splitting with ILEC switching to line splitting over CLEC switching in a timely manner. Covad insists that SBC must fully document the processes and make the documentation available to the Commission and parties well in

advance of the implementation date. According to Covad, SBC's processes also must be tested at forward looking commercial churn volumes and subject to performance measurements for these processes and a remedy plan.

c. MCI

MCI argues that SBC's inability to move high volumes of CLEC mass-market customer loops from its switches to CLEC switches is a major problem. According to MCI, the presence of a CLEC switch in a given geographic market will be irrelevant because, if CLECs cannot reliably use their deployed switches to serve mass-market customers, then it is extremely unlikely that CLECs will self-deploy any further.

MCI maintains that the improved hot cut process envisioned by the FCC must support migrations of all customer services on the loop, including both voice and data, and must support migrations from any carrier to any other. MCI insists that the FCC explicitly noted the need for seamless and timely migrations to and from the facilities of other competitive carriers. However, MCI contends that SBC has proposed only modest improvements and has left untouched highly manual and inefficient hot cut processes. MCI insists that SBC's proposed manual batch cut migration processes will be overwhelmed by the volume of hot cuts that would arise if CLECs lose access to UNE switching. Further, contends MCI, the evidence shows that SBC's proposals fail to address a host of other operational issues arising during the complex series of steps involved in the end-to-end hot cut process, from pre-ordering to ordering, provisioning, and order completion in several ILEC or industry databases.

MCI urges the Commission to establish a robust, comprehensive set of performance measures, which are subject to penalties, prior to any decision to remove CLEC access to UNE switching.

According to MCI, such performance measures are the only means to judge the performance of SBC's batch cut migration processes.

d. AT&T

AT&T argues that SBC's proposed batch cut migration processes fail to meet the FCC's requirements and do not cure the significant impairment faced by CLECs for unbundled local switching. Therefore, AT&T urges the Commission to reject SBC's proposals and implement the specific recommendations offered by AT&T in this proceeding. AT&T also asserts that the Commission need not decide whether the batch cut migration process approved in this proceeding eliminates CLEC impairment because that issue has not been contested and is incapable of resolution before testing and implementation.

AT&T comments that the batch cut migration process will be of minimal assistance in dealing with new customer acquisitions, which occur one-by-one, in undefined and unpredictable patterns. AT&T is also concerned with the 13 business-day interval for provisioning loops designated with a batch, which it maintains is inconsistent with current customer expectations. Further, AT&T claims that SBC's proposal fails to account for customers that have digital subscriber line (DSL) through line splitting or line sharing, customers that are migrated from CLEC to CLEC, and customers that CLECs desire to serve via enhanced extended links (EELs).

AT&T insists that SBC's pricing, metrics, and testing proposals are flawed and incomplete. For example, AT&T insists that all right-thinking persons would expect that any nonrecurring charge associated with a batch cut would be lower than the current Commission-approved nonrecurring charge for an individual unbundled loop. Despite this reasonable expectation, AT&T points out that SBC has proposed much higher batch cut migration process charges.

AT&T contends that certain matters, such as performance measurements, should be delegated to a collaborative. The specific tasks listed by AT&T include developing specific metrics to measure SBC's performance in these areas, setting performance standards in these areas, and determining the penalties that should be imposed whenever SBC fails to meet these standards. Pages 23 to 25 of AT&T's brief set forth specific recommendations that it urges the Commission to adopt for batch cut migration process performance metrics.

AT&T also states that the Commission should not approve a new batch cut migration process without moving simultaneously to require implementation of metrics and penalties as a condition for approval of the process. According to AT&T, the Commission should require stringent hot cut and batch hot cut metrics and very substantial remedies as a condition of its approval of a batch hot cut process. While the details can be delegated to a collaborative, AT&T insists that the threshold issue of whether there should be expanded hot cut and batch hot cut metrics as part of an acceptable process should be settled at this time.

With regard to testing issues, AT&T stresses that SBC has yet to experience anything even close to the hot cut volumes that would be entailed in such a process. For that reason, AT&T maintains that the Commission should require SBC to submit a proposed test plan that: (1) uses live lines, (2) tests hot cut volumes identified by SBC in its filings in this case (both for the migrations and for new customer acquisitions), (3) includes numerous central offices throughout the state, (4) provides CLECs with the ability to monitor the test and review the results in real-time, (5) identifies a third-party administrator agreed to by the parties, and (6) is subject to Commission review and public comment.

e. Commission Staff

In its brief, the Staff states that it participated in collaborative meetings on the batch cut migration process issue with SBC, the CLECs, and other state regulatory staffs. The Staff indicates that the collaboratives were useful and brought about modifications to SBC's original proposal. However, the Staff would like to see the progress made in these meetings continue by having the parties incorporate the issues and concerns highlighted by the Staff in its brief into the proposed batch cut migration process. These topics include issues related to costs/pricing, testing, OSS, performance measures, IDLC, line sharing/line splitting, CLEC-to-CLEC migrations, EEL migrations, provisioning intervals, mechanization, and retention of existing processes. Until a final batch cut migration process is approved by this Commission, the Staff believes that CLECS are impaired and that UNE-P should remain available for CLECs to use to provision customers.

Most critical in the Staff's opinion is the issue of testing. According to the Staff, without adequate testing, the parties cannot evaluate whether SBC is capable of migrating multiple lines in a timely manner. The Staff believes that only after appropriate testing of the proposed process occurs, modifications are made to make this process more mechanized, and adoption of performance measures and new OSS standards, will the Commission be able to effectively evaluate and approve a batch cut migration process.

The Staff recommends a three-phase batch cut migration process development approach, which calls for SBC and CLECs to develop and submit a joint proposal for a plan to test and revise the current SBC proposal as set forth in the Staff's brief. Specifically, the Staff supports the following procedures:

Phase I: OSS and PMs should be addressed in the PM and OSS dockets. Interested parties would submit a joint test plan to the Commission. Testing of initial proposals would take place and necessary adjustments would be incorporated.

Phase II: The inclusion of IDLC and line-splitting scenarios in the batch cut migration process would be considered. The existing line splitting collaboratives in Case No. U-12320 would be continued.

Phase III: The parties would address and find solutions to the CLEC-to-CLEC and EEL migration issues, which would then be incorporated into the batch cut migration process.

3. Discussion

a. Motion to Dismiss

On June 18, 2004, SBC filed a motion to dismiss this proceeding and Case No. U-13796, the TRO proceeding. In so doing, SBC maintained that Michigan law limits the Commission's jurisdiction over federal telecommunications laws, rules, orders, and regulations to matters that have been *lawfully* delegated to the states. MCL 484.2201(1). SBC contended that on June 16, 2004 as a result of USTA II, the Court of Appeals for the District of Columbia issued its mandate to the FCC formally vacating the FCC's rules concerning mass market switching, high-capacity loops, and dedicated transport. According to SBC, the basis for the Court's ruling was that the FCC unlawfully subdelegated its responsibilities under Section 251(d)(2) of the federal Telecommunications Act of 1996, Pub L 104-104, 110 Stat 56, codified at 47 USC 151 et seq. (FTA), to state commissions to develop a batch cut migration process. Specifically, SBC insists that the Commission instituted Case No. U-13891 exclusively on authority delegated to it by the FCC by the TRO. Further, SBC asserts that the FCC's batch cut rules were predicated on, and

intrinsically tied to, the FCC's attempted sub-delegation of authority to state commissions to make market-by-market impairment decisions, which was determined to be unlawful by the D.C. Circuit in USTA II. SBC also maintained that the FCC's batch cut rules were premised on the FCC's blanket, nationwide finding of impairment with respect to mass market switching, which was likewise rejected by the D.C. Circuit. According to SBC, the Commission cannot lawfully regulate inter-carrier relations with respect to matters that are subject to Section 251 of the FTA, except as provided by Congress. As applied here, SBC argued, the Commission is precluded from exercising the authority delegated to it by the FCC to review and approve batch cut processes set forth in Section 251. Moreover, SBC insisted that the Commission may only lawfully review a batch cut process in an arbitration proceeding conducted pursuant to Section 252 of the FTA.

Responses to the motion to dismiss were filed by MCImetro Access Transmission Services LLC (MCImetro) and AT&T Communications of Michigan and TCG Detroit (AT&T). MCImetro and AT&T argue that the Commission's March 15, 2004 order properly found that the Commission had an independent basis to continue this proceeding under state law. Moreover, they insist that the process of compiling the record is now complete and that it would be waste of resources to simply close the docket at this juncture.

The Commission finds that SBC's motion to dismiss should be rejected. An examination of USTA II does not support SBC's position that the Commission must immediately terminate this proceeding. The focus of the Court's concerns in USTA II was on the finding of impairment and on the FCC's sub-delegation to the Commission of the responsibility to determine on a more granular approach whether, in a particular market, there is evidence of non-impairment amongst competing carriers without access to unbundled switching. USTA II, slip opinion, p. 22. As summarized by the Court:

> We vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations, which in the context of this Order applies to the subdelegation scheme … (Emphasis added).

Because Section 51.319(d)(2)(ii) of the FFC's rules does not delegate to state commissions decision-making authority for impairment determinations and was therefore not vacated, the Commission is required to establish a batch hot cut migration process even if the FCC later makes its own impairment determinations. Moreover, the Commission has jurisdiction pursuant to the Michigan Telecommunications Act (MTA), 1991 PA 179, as amended, MCL 484.2101 et seq., to ensure that a healthy, vibrant competitive market for local exchange service exists in Michigan. In Section 305 of the MTA, the Legislature has prohibited numerous forms of discriminatory behavior. Section 305 also prohibits specific activities that degrade or impair the quality of service offerings of other providers.

Finally, the Commission is persuaded that acceptance of SBC's position would place the telecommunications industry in jeopardy of facing a new regulatory paradigm that is expected to result in unprecedented numbers of customer migrations without the means to accomplish the migrations in a timely manner. CLECs that currently provide service to customers through use of UNE-P will need to transition those customers to the CLEC's own switches. Indeed, SBC readily conceded that "[i]n geographic markets where the Commission finds that CLECs are not impaired without access to unbundled switching, hot cut volumes may increase significantly." SBC brief, p. 19. With 1.2 million Michigan customers served via UNE-P as of September 2003, the availability of a reliable, cost-efficient batch cut migration process is both necessary and in the public interest. AT&T suggested that the absence of a workable batch cut migration process "could result in tens of thousands of Michigan customers being left without service, thereby irreversibly tarnishing the reputation of the entire CLEC community." AT&T brief, p. 22. In the

Commission's viewpoint, it would be a waste of effort and extremely detrimental to the interests of ILECs, CLECs, and their customers, and contrary to the intent of federal and state law to foster local competition for the Commission to simply abandon this proceeding at this time. Therefore, the Commission finds that SBC's motion to dismiss should be rejected.

b. Implementation of a Temporary Batch Cut Migration Process

The FCC identified several deficiencies with existing hot cut processes. According to the FCC, the non-recurring charges are too high, customers have their services disrupted in a manner that negatively affects customer perceptions of CLEC service quality, provisioning delays often prevent CLECs from meeting customer expectations, and the volume of hot cuts that ILECs can currently handle is substantially inadequate compared to the volume necessary to migrate customers between carriers. The FCC also specifically found that hot cut processes should include not only the ability to handle migrations from the ILEC to the CLEC, but from any carrier to another. The Commission was given 9 months, or until July 2, 2004 to resolve these concerns.

SBC asserts that its proposals for batch hot cuts fully address the deficiencies identified by the FCC. The Staff, Covad, AT&T, and MCI disagree and urge the Commission to adopt significant modifications to the proposals proffered by SBC. TDS is less concerned with implementation of a new batch cut process than it is with preservation of SBC's existing alternatives.

Given the fluidity of the current regulatory climate, impending changes that may precipitate significant volumes of customer migrations, and the need to complete this proceeding in a timely manner, the Commission is persuaded that its initial regulatory response to the situation calls for approval of a batch cut migration process on a temporary basis while giving the parties most interested in the outcome of the issues more time to work out their differences in a forum that features mutual cooperation, not litigation. The Commission has successfully used the

collaborative process in several other situations, most notably in Case No. U-12320, which concerned SBC's compliance with the competitive checklist in Section 271 of the FTA,[9] and in Case No. U-11830, which concerned the establishment of performance measurements for Ameritech Michigan.

With regard to the interim batch cut migration process, the Commission notes that SBC has agreed to maintain its existing hot cut offerings at their existing prices, terms, and conditions. Providers such as TDS that deal in lower volume switches of customers need these services and should not have access to them disrupted or revised at this time.

The FCC indicated that the Commission should first establish the appropriate volume of loops that should be included in the "batch." In so doing, the Commission adopts SBC's proposal for including 100 loops in the batch, which was detailed in the testimony of SBC witness Chapman. The Commission is persuaded that this batch size is reasonable and appropriate for interim purposes.

The FCC then instructed the Commission to consider specific processes to be employed when performing a batch cut, taking into account the ILEC's particular network design and cut over practices. For the purposes of this order, the Commission adopts SBC's proposals on an interim basis, subject to one exception. While the Commission agrees with the Staff and the CLECs that SBC's proposals need revision, the Commission finds that the revisions should be determined through a collaborative process, not a litigious one. The final batch cut procedures will be approved by the Commission after the parties have collaborated on the modifications to include the migration scenarios as outlined in the Staff's brief. At that point, the Commission will determine the costs/prices that will be approved for the final batch cut procedures.

[9]See, the February 9, 2000 order in Case No. U-12320.

The one exception to adoption of SBC's proposal involves the Staff's recommendation that the provisioning interval proposed by SBC should be revised for migrating customers via SBC's proposed DBP process. The proposed provisioning interval for the DBP service would have been at least 13 business days under SBC's proposal. The CLECs contended that this interval is too long and should be comparable with the two to three business day interval used to cut over a UNE-P customer. The CLECs claim that they will be harmed if the batch cut migration to UNE-L does not match the interval for UNE-P migration. An examination of Rule 58 of the Commission's Telecommunications Quality Service Rules, R 484.458, clearly indicates that SBC's adherence to a 13 business day provisioning interval would be problematic.[10] The Commission finds that SBC should modify its proposal so as to comply with the requirements of R 484.458.

The rates for batch cuts will not be developed in this proceeding as the issue of costs/prices was deferred to the SBC TSLRIC cost proceeding in Case No. U-13531. For interim purposes, SBC's existing rates for individual hot cuts will be adopted, subject to possible refund after resolution of Case No. U-13531. This means, for example, if SBC performs a 100-loop batch cut, the charge for that service would be the individual hot cut rate for a loop connection multiplied by 100 plus a single standard service order charge. If the Commission determines in Case No. U-13531 that a lower rate is appropriate, then SBC will refund the difference. In so doing, the Commission specifically rejects interim use of SBC's proposed rates because they have not been sufficiently scrutinized to justify their use at this time.

[10]Rule 58 (1) obligates a provider to routinely install service for a residential or small business customer or applicant within a monthly average of 5 business days of the installation request, or a monthly average of 10 business days after a customer is released for a migration. Rule 58(2) provides that, for basic local exchange service, a provider shall release the loop facilities and telephone number serving its customer within a monthly average of 5 business days after a request is made by a customer or on behalf of a customer to change local service providers.

Finally, the Commission directs the Staff to convene collaborative discussions involving all interested parties to address all issues left unresolved by this order. To the extent that specific issues may be appropriately addressed in the context of an existing collaborative, the parties are free to do so.

The Commission specifically directs the parties to address the following areas of concern to achieve modifications: IDLC migrations, line sharing/line splitting migrations, CLEC to CLEC migrations, and EEL migrations. These modifications should be made after collaborative efforts among SBC, the CLECs, and the Staff to accommodate the CLEC's and the Staff's concerns. The Commission also advocates an industry collaborative effort to address the issues of operational and economic efficiencies that can be achieved through a more mechanized and less manual process for performing batch hot cuts.

The Commission is also persuaded that there must be appropriate procedures for testing of the SBC modified process to make sure the batch cut migration processes will work as anticipated in a real environment. Without adequate testing, the parties and the Commission cannot evaluate whether SBC is capable of migrating multiple lines in a timely manner. SBC, the CLECs, and the Staff shall submit a joint plan to the Commission regarding testing within six weeks of the date of this order that is modeled after SBC's managed introduction plan. The plan shall be posted on the company's and the Commission's websites and served by SBC on all CLECs licensed to serve customers in Michigan. Any person having a comment or objection to the plan shall have two weeks to file comments in this proceeding. Testing should begin as soon as possible, and should include real world examples of batch cut migrations performed by SBC. In a future order in this proceeding, the Commission will address proposals for the length of the test program and the standards by which the results of the testing program will be evaluated.

After SBC's batch cut migration process proposal is modified as outlined in the Commission order, OSS modifications shall be made and related performance measures shall be developed collaboratively by the parties.

The parties are directed to work as expeditiously as possible to bring this proceeding to a close. It is the Commission's goal to have all outstanding issues resolved by July 1, 2005.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.; and 47 USC 251 and 252.

b. The batch cut migration processes described in this order should be approved on an interim basis.

c. Interested parties should be directed to engage in collaborative discussions to reach agreements regarding the content and testing procedures for a final batch cut migration process.

THEREFORE, IT IS ORDERED that:

A. The batch cut migration processes described in this order are approved on an interim basis.

B. Interested parties are directed to engage in collaborative discussions to reach agreements regarding the modifications required by this order. Within two weeks of the date of this order, the Commission Staff shall convene the initial collaborative discussions required by this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chair

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of June 29, 2004.

/s/ Mary Jo Kunkle
Its Executive Secretary

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

_____
Chair

_____
Commissioner

_____
Commissioner

By its action of June 29, 2004.

_____
Its Executive Secretary

In the matter, on the Commission's own motion, to investigate and to implement, if necessary, a batch cut migration process.	))))	Case No. U-13891

Suggested Minute:

"Adopt and issue order dated June 29, 2004 approving a temporary batch cut migration process and commencing a collaborative process for all interested parties to participate in the establishment of specific modifications to the batch cut migration process, as set forth in the order."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. **01-338**
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. **96-98**
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. **98-147**
	)	

COMMENTS OF THE MICHIGAN PUBLIC SERVICE COMMISSION

Introduction:

The Federal Communications Commission (Commission) issued a Notice of Proposed Rulemaking in this docket on December 12, 2001. This proceeding considers the circumstances under which incumbent local exchange carriers (LECs) must make parts of their networks available to requesting carriers on an unbundled basis pursuant to sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996 (1996 Act). In this review, the Commission is undertaking a comprehensive evaluation of its unbundling rules. The Commission also seeks to ensure that the regulatory framework remains current and faithful to the pro-competitive, market-opening provisions of the 1996 Act in light of the experience over the last two years, advances in technology, and other developments in the markets for telecommunications services. The Michigan Public Service Commission (MPSC) hereby submits its comments in this docket.

Specific Proposals:

The Commission expressly focuses on the facilities used to provide broadband services and explores the role that wireless and cable companies have begun to play and will continue to

play both in the market for broadband services and the market for telephony services generally. At the same time, the Commission recognizes that the statute contemplates three modes of entry -- through resale of tariffed incumbent LEC services, use of unbundled network elements (UNE), and construction of new facilities. The Commission is statutorily bound to require incumbents to permit both facilities-based and non-facilities-based entry. With respect to facilities-based entry, the Commission seeks to promote entry not only by fully facilities-based carriers but also by those facilities-based carriers that purchase actual UNEs, such as the loop.

Background:

In 1996, the Commission adopted the *Local Competition First Report and Order*, which implemented the local competition provisions of the 1996 Act. In that order, the Commission interpreted the terms "necessary" and "impair" in section 251(d)(2), which contains standards that must be considered in determining the network elements that must be made available. For network elements that are "proprietary in nature," the Commission must consider whether access to them is "necessary" to competitors. For network elements that are not proprietary, the Commission must consider whether "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." In the *Local Competition First Report and Order*, the Commission interpreted these terms as standards by which it could limit the general obligation in section 251(c)(3) to provide access to all UNEs where technically feasible.

To respond to the Supreme Court's directives, the Commission adopted the *UNE Remand Order*. In that order, the Commission revised its interpretation of the "necessary" and "impair" standards of section 251(d)(2) in order to identify specifically where requesting carriers are impaired without access to the incumbent's network, rather than making UNEs available

wherever it is technically feasible to do so, as the Commission had done in the *Local Competition First Report and Order.*

In applying this section 251(d)(2) analysis to incumbents' networks, the Commission identified seven network elements without which requesting carriers were impaired: (1) loops, including high-capacity lines, dark fiber, line conditioning, and some inside wire; (2) subloops; (3) network interface devices; (4) local circuit switching (but not most packet switching); (5) interoffice transmission facilities, including dedicated transport from DS1 to OC96 capacity levels and such higher capacities as evolve over time, dark fiber, and shared transport; (6) signaling networks and call-related databases; and (7) operations support systems (OSS). In a separate order released shortly after the *UNE Remand Order,* the Commission added the high frequency portion of the loop to the list of elements that must be unbundled on a national basis.

Today the Commission seeks comment generally on how to apply the section 251(d)(2) analysis in a manner that is faithful to the 1996 Act and promotes its goals. The Commission requests comment on many very technical issues regarding the unbundling of network elements. As part of this docket, the Commission also requests comment on the appropriate role of state commissions. Due to the highly technical nature of this docket and the time constraints involved, this is the only issue the MPSC will be addressing.

The Role of the State Commissions:

The Commission seeks comment on the proper role of state commissions in the implementation of unbundling requirements for incumbent LECs. Section 251(d)(3) of the 1996 Act permits state commissions to establish access obligations that are consistent with the Commission's unbundling rules. In the *UNE Remand Order,* the Commission interpreted section 251(d)(3) to grant authority to state commissions to impose additional obligations upon incumbent LECs so long as they met the requirements of section 251 and national policy

framework of that order. However, the Commission found that "state-by-state removal of elements from the national list would substantially prevent implementation of the requirements and purposes of this section and the Act," particularly with regard to uncertainty and frustration of business plans. The Commission also recognizes that state commissions may be more familiar than the Commission with the characteristics of markets and incumbent carriers within their jurisdictions, and that entry strategies may be more sophisticated in recognizing regional differences. It seeks comment, therefore, on the extent to which state commissions can act in creating, removing, and implementing unbundling requirements and the statutory provisions that would provide authority for states to act, consistent with applicable limitations on delegations of authority to the states.

Specifically, the Commission asks whether national standards should be established that the states can apply to incumbents' networks, much like the Commission has done with regard to setting network element pricing. The Commission asks whether states are better situated to tailor unbundling rules that more precisely fit their markets. The Commission asks whether the development of federal unbundling standards should rely on any of the federal performance standards that may be established in the *UNE Measurements and Standards Notice and Special Access Measurements and Standards Notice.* The Commission also seeks comment on a proposal to convene a Federal-State Joint Conference on UNEs pursuant to section 410(b) of the Act to inform and coordinate their three-year review.

The MPSC agrees with the Commission that the state commissions may be more familiar than the Commission with the characteristics of markets and incumbent carriers within state jurisdiction. The Commission should maintain a minimum list of national UNEs that would serve as the "floor" for the minimum unbundling required under the federal law. The states should then be permitted to add to this "minimum list" of national UNEs available in their

markets under the act. States may also be more familiar with investment strategies and patterns and marketing strategies of all providers. States may also be more familiar -- just like in 271 -- with the general conduct of all providers. Finally, some States, like Michigan, have been pursuing regulatory strategies based on their individual goals, objectives and circumstances, and those strategies should not now be disrupted by external tinkering.

The Commission should establish a process by which state regulatory commissions can take the lead in determining when alternatives in their states are sufficiently available to warrant the "de-listing" of a UNE. State commissions have policies currently in place that assume the availability of the UNEs on the current national list that were adopted in the context of lengthy proceedings on an extensive factual record. Any unilateral action by the Commission to de-list a UNE, without a detailed and specific coordination with individual states, could undermine these state policies and needlessly require state commissions to conduct proceedings and issue orders re-establishing the state rules and policies undermined by the Commission's unilateral action. States have the ability and the expertise to assemble and analyze more detailed factual records on impairment. The process should include the following:

i) The Commission should identify in advance which UNEs it would be willing to consider de-listing, in order to prevent incumbent LECs from filing frivolous or overreaching petitions to de-list UNEs that are clearly not ready for elimination.

ii) The Commission should establish a streamlined and orderly process for the consideration of state petitions to remove a UNE on the minimum national list.

iii) The Commission should allow for the possibility of de-listing a UNE in only part of a state.

iv) There must be evidence from the state proceedings that amply addresses the factors that the Commission has deemed relevant to the impairment analysis.

Due to the state's familiarity with competitive concerns within its territory, state commissions should have the authority to act in creating, removing, and implementing unbundling requirements. The Commission could set national standards that the states could apply to incumbents' networks, much like the Commission has done with regard to setting network element pricing. States are better suited to tailor unbundling rules that more precisely fit their markets. The state commissions have been responsible for arbitrating interconnection agreements between the incumbents and the competitive local exchange carriers and have been faced with the issue of applying the Commission's unbundling rules to the particular carriers that operate in our states. The technologies are constantly changing, which makes the unbundling issues take on different characteristics as the technologies change.

The MPSC supports the development of federal unbundling standards that rely on the federal performance standards. However, states are developing their own performance standards in 271 proceedings tailored to each particular state. The MPSC would support the federal model as long as states can use that model and refine it to the unique state needs, while staying within the federal standard. The MPSC also supports the Commission's proposal to convene a Federal-State Joint Conference on UNE's pursuant to section 410(b) of the 1996 Act to inform and coordinate the three-year review. Such a federal-state collaborative would greatly facilitate the gathering of information and input into the process.

Conclusion:

In conclusion, the MPSC supports the Commission's efforts to develop a set of network elements, to be unbundled by the incumbents, that may be used by the states to implement individual state policies. The MPSC also requests that the Commission not disrupt the strategies States have been pursuing by changing the rules and that it allow the states to continue to have the authority to act in creating, removing, and implementing unbundling requirements that suit State needs that would best reflect the market situations and other realities in the respective states. Finally, the MPSC supports the convening of a Federal-State Joint Conference on UNEs.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION

By its attorneys:

Jennifer M. Granholm
Attorney General of Michigan

David A. Voges (P25143)
Steven D. Hughey (P32203)
Henry J. Boynton (P25242)
Assistant Attorneys General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911
Telephone: (517) 241-6680

DATED: April 5, 2002
01-338 et al/Comments

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. **01-338**
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. **96-98**
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. **98-147**
	)	

REPLY COMMENTS OF THE
MICHIGAN PUBLIC SERVICE COMMISSION

The Michigan Public Service Commission (MPSC) respectfully submits the following comments in reply to the April 5, 2002 pleadings filed in response to the to the Notice of Proposed Rulemaking (*Triennial Review*) issued by the Federal Communications Commission (Commission) in the above-captioned proceedings.[1] Because of the critical impact action in this proceeding will have on existing State commission policy initiatives, the MPSC is compelled to file and specifically endorse the National Association of Regulatory Utility Commissioner's (NARUC) April 5, 2002 comments (1) requesting that the Commission immediately convene a § 410(b) Federal-State Joint Conference to facilitate, inform and coordinate its implementation of the three-year unbundled network element (UNE) review; and (2) assure that States retain the authority to impose additional unbundling "obligations upon incumbent local exchange carriers

[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket Nos. 01-92, 96-98 and 98-147, *Notice of Proposed Rulemaking,* FCC 01-361 (rel. Dec. 20, 2001) ("*Notice*").

(LECs) beyond those imposed by the national list, as long as they meet the requirements of [§] 251." Specifically, we endorse the following NARUC positions:

(1) *A Joint Conference is in the Public Interest:* Given the critical role played by State regulators in implementing the statutory UNE regime, as well as the intensive data- and State-specific nature of the three-year review, *at a minimum*, the Commission should establish a formal mechanism to secure the State participation necessary for an informed application of the statutory "necessary" and "impair" standards.

(2) *State Authority To Add New UNEs/Obligations:* We agree with the FCC findings that § 251(d)(3) of the 1996 Act "grants State commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of [§] 251." We believe Congressional intent as outlined in the 1996 federal statute, existing State enabling statutes, and the Commission rules and prior findings in this and related dockets support this approach.[2]

(3) *Impact of Federal Minimum List:* As recognized implicitly in the *UNE Remand* Order's specific State authority findings, the States are better positioned to conduct a detailed review of additional unbundling that is appropriate for local market conditions. Consequently, the Commission should defer to State determinations of whether unbundling requirements in any State should collapse to the existing or new federal minimums. Assuming any new federal minimum removes one or more UNE from the national list or restricts availability of any UNE, such limitations should not apply in any State unless that State first determines that a competitor's access is "necessary" or whether lack of access "would impair" that competitor's ability to offer services, or is required as a matter of State rule or statute.[3]

(4) *Impact of Federal Action on UNE-P:* The Commission " . . . should support the implementation of universal availability of the UNE-P, on the basis that one form of entry should not be favored over another." Specifically, the Commission should assure that its implementation of

---

[2] See, *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 3696, 3766-7 at ¶¶ 153-154 (rel Nov. 5, 1999) ("*Remand Order*"). See also *NARUC's February 2002 Resolution Concerning the States' Ability to Add to the National Minimum List of Network Elements* ("[NARUC] urges the FCC to recognize that States may continue to require additional unbundling beyond that required by the FCC's national minimum.")

[3] See, *NARUC December Letter* at 2 ("[A] party seeking to remove or scale back a UNE bears the burden of proof to show, by a preponderance of [] evidence, that the requested relief is justified.")

§ 251 "does not favor one method of entry, at the expense of other methods of entry."[4] In this regard, the U.S. Supreme Court recently upheld the Commission's requirement under § 251(c)(3) that incumbent LECs combine UNEs, as requested by the CLECs.[5]

NARUC's position is consistent with the earlier comments that the MPSC filed and we therefore endorse NARUC's position as outlined here.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION

By its attorneys:

Jennifer M. Granholm
Attorney General

David A. Voges
Henry J. Boynton
Assistant Attorneys General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911
Telephone: (517) 241-6680

DATED: July 17, 2002
01-338 et al/Reply Comments

[4] See, *NARUC November 13, 2001 Resolution on the UNE-P Platform.* ("[A]ny party seeking to remove or scale back a UNE bears the burden of proof to show, by a preponderance of record evidence, that the requested relief is justified.")

[5] See, *Verizon Communications, Inc v F.C.C.*, 523 US ____; 70 USLW 4396; 2002 US LEXIS 3559 (May 13, 2002).

"Adopt and issue minute dated October 4, 2004 transmitting to the Federal Communications Commission (FCC) a summary of the record in this docket, which was opened by the Michigan Public Service Commission to facilitate determinations to be made in accordance with the FCC's proceeding entitled: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147."

MICHIGAN PUBLIC SERVICE COMMISSION

_____

J. Peter Lark, Chair

_____

Robert B. Nelson, Commissioner

_____

Laura Chappelle, Commissioner

_____

Mary Jo Kunkle,
Executive Secretary