

RECEIVED

NOV 10 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

VERIZON PENNSYLVANIA INC. AND VERIZON NORTH INC.
STATEMENT NO. 1.0

INVESTIGATION INTO THE
OBLIGATION OF INCUMBENT LOCAL
EXCHANGE CARRIERS TO UNBUNDLE
LOCAL CIRCUIT SWITCHING FOR THE
ENTERPRISE MARKET

DOCKET NO. I-00030100

VERIZON PENNSYLVANIA INC.
AND VERIZON NORTH INC.

STATEMENT NO. 1.0
(DIRECT TESTIMONY)

WITNESS: Debra M. Berry

DATED: October 24, 2003

EXPURGATED VERSION

TABLE OF CONTENTS

1	I.	INTRODUCTION	1
2	II.	COMPETITIVE SWITCH DEPLOYMENT IS WIDESPREAD IN PENNSYLVANIA	3
3	III.	COMPETITORS ARE USING THEIR OWN SWITCHING TO PROVIDE HIGH	
4		CAPACITY SERVICE TO ENTERPRISE CUSTOMERS.....	5
5	V.	VERIZON'S PERFORMANCE ON OPERATIONAL CRITERIA	8

1 I. INTRODUCTION

2 Q. PLEASE STATE YOUR NAME AND IDENTIFY THE PARTIES ON
3 BEHALF OF WHOM THIS TESTIMONY IS SUBMITTED.

4 A. My name is Debra M. Berry. This testimony is submitted on behalf of Verizon
5 Pennsylvania Inc. ("Verizon PA") and Verizon North Inc. ("Verizon North")
6 (collectively "Verizon").

7 Q. PLEASE STATE YOUR BUSINESS ADDRESSES, EMPLOYMENT
8 INFORMATION AND BACKGROUND.

9 A. I am employed by Verizon as Director-Regulatory Planning and my business
10 address is 1717 Arch Street, Philadelphia, Pennsylvania, 19103. My responsibilities
11 include developing Verizon's regulatory policies, directing filings, and other
12 regulatory activities involving the Pennsylvania and Delaware State Commissions. I
13 joined Diamond State Telephone Company in 1970 where I held a variety of
14 positions including Supervising Service Foreman, supervising installation and repair
15 technicians, and Manager of the Customer Service Center. After a period of time
16 with Diamond State Telephone and then Bell Atlantic in Arlington Virginia and
17 BELLCORE in Washington, D.C., I achieved my current position of Director-
18 Regulatory in 1990. I earned a Masters of Business Administration from St.
19 Joseph's University in May 1997.

20

1 Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE PENNSYLVANIA
2 PUBLIC UTILITY COMMISSON (“COMMISSION” OR “PUC”)?

3 A. Yes. Most recently I testified before this Commission on behalf of Verizon in the
4 proceeding to set statewide access rates for the two Verizon companies. I have also
5 testified on behalf of Verizon North in its Chapter 30 case and on behalf of Verizon
6 PA in its Petition to Amend its Network Modernization Plan.

7 Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS
8 PROCEEDING?

9 A. The purpose of my testimony is to provide the factual information necessary to
10 respond to the Petitions to Initiate Proceedings filed by Arc Networks, Inc. d/b/a
11 InfoHighway (“InfoHighway”), Metropolitan Telecommunications Corporation of
12 PA (“MetTel”), Full Service Computing Corporation t/a Full Service Network
13 (“FSN”), Remi Retail Communications, LLC (“Remi”), ATX Licensing, Inc.
14 (“ATX”) and Line Systems, Inc. (“LSI”). These petitions ask the Commission to
15 initiate a so-called “90-day proceeding” as described in the FCC’s *Triennial Review*
16 *Order* (“TRO”)¹ to determine whether this Commission should make a filing with
17 the FCC on or before December 31, 2003 to seek a waiver from the FCC’s national
18 finding of “no impairment” regarding unbundled switching for the enterprise market.
19 I understand that much of the response to these petitions will be in the form of legal

¹ *Review of 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*

1 argument and will be contained in the legal pleading (Motion to Dismiss, or in the
2 Alternative to Strike Portions of Testimony, and Response to Petitions to Initiate
3 Proceedings).

4 **II. COMPETITIVE SWITCH DEPLOYMENT IS WIDESPREAD IN**
5 **PENNSYLVANIA**

6 **Q. THE PENNSYLVANIA CARRIERS' COALITION ("PCC") WITNESSES**
7 **CLAIM THAT CLECS ARE NOT DEPLOYING SWITCHES IN**
8 **PENNSYLVANIA. (PCC TESTIMONY AT 23). DO THEY SUPPORT**
9 **THEIR CLAIM WITH ANY EVIDENCE?**

10 **A.** No. They just make this bald statement with nothing whatsoever to back it up.

11 **Q. WHAT DOES THE EVIDENCE ACTUALLY SHOW?**

12 **A.** The record of competitive switch deployment in Pennsylvania establishes that
13 competitors are already serving customers of all kinds using their own switches on a
14 widespread basis throughout the Commonwealth. Competing carriers operate at
15 least 54 *known* local circuit switches that are physically located within Pennsylvania,
16 and approximately 24 competing carriers of all sizes have deployed local circuit
17 switches in Pennsylvania. The location of CLEC switches is available from the
18 Local Exchange Routing Guide ("LERG").²

19 This Pennsylvania-specific information is consistent with the record

Capability, CC Docket No. 98-147, FCC 03-36 (rel. August 21, 2003) ("TRO").

² See Telcordia, *February 2003 LERG*.

1 nationwide, where competing carriers operate approximately 1,300 circuit switches,
2 including more than 500 within Verizon's 30-state region.³

3 Q. THE PCC WITNESSES CONTEND THAT A LOCAL SWITCH
4 PRIMARILY SERVES THE NEARBY SURROUNDING GEOGRAPHICAL
5 AREA, AND CANNOT BE EXTENDED TO SERVE LARGER AREAS (PCC
6 TESTIMONY AT 10). DO YOU AGREE?

7 A. No. A single switch can serve an entire LATA or state, or multiple LATAs and/or
8 states.⁴ For example, AT&T claims that the switches of its CLEC affiliate, TCG,
9 can "connect virtually any qualifying customer in a LATA."⁵ Therefore, even
10 competitors with switches located in Philadelphia and Pittsburg are capable of
11 serving the entire state.

12 Q. IS IT NECESSARY FOR THE CLEC SWITCH TO BE LOCATED IN THIS
13 STATE TO SERVE CUSTOMERS IN PENNSYLVANIA?

14 A. No. For the reasons stated in response to the previous question, the geographic
15 reach of a switch can easily cross state boundaries. In fact, CLEC Global NAPS
16 stated in the recent virtual NXX investigation before this Commission that "Global

³ See Telcordia, *February 2003 LERG; NPRG CLEC Report 2003* at Chapter 5.

⁴ See *UNE Remand Order* ¶ 261 ("[S]witches deployed by competitive LECs may be able to serve a larger geographic area than switches deployed by the incumbent LEC, thereby reducing the direct, fixed cost of purchasing circuit switching capacity and allowing requesting carriers to create their own switching efficiencies.").

⁵ Panel Direct Testimony of AT&T Communications of NJ, L.P. et al., Docket No. TO00110893 (February 25, 2003), at 75.

1 has no switch in Pennsylvania and backhauls its Pennsylvania traffic on its own
2 network to it's facility in Reston, VA for switching."⁶

3 **III. COMPETITORS ARE USING THEIR OWN SWITCHING TO**
4 **PROVIDE HIGH CAPACITY SERVICE TO ENTERPRISE**
5 **CUSTOMERS**

6 **Q. DOES VERIZON HAVE EVIDENCE THAT CLECS IN PENNSYLVANIA**
7 **ARE ACTUALLY USING THEIR OWN SWITCHING TO SERVE**
8 **ENTERPRISE CUSTOMERS WITH DS1 AND HIGHER CAPACITY**
9 **LOOPS.**

10 **A. Yes. Putting aside for the moment those CLECs that use both their own switching**
11 **and their own loop facilities, Verizon's own records of UNE provisioning**
12 **demonstrate that the vast majority of CLECs serving customers with Verizon-**
13 **provisioned high-capacity loops are doing so through their own switching or some**
14 **other non-Verizon source of switching. In fact, about 99% of the high capacity**
15 **loops provisioned by Verizon to CLECs are using non-Verizon switching.**

16 This fact is evident from comparing the number of DS1 and higher UNE
17 platform arrangements Verizon provisions with the number of DS1 and higher loops
18 and EELs Verizon provisions without providing the switching. Verizon PA and
19 Verizon North combined provide competitors approximately [BEGIN VERIZON
20 PROPRIETARY] [END VERIZON PROPRIETARY] DS1 or faster

⁶ *Generic Investigation Regarding Virtual NXX Codes, Docket No. I-00020093*

1 loops, comprised of [BEGIN VERIZON PROPRIETARY] [END
2 VERIZON PROPRIETARY] stand-alone DS1 (or higher) loops plus [BEGIN
3 VERIZON PROPRIETARY] [END VERIZON PROPRIETARY] EELs
4 with a DS1 (or higher) loop at the end. In comparison, CLECs are using Verizon's
5 switching, i.e. DS1 & ISDN-PRI UNE-Ps or resale, to serve fewer than [BEGIN
6 VERIZON PROPRIETARY] [END VERIZON PROPRIETARY] high
7 capacity lines. This means that for about 99% of all DS1 and higher UNE loops that
8 competitors use in Pennsylvania, they have chosen to use their own (or some other
9 competitor's) switching, not Verizon's. As noted, this is a conservative percentage
10 because it does not include those CLECs that are serving customers using both their
11 own high capacity loops and switching. Clearly, CLECs are not impaired in serving
12 this market without Verizon switching.

13 **IV. DS1 AND HIGHER LOOP MIGRATION ISSUES**

14 **Q. THE PETITIONERS COMPLAIN ABOUT VERIZON'S PROCESS FOR**
15 **PROVISIONING DS1 AND HIGHER LOOPS TO CLECS. DO YOU HAVE**
16 **ANY RESPONSE TO THEIR CLAIMS?**

17 **A.** Yes. I understand that Verizon will be arguing in its legal pleadings that these
18 petitioners have raised arguments that were already duly considered by the FCC and
19 are not unique to Pennsylvania.

1 As the FCC recognized, parallel provisioning is the accepted standard for
2 DS1 and higher capacity loops. It does not make sense to attempt to cut over an
3 existing DS1 or higher loop instead of provisioning a parallel facility because the
4 complexity of the equipment on the ILEC's and the end user's side makes it unlikely
5 that the existing loop will still work once disconnected. This is why parallel
6 provisioning is recommended and used for DS1 and higher facilities.

7 Petitioners' complain that even if spare facilities are available, end users do
8 not have the capacity on their customer premises equipment to handle the existence
9 of two facilities. This claim is unfounded. First, this is not a real problem because
10 generally the new facility is turned up only after the old one is disconnected and the
11 equipment is not running two systems at once. Second, there is no reason to believe
12 that end users in Pennsylvania would be any different in this regard than end users
13 anywhere else.

14 **Q. PETITIONERS CLAIM THAT IT SHOULD BE POSSIBLE TO DO A**
15 **TRADITIONAL HOT CUT ON A HIGH CAPACITY LINE TO TRANSFER**
16 **THE SAME FACILITY FROM ONE SWITCH TO ANOTHER. IS THIS**
17 **ACCURATE?**

18 **A. No. Petitioners' argument is flawed as a technical matter. It is precisely because a**
19 **DS1 capacity or higher loop cannot be disconnected and reconnected in a typical hot**
20 **cut process due to the complex equipment on both ends of the loop that parallel**
21 **provisioning is the accepted standard for provisioning such loops.**

1 V. VERIZON'S PERFORMANCE ON OPERATIONAL CRITERIA

2 Q. IN DETERMINING WHETHER CLECS ARE IMPAIRED BY NOT
3 HAVING ACCESS TO UNBUNDLED SWITCHING FOR THE
4 ENTERPRISE MARKET, THE FCC HELD THAT THE STATE
5 COMMISSIONS SHOULD CONSIDER A BOC'S PERFORMANCE
6 METRICS AND STANDARDS.⁷ HAVE THE PETITIONERS CITED ANY
7 PERFORMANCE METRICS IN SUPPORT OF THEIR CLAIMS?

8 A. No. The petitioners have pointed to no metrics that demonstrate that they are
9 receiving discriminatory service on any DS-1 related products or collocation.

10 Q. WHAT DOES A REVIEW OF VERIZON'S PERFORMANCE METRICS IN
11 THESE AREAS REVEAL?

12 A. A review of Verizon PA's most recent Carrier-to Carrier (C2C) reports in
13 Pennsylvania for the last three months, June, July and August, demonstrates that
14 Verizon PA is providing the CLECs with very good service. For example, Verizon
15 PA has satisfied the 95% standard for OR-1-06 "% On Time LSR/ASR Facility
16 Check DS-1" in each month. In some months 99% of the orders were processed on
17 time. As for provisioning, a review of the key timeliness and quality metrics
18 demonstrates that Verizon PA is providing very good service to CLECs on DS-1

⁷ TRO Para 456 ("state commissions must consider whether incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive LECs . . . state commissions [should] consider evidence, [including] performance metrics and standard for BOCs . . .")

1 loops. Verizon PA has consistently provided parity service on PR-4-01 "% Missed
2 Appointment -Verizon - DS-1" and PR-6-01 "% Installation Troubles Reported with
3 30 Days." Verizon PA has also provided the CLECs with excellent service on
4 collocation, and no CLEC has alleged that it has had difficulties in obtaining
5 collocation space in Verizon's Pennsylvania territory. Finally, Verizon knows of no
6 complaints from the CLECs regarding collocation cross connects related to DS-1
7 UNE Loop products in Pennsylvania.

8 **Q. DOES VERIZON PROVIDE PUBLIC INFORMATION AS TO**
9 **COLLOCATION SPACE AVAILABILITY?**

10 A. Yes. Verizon maintains information regarding collocation space availability on its
11 website at : [http://www22.verizon.com/wholesale/attach-](http://www22.verizon.com/wholesale/attachments/space-exhaust/WebUpdatePA.pdf)
12 [ments/space-](http://www22.verizon.com/wholesale/attachments/space-exhaust/WebUpdatePA.pdf)
13 [exhaust/WebUpdatePA.pdf](http://www22.verizon.com/wholesale/attachments/space-exhaust/WebUpdatePA.pdf). The website currently shows that only 13 of Verizon's
14 (PA and North combined) 387 central offices, or 3.4%, are closed to collocation or
restricted to virtual collocation.

15 **Q. DOES THAT CONCLUDE YOUR DIRECT TESTIMONY?**

16 A. Yes.

Requests for Information of the Office of Trial Staff from the

Pennsylvania Carrier Coalition, which includes Full Service Computing Corporation t/a Full Service Network Retail Communications, LLC ATX Licensing, Inc., and Line Systems, Inc.

Docket No. I-00030100

Investigation into the Obligations of ILECs to Unbundle Local Circuit Switching for The Enterprise Market

RECEIVED

NOV 10 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

- OTS-4 . Refer to PCC Petition, page 4: The PCC claims that a review of the historic deployment, scope of deployment, recent history of deployment and likely future deployment shows that Pennsylvania CLECs, even if they deploy their own switches can not overcome economic barriers to entry for DSL enterprise customers around the state. Provide details of this review that support the contention that CLECs can not overcome economic barriers.

Based upon the present EEL pricing structure a collocated CLEC switch must service 38 DSL customers to simply reach a facility cost the equal to what Verizon charges retail. To reach the rate of what FSN charges retail to the customer the same switch needs to service 50 DSL customers and to reach the cost of facilities equal to Verizon UNE-P pricing 100 customers must be serviced. 100 Customers per CLEC switch is an unreasonable economic barrier to overcome as opposed to being able to ramp up subscribers on Verizon UNE-P from Customers 1 to 100 and then install our own switch.

OTS Exhibit No. 2
(Answer to OTS No. 5
by Infohighway)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation into the Obligations of)
Incumbent Local Exchange Carriers to)
Unbundle Local Circuit Switching for)
The Enterprise Market)
_____)

Docket No. I-00030100

**RESPONSE OF ARC NETWORKS, INC., D/B/A INFOHIGHWAY
COMMUNICATIONS CORP. TO REQUESTS FOR INFORMATION OF THE
OFFICE OF TRIAL STAFF**

ARC Networks, Inc. d/b/a InfoHighway Communications Corp. ("InfoHighway") by its undersigned counsel, hereby provides its responses to the informal discovery electronically propounded by Office of Trial Staff ("OTS") upon InfoHighway on October 30, 2003.

OTS Request No. 5: Refer to Initial Joint Declaration, page 5: The Petitioners claim that no process exists for migrating existing DS1 circuits from the ILEC's switch to a competitively provided switch facility. A flash cut elimination of ULS to serve the installed customer base of InfoHighway and MetTel will result in the return of our customers to Verizon. What does that statement "flash cut elimination of ULS to serve the installed customer base of the Petitioners" mean? Why would this result in the return of the customer to Verizon?

Answer to OTS-5:

In the TRO, the FCC determined that if no finding of impairment is made by the state commission within 90 days of the effective date of the TRO "competing carriers must transfer their embedded base of DS1 enterprise customers to an alternative service arrangement within 90 days from the end of the 90 day state commission consideration period, unless a longer period is required to comply with a 'change of law' provision of the applicable interconnection agreement." TRO, ¶ 534.

By "flash cut" InfoHighway means the elimination of ULS to serve DS1 or above loops (i.e. a failure to make an impairment determination) and application of the 90 transition period provided by the FCC.

Given the labor intensive and time consuming tasks associated with actually transferring customers, assuming alternate switching facilities are available, 90 days is simply not enough time to make such a transition. InfoHighway does not have its own switch in Pennsylvania, and therefore would need to locate alternative wholesale switching facilities, which may or not be available in the markets where InfoHighway provides services. Transferring customers, in effect, means using the parallel service delivery process, which is intricate, time consuming and expensive.

The parallel delivery process may require up to 5 different parties to be involved, including: Verizon, the alternate switch provider, customer, the customer's equipment vendor and the UNEP CLEC. Some of the primary functions include, but are but not limited to: The CLEC (switch provider) orders the new UNE DS1 loop from Verizon and provisions their switch to meet the customers requirements. Verizon is needed to build the new UNE DS1 loop and is needed to port the customer's line numbers to the new CLEC (switch provider). The customer needs to provide access to their premises and contact their equipment vendor. The equipment vendor needs to test the new UNE DS1 facility and transfer the T1 at the same time as the number porting is done. The UNE-P CLEC (InfoHighway) needs to coordinate the whole transfer among all the parties and disconnect the UNE-P DS1 line when complete. The following table (which was set forth at page 13 in the initial declaration InfoHighway cosponsored in this proceeding) sets forth the steps a CLEC must take in order to keep a customer, and contrasts those steps with the steps that Verizon must take:

Steps Required of CLEC to Keep Customer	Steps for Customer to Go to Verizon
Order T-1 loop to end user premise ¹	

¹ Verizon's wholesale website indicates that the standard provisioning interval for a UNE DS1 loop is 9 business days if spare DS1 facilities are available. See http://www22.verizon.com/wholesale/attachments/une_intervals.xls, at rows 285-287. If no spare DS1 facilities are available the interval is "Estimated Construction Completion Date" ("ECCD") plus 6 business days. ECCD is, in effect, a date that Verizon estimates that the completion of a new DS1 facility will be built where spare facilities currently don't exist. As a result, if a new loop is required—that is where Verizon says there are 'no facilities'—obtaining a new UNE DS1 loop could take as a few weeks, or it could take more than several months.

Order IOT (interoffice transport) to the CLEC switch or collocation ²	Electronic Transfer to Retail
CLEC rolls truck to test circuit for basic transmission quality and make sure that the new DS-1 jack is accessible for cutover onto the PBX.	
Verizon must provide CLEC with the PRI settings on the existing circuit.	
PBX Vendor/CLEC Map PRI Settings to assure that customer experience is transparent between new and old switch.	
CLEC establishes cross connection of DS-1 at collocation and at its switch. CLEC programs with PRI settings	
PBX vendor rolls Truck for x-connect and Reprogramming of PBX to new PRI settings (if needed)	
CLEC coordinates LNP and effects cutover	

There is a substantial likelihood that InfoHighway would lose its existing customers to Verizon if ULS were eliminated for DS1 enterprise customers in Pennsylvania because a customer, given the choice of risking a service outage as InfoHighway attempts to locate alternate switching providers and undertake the tenuous process of transferring the customer's service to the new provider, or going back to receiving service from Verizon, where no risk of disruption in service exists because Verizon simply has to make a software billing change in order to begin providing service to customers, the customer will likely choose the risk-free option of going back to Verizon.

Given the harm that InfoHighway will suffer if we are forced to move our installed customer base to alternate facilities, the Commission should seek a waiver from the FCC to allow CLECs in Pennsylvania to continue to serve their installed DS1 customer base

² The UNE DS1 transport standard interval for Verizon Pennsylvania is 15 business days where facilities exist; if no facilities exist the interval is estimated at ECCD plus 15 days. See Verizon web site: http://www22.verizon.com/wholesale/attachments/une_intervals.xls, row 645-647.

utilizing ULS, until such time as the Verizon has implemented a loop migration system—including procedures to provide switch-port settings—to allow DS1 customers' circuits to be migrated between carriers.

OTS Exhibit No. 3
(Answer to OTS No. 6
by Infohighway)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation into the Obligations of)
Incumbent Local Exchange Carriers to)
Unbundle Local Circuit Switching for)
The Enterprise Market)
_____)

Docket No. I-00030100

**RESPONSE OF ARC NETWORKS, INC., D/B/A INFOHIGHWAY
COMMUNICATIONS CORP. TO REQUESTS FOR INFORMATION OF THE
OFFICE OF TRIAL STAFF**

ARC Networks, Inc. d/b/a InfoHighway Communications Corp. ("InfoHighway") by its undersigned counsel, hereby provides its responses to the informal discovery electronically propounded by Office of Trial Staff ("OTS") upon InfoHighway on October 30, 2003.

OTS Request No. 6: Same reference: Are the Petitioners aware of the process other CLECs use for migrating existing DS1 circuits from a Verizon switch to their switching facility? If yes, explain the process and the CLECs which utilized it.

Answer to OTS-6:

InfoHighway is aware of the parallel process utilized by switched-based CLECs and Verizon and we understand how it works in theory and in practice; however InfoHighway itself does not utilize the process.

As we understand it, the parallel delivery process to which OTS-6 refers requires competitors to undertake a series of steps that are extremely complex and which must be executed flawlessly in order to get a circuit being transferred from the ILEC to the CLEC up and running. The process is even more complicated when it involves the provisioning of primary rate interface ("PRI") circuits. The following table contrasts the basic steps that must be executed in migrating DS-1 facilities from an ILEC to a CLEC:

- (1) The CLEC must order and install the DS-1 loop and IOF facilities;
- (2) Transmission facilities must be made operational and tested for basic transmission capability;
- (3) The equivalent switch operations must be established in the CLEC network that were being utilized by Verizon to serve the end-user (both physical switch operations and software applications for PRI circuits) which involves the following steps:

- a. Determine Verizon's PRI settings

PRI interfaces have a variety of user-adjustable settings between the customer premises equipment and the switch. Before a PRI circuit can be migrated the exact settings must be known so that the new switch will interoperate with the

customer PBX in exactly the same way. If the switch-types are different (i.e., you are moving from a Lucent to a Nortel switch, then an added complexity ~ mapping the old settings to the new settings in a way that the customer experience is transparent – arises. There is not currently a process in place to coordinate this process between the CLEC and the ILEC.

- b. New CLEC settings must be mapped for transparent operation by the customer.
- c. The vendor must set PBX settings at end user premises.
- d. Testing must be conducted to confirm that the circuit is up and running.
- e. LNP must be performed with the cutover.

InfoHighway does not possess any information regarding which CLECs operating in Pennsylvania actually utilize this process.

RECEIVED

NOV 10 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

the participants, listed below, in accordance with the requirements of § 1.54 (relating to service by a participant).

VIA EMAIL AND FIRST CLASS MAIL

Julia A. Conover, Esq.
William Peterson, Esq.
Verizon Pennsylvania Inc.
1717 Arch Street, 32N
Philadelphia, PA 19103

Ross A. Buntrock
Kelley, Drye & Warren, LLP
1200 Nineteenth Street, NW, Suite 500
Washington, DC 20036

Norman Kennard
Hawke McKeon Sniscak & Kennard LLP
Harrisburg Energy Center
100 North Tenth Street P. O. Box 1778
Harrisburg, PA 17108

Russell M. Blau
Philip Macres
Tamar E. Finn
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Patricia Armstrong
Thomas, Thomas, Armstrong & Niesen
212 Locust St., Suite 500
PO Box 9500
Harrisburg, PA 17108-9500

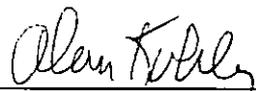
Kandace F. Melillo
Office of Trial Staff
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Maryanne R. Martin
PA Public Utility Commission
400 North Street
Harrisburg, PA 17101

Angela Jones, Esq.
Office of Small Business Advocate
Commerce Building, Suite 1102
300 North 2nd Street
Harrisburg, PA 17101

Barrett Sheridan, Esq.
Office of Consumer Advocate
5th Floor, Forum Place Bldg.
555 Walnut Street
Harrisburg, PA 17101-1921

Date: November 10, 2003



Alan Kohler, Esq.

212 Locust Street, Suite 300, Harrisburg, Pennsylvania 17101
Tel: (717) 237-7160 □ Fax: (717) 237-7161 □ www.WolfBlock.com

Alan C. Kohler
Direct Dial: (717) 237-7172
Direct Fax: (717) 237-2752
E-mail: akohler@wolfblock.com

ORIGINAL

November 12, 2003

VIA HAND DELIVERY

James McNulty
Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg., 2nd
Floor, 400 North Street P.O. Box 3265
Harrisburg, PA 17105-3265

RECEIVED

NOV 12 2003

DOCUMENT

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

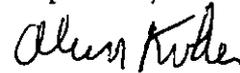
Re: Investigation into the Obligation Incumbent of Local
Exchange Carriers to Unbundle Local Circuit Switching
for the Enterprise Market; I-00030100

Dear Secretary McNulty:

It has come to my attention that the Joint Procedural Stipulation filed on Monday, November 10, 2003 was inadvertently filed with an outdated version of the Pennsylvania Carriers' Coalition's ("PCC") Direct Testimony. Enclosed please find an two copies of PCC-1 (Direct-Revised). This version of PCC-1's Direct Testimony should replace the version that was included in both the public and proprietary attachments to the November 10, 2003 Joint Procedural Stipulation.

If you have any questions, please contact me. Thank you for your attention to this matter.

Respectfully submitted,



Alan C. Kohler

For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

ACK/smw

cc: The Honorable Michael C. Schnierle
Parties of Record

DSH:38778.1/FUL022-216383

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation into the :
Obligation Incumbent of Local : Docket No.
Exchange Carriers to Unbundle : I-00030100
Local Circuit Switching for the :
Enterprise Market :

DIRECT TESTIMONY

OF

DAVID SCHWENCKE,

DAVID MALFARA

AND

SCOTT DULIN

ON BEHALF OF THE

PENNSYLVANIA CARRIERS' COALITION

DOCKETED

NOV 17 2003

RECEIVED

NOV 12 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

DOCUMENT

**(Full Service Computing Corporation t/a Full Service Network, Remi Retail
Communications, L.L.C., ATX Licensing, Inc., and Line Systems, Inc.)**

OCTOBER 17, 2003

1 **I. INTRODUCTION.**

2 **Q. PLEASE IDENTIFY THE MEMBERS OF THE PANEL AND IDENTIFY ON**
3 **WHOSE BEHALF THIS TESTIMONY IS BEING SUBMITTED.**

4 A. The three members of this panel are David Schwencke, President and CEO of Full
5 Service Computing Corporation t/a Full Service Network ("FSN"), David Malfara,
6 President and CEO of Remi Retail Communications, LLC ("Remi") and Scott Dulin,
7 Senior Vice President of ATX Licensing, Inc. ("ATX"). Mr. Schwencke, Mr. Malfara
8 and Mr. Dulin are submitting testimony on behalf of their individual companies and on
9 behalf of the Pennsylvania Carriers' Coalition, an informal group of competitive local
10 exchange carriers ("CLECs") comprised of FSN, Remi, ATX and Line Systems, Inc.
11 ("LSI") which carriers' sole business, as in the case of FSN and Remi, or primary
12 business, as in the case of ATX and LSI, is in Pennsylvania.

13 **Q. WHAT ROLE DID EACH MEMBER OF THIS PANEL PLAY IN THE**
14 **PREPARATION OF THIS TESTIMONY AND ASSOCIATED EXHIBITS?**

15 A. Each member of the panel has reviewed and supports this testimony and the testimony
16 was prepared by or under the direct supervision of all witnesses. However, as one might
17 expect, Mr. Schwencke has primary responsibility for portions of the testimony which
18 relate most directly to FSN's business and business plans. The same goes for Mr. Malfara
19 and Mr. Dulin as the testimony pertains to Remi's and ATX's business and business
20 plans, respectively. The general panel testimony is on behalf of all the members of the
21 Coalition, including LSI.

22 **Q. MR. SCHWENCKE, PLEASE IDENTIFY YOURSELF AND PROVIDE A**
23 **SUMMARY OF YOUR PROFESSIONAL BACKGROUND AND FSN'S**
24 **BUSINESS WHICH IS RELEVANT TO THIS PROCEEDING.**

25 A. My name is David Schwencke. I am President and CEO of FSN. My business address is
26 1420 Centre Avenue, Pittsburgh, PA 15219.

1 I founded Full Service Network in 1988 as my only financial means to attend
2 college at the University of Pittsburgh. Because my original background was in
3 computer programming, FSN was initially involved in developing software solutions, but
4 quickly transitioned to a business that aggregated demand for interexchange service and
5 provided ongoing consultation, support and customer care for its clients/customers.
6 During these days, we developed a nationwide calling card platform that includes a
7 "home call hotline service" for business travelers and kids away at school, for which we
8 wrote the switch software which is still in use today.

9 FSN is a relatively small CLEC which provides a variety of telecommunication
10 services, including local exchange services, to both residential and business customers
11 located in Verizon Pennsylvania, Inc.'s ("Verizon PA") service territory. Recently, FSN
12 entered into an interconnection agreement with Verizon North, Inc. ("Verizon North")
13 and has now initiated service offerings in that service territory. FSN also has a business
14 interest in serving customers in non-Verizon areas, and in particular in the service
15 territory of North Pittsburgh Telephone Company ("NPTC"), however, FSN has been
16 precluded from doing so either through access to unbundled network elements ("UNEs")
17 or through its own facilities, because of rural exemption/suspension issues as well as
18 other barriers to entry erected by those companies.

19 FSN's headquarters are located in Pittsburgh and the Company recently opened an
20 office in Philadelphia. FSN is a Pennsylvania company and its entire customer base is
21 located in Pennsylvania. In this regard, FSN presently employs approximately 50
22 Pennsylvanians in its two offices. While currently the core of FSN's business is in the
23 Pittsburgh area, expansion of FSN's business requires the Company to move outward to

1 serve both businesses and residential customers in surrounding suburban and rural areas,
2 including into Verizon North's and NPTC's service territories. However, FSN will only
3 be able to achieve this necessary expansion if the terms and conditions of the incumbent
4 local exchange carrier's wholesale service permit such an expansion from a business
5 perspective. Furthermore, dependent on the outcome of this proceeding, FSN's existing
6 enterprise business could be threatened.

7 FSN owns and operates one local switch in downtown Pittsburgh from which it
8 serves DS1 customers within the coverage of the switch. FSN is continuously
9 considering whether investment in additional local switches is justified. However, FSN
10 can not invest in such deployment unless market conditions permit. Otherwise, it will not
11 recover its costs of, much less realize a return, on its investment.

12 **Q. DOES FSN CURRENTLY SERVE CUSTOMERS THROUGH DS1 LOOP IN**
13 **COMBINATION WITH LOCAL CIRCUIT SWITCHING?**

14 A. Yes, but only for customers with PRI capability. For this limited portion of the DS1
15 market, FSN has been able to offer customers a savings of approximately 20% as
16 compared to Verizon's retail rates.

17 **Q. DOES FSN HAVE FUTURE BUSINESS PLANS TO SERVE CUSTOMERS**
18 **THROUGH THIS WHOLESALE ARRANGEMENT?**

19 A. Yes, now that the DS1 Platform appears to be a commercially viable wholesale product
20 for all DS1 customers (and assuming its continued availability), FSN intends to
21 significantly expand its plans to serve DS1 customers through this wholesale
22 arrangement.

23 **Q. MR. MALFARA, PLEASE IDENTIFY YOURSELF AND PROVIDE A**
24 **SUMMARY OF YOUR PROFESSIONAL BACKGROUND AND REMI'S**
25 **BUSINESS WHICH IS RELEVANT TO THIS PROCEEDING.**

1 A. My name is David Malfara. I am a Director and President and CEO of Remi. My
2 business address is 138 South Main Street, Greensburg, Pennsylvania 15601. I am also a
3 founding director of Boathouse Communications Partners LLC, a Philadelphia-based
4 investment and management firm which is the majority shareholder of Remi.

5 Prior to this, I was President and co-founder of Z-Tel Network Services, Inc. the
6 CLEC subsidiary of Z-Tel Technologies. Under my direction, Z-Tel Network Services
7 became the largest consumer-based CLEC in the U.S., achieving an annual revenue run
8 rate of nearly \$300 million, with more than 340,000 subscribers at the time of my
9 departure in January of 2001.

10 I have been active in the telecommunications industry for more than 27 years. In
11 1983, I formed Pennsylvania Alternative Communications, Inc., and its subsidiary, Pace
12 Long Distance, which grew to operate nationally and was later sold to LCI International.
13 In 1995, I co-founded Pace Network Services ("PNS"), which provided traffic and
14 signaling network oriented services to telecom carriers. PNS became the largest supplier
15 of SS7 connectivity to the interexchange carrier market with over 100 carrier-customers
16 prior to its sale to ICG Telecom Group, Inc. in 1996. In 1979 I co-founded Vector
17 Communications, Inc. – one of the first third-tier long distance carriers, and I've served
18 in senior management positions at National Computer Corporation, Honeywell
19 Information Systems, and GTE Telenet. I currently serve as a Director and Executive
20 Committee member of CompTel, the leading competitive telecommunications industry
21 association, and as Chairman of CompTel's Technology Task Force.

22 Remi is a relatively small CLEC which entered Pennsylvania as a local service
23 provider in mid-2002. Remi is headquartered in western Pennsylvania in a rural part of

1 the Commonwealth. Remi's business market is Pennsylvania. Remi employs a growing
2 work force of approximately 20 Pennsylvanians and its distribution channel consists of
3 21 entrepreneurial companies that represent Remi's products and services throughout the
4 Commonwealth through a network of hundreds of Pennsylvania-based sales people and
5 support staff who make part of their living by selling Remi products.

6 Remi is a "smart communications" company that combines the best local, long-
7 distance, toll free, and unified messaging solutions in simple yet cost-efficient bundles by
8 leveraging the unbundled network element platform ("UNE-P"). Remi supplements the
9 unbundled network elements ("UNEs") leased from Verizon with proprietary technology
10 that allows innovations from Remi that uniquely configure and optimize the integration
11 of necessary network elements, ensuring both least cost status as compared to other
12 competitive local providers and product delivery innovations that are unavailable from
13 other local telecommunications providers. At this time, Remi does not own or operate
14 any local switches in Pennsylvania, however, like all other CLECs, Remi will invest and
15 deploy switches as soon as economies and market conditions permit.

16 Remi's fundamental goal is to be the simplified, low cost, low risk alternative
17 provider that was the vision and promise of the Telecommunications Act of 1996.
18 Remi's flagship product is the "RemiPack," which is a voice service offering that comes
19 in 2, 3, 5, and 24 line packages. RemiPack includes analog or digital telephone lines,
20 thousands of local and long-distance minutes and a variety of optional services.
21 RemiPack 2, 3 and 5 are designed for small business and can be expanded with
22 incremental lines, and RemiPack 24 is a DS1-based product designed for businesses that

1 must sustain unexpected surges in call volumes, allowing a peak capacity of a full 24
2 lines of digital service.

3 Remi's Intelligent Bundle and its *ALERT ("Allow Least Expensive RaTe")* rating
4 feature **automatically** provide businesses with cost-optimized local and long distance
5 calling minutes. Remi's Intelligent Bundle also optimizes the local and long distance
6 minutes used by a business with multiple locations as it pools total plan minutes across
7 all customer locations, including home offices, and dramatically reduces the time for bill
8 review making its customers more efficient. Finally, with the Intelligent Bundle's
9 Facility Independence feature, multi-location customers can use pooled minutes
10 purchased at low, DS1 dedicated rates at the headquarters location to lower the cost of
11 calling in their smaller offices in rural locations. With the Intelligent Bundle, even if the
12 calling patterns of a business' locations change dramatically from month to month, the
13 business is still assured of the most efficient use of its plan minutes, thereby maximizing
14 the value of communications dollars spent. In short, Remi's proprietary software ensures
15 that businesses are billed the lowest possible rate for service, based on how the consumer
16 uses telephone service, rather than based on the plan a consumer happens to enroll in. By
17 guaranteeing least-cost billing and reducing multiple bills into a single bill, businesses no
18 longer need to administer or analyze a confusing array of bills. This type of consumer-
19 friendly functionality is not offered by incumbents, such as Verizon.

20 Remi also offers its customers a variety of enhanced messaging services,
21 including voicemail and faxmail. RemiMessenger can deliver voicemails to standard
22 voicemail boxes, convert the message to ".wav" format and simultaneously email the
23 message to the subscriber. RemiMessenger also can receive faxes, convert them into

1 “.pdf” files and automatically email them to a designated address. Moreover, Remi
2 Messenger produces a true “.pdf” electronic file format that can be attached to any
3 customer record, and added to any of the currently available database programs.

4 Finally, Remi offers its customers a smooth operating environment for mixed
5 technologies, supporting newer customer premise equipment based upon voice-over-
6 packet technology with an intelligent interface to the legacy public switched network
7 through High-Capacity Primary Rate Interface (“PRI”) interconnections. Businesses
8 making telephone system buying decisions increasingly are considering the formidable
9 benefits of purchasing Internet Protocol-based PBX systems because of their efficiency in
10 using IP transport, where available, and conventional transport for interaction with
11 subscribers on the Public Switched Telephone Network (“PSTN”).

12 Although it is certainly possible for the incumbents to support these advanced
13 systems, they have no incentive to do so for fear of “cannibalizing” existing high-cost
14 enterprise services. Of course, these very incumbent-provided retail services are beyond
15 the reach of many small businesses, and Remi’s ability to obtain unbundled local
16 switching DS1 and PRI ports is vital to Remi’s ability to bring innovative services to
17 small and medium-sized businesses that would otherwise be unable to obtain these
18 advanced communications functionalities.

19 **Q. DOES REMI CURRENTLY SERVE CUSTOMERS THROUGH A**
20 **COMBINATION OF A DS1 LOOP AND LOCAL CIRCUIT SWITCHING?**

21 A. Yes. The DS1 Platform forms the foundation of our RemiPack24 service. The
22 RemiPack24 provides the customer with a high-capacity facility and a bundle of 5000
23 local minutes and 20,000 Anytime/Anywhere minutes. Because of Remi’s Intelligent
24 Bundle and the Facility Independence feature customers can use these minutes from

1 analog lines at outlying office locations. In other words, once the minutes are purchased,
2 they may be used by any facility at any customer location. It is very popular for
3 customers to purchase a RemiPack24 at the main office location and use the included
4 minutes at their higher-cost rural locations. This results in dramatic savings and
5 efficiency enhancements for the customer which remove significant operational cost
6 barriers to conducting business in more rural areas of the Commonwealth. The product is
7 enjoying strong visibility in the banking, healthcare, real estate and insurance sectors.

8 **Q. DOES REMI HAVE BUSINESS PLANS TO EXPAND ITS USE OF THIS**
9 **WHOLESALE SERVICE ARRANGEMENT TO OTHER ENTERPRISE**
10 **CUSTOMERS?**

11 A. Yes. Remi currently plans to offer service throughout the Commonwealth using the DS1
12 Platform as a critical facilitator of our market penetration strategy. Important decisions
13 regarding capital expenditures will be made based upon the speed and degree to which
14 we are able to capture market share. The DS1 Platform is an integral part of that strategy.

15 Remi has only been providing service in Pennsylvania for a little more than 1 ½
16 years. Since Remi is privately funded, and since our majority stockholder, BCP, is
17 constantly evaluating numerous investment opportunities, we must be certain that our
18 plans for Remi's expansion are based upon a stable foundation. This includes the
19 legislative/regulatory framework in the areas in which we operate, the technology
20 available to us and the critical timing of our capital purchases which will ensure that we
21 are building an infrastructure that will support our operation for many years to come and
22 finally, the willingness of capital markets to support our expansion. Our business plan is
23 one of evolution. It is vital to Remi's development that we emerge from our early
24 development period as quickly as possible. Because our business case is focused on
25 businesses with locations in all areas of the Commonwealth, it is critical that we are able

1 to compete on equal footing with the Incumbent LEC. Barring the complete replication
2 of the incumbent local exchange carrier's ("ILEC") network as a prerequisite to market
3 entry, Remi needs access to the unbundled network elements, including DS1 Platform, in
4 order to capture sufficient market share to support our plans for investment and
5 expansion.

6 **Q. MR. DULIN, PLEASE IDENTIFY YOURSELF AND PROVIDE A SUMMARY**
7 **OF YOUR PROFESSIONAL BACKGROUND AND ATX'S BUSINESS WHICH**
8 **IS RELEVANT TO THIS PROCEEDING.**

9 A. My name is Scott Dulin. My business address is 50 Monument Road, Bala Cynwyd, PA
10 19004. I have worked for ATX since 1988 and have been responsible for operational,
11 technical and business issues relating to the planning, development and implementation
12 of ATX's local product offering. To that end, I have also participated in the various
13 regulatory and legislative initiatives promoting fair competition in the local market and
14 ILEC compliance.

15 Founded in 1985, ATX maintains its headquarters in Bala Cynwyd, Pennsylvania
16 and provides a broad range of service including local, long distance, and data
17 communications, ATX employs a staff of more than 600 in Pennsylvania, most of which
18 are Pennsylvania residents, and an additional 600 throughout the Mid-Atlantic and
19 Midwestern United States, ATX generates \$300 million in annual revenue and operates
20 multiple local and long distance switches in Pennsylvania. In order to gain access to the
21 end user, ATX utilizes the public switched network, an infrastructure operated and
22 maintained by Verizon for most of Pennsylvania.

23 **Q. DOES ATX CURRENTLY SERVE CUSTOMERS THROUGH A DS1 LOOP IN**
24 **COMBINATION WITH LOCAL CIRCUIT SWITCHING?**

1 A. No. ATX has a strong desire to offer products utilizing a DS1 Platform, but does not due
2 to operational impairment issues. After the wholesale product was ordered by the
3 Commission and tariffed by Verizon, ATX performed marketability and profitability
4 analyses, concluding that the product was viable as an offering. ATX then conducted an
5 installation simulation to test the operability of Verizon's DS1 Platform, which revealed
6 far-reaching problems with the wholesale product. Based on this outcome, ATX
7 determined this wholesale product to be operationally unviable. Within the last few
8 weeks, however, Verizon appears to have made the DS1 Platform available in a manner
9 which may be usable by CLECs to serve DS1 enterprise customers. Due to this recent
10 development, ATX has decided to reinitiate product development and design activity
11 pending a favorable outcome in this proceeding.

12 **Q. WILL A DS1 PLATFORM BE VALUABLE TO ATX IN EXPANDING ITS**
13 **NETWORK OUTWARD FROM THE PHILADELPHIA METROPOLITAN**
14 **AREA IN THE FUTURE?**

15 A. Absolutely. As with other customers, UNE-P provides a vehicle for CLECs to develop
16 an enterprise or mass market customer base, including for DS1 customers, with sufficient
17 concentration and scale to justify the investment in new transport and switching facilities.

18 A local switch primarily serves the immediately surrounding geographical area
19 from its physical location. For ATX in Pennsylvania, this area is the Philadelphia
20 metropolitan area. Since the geographic coverage or reach of a local switch is
21 economically restricted by the cost elements of loop/collocation/transport distance, ATX
22 cannot expand its DS1 customer base outward from a given market without the
23 availability of a product that limits the substantial costs resulting from transporting traffic
24 over great distances from switch to end user. DS1 Platform is the only product that

1 accommodates this problem for DS1 customers outside the optimal range of a
2 competitive LEC switch as well as in more rural geographic regions.

3 **Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?**

4 A. Our testimony is designed to rebut the national finding that the Federal Communications
5 Commission (“FCC”) reached in its “Triennial Review Order” (“TRO”) – that being that
6 CLECs would not be impaired without access to local circuit switching as an unbundled
7 network element (“UNE”) to serve enterprise customers.¹ It is our understanding that
8 evaluation of whether CLECs are impaired without access to local circuit switching is
9 legally required because of a certain provision of the Telecommunications Act of 1996 –
10 namely Section 251(d)(2) of that federal law. Although the FCC made a national finding
11 of non-impairment for local circuit switching, the FCC recognized that the states are
12 “uniquely positioned to evaluate local market conditions and determine whether DSI
13 enterprise customers should be granted access to unbundled incumbent LEC circuit
14 switching.”²

15 Throughout the TRO, the FCC refers to a state commission review of whether
16 impairment exists for a wholesale product throughout a specific state or within areas of a
17 specific state as a “granular” review – in that it is more locally focused than the FCC’s
18 national review. As to local circuit switching for enterprise customers, the FCC
19 established a 90 day window starting on the effective date of the TRO within which states
20 could conduct a state specific granular review. This Commission has decided to conduct

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand and Further Notice of Proposal Rulemaking*, CC Docket No. 01-338 (August 21, 2003) at ¶ 451.

² TRO at ¶ 455.

1 just such a review. The PCC thanks the Commission for dedicating the time and the
2 resources to a matter which is critical to our respective businesses.

3 The Commission has required that we submit the PCC's prima facie case in our
4 original submission. Our testimony is intended to leave no doubt that there is both
5 operational and economic impairment to CLECs if DS1 local circuit switching is
6 eliminated as a UNE. Our testimony will show that while there is impairment throughout
7 this Commonwealth, the impairment becomes overwhelming as one moves out from
8 Pennsylvania's two big cities.

9 We will show this through testimony describing that substantial imposition of
10 costs, service delays, service interruptions or service degradation all too often occur in
11 the migration process for a DS1 customer to a CLEC's switch. We will show through a
12 business model that switch and collocation investment to serve DS1 customers can not be
13 reasonably recovered except possibly in Philadelphia and Pittsburgh. We will show that
14 Verizon PA, in particular, has assured continuing impairment by its refusal or inability to
15 comply with the *Global Order*³ which was issued over four years ago, as well as its own
16 wholesale tariff. We will show this impairment through evidence of the critical nature of
17 the availability of DS1 unbundled circuit switching to the transition of our customers to
18 next generation technology.

19 This testimony will demonstrate impairment within the analytical structure
20 established by the FCC in the TRO. This should not be taken to mean that we agree with
21 any aspect of the FCC's analysis of the impairment issue -- we do not. However, even
22 within the constraints of the FCC's distorted analysis, it is clear that both operational and

³ *Join Petition of Nextlink Pennsylvania, Inc. et. al.*, P-000991648, P-000991649
(September 30, 1999).

1 economic impairment continues for unbundled DS1 circuit switching under a granular
2 Pennsylvania analysis.

3 **II. BACKGROUND.**

4 **Q. BECAUSE NOT EVERYONE SPENDS THEIR PROFESSIONAL LIFE IN THIS**
5 **COMPLICATED BUSINESS, I WANT TO ASK THE PANEL SOME**
6 **PRELIMINARY QUESTIONS SO THAT YOUR EVIDENTIARY**
7 **PRESENTATION IS UNDERSTANDABLE. YOU HAVE INDICATED THAT**
8 **THIS CASE IS ABOUT THE AVAILABILITY OF UNBUNDLED LOCAL**
9 **CIRCUIT SWITCHING FOR DS1 ENTERPRISE CUSTOMERS. CAN YOU**
10 **EXPLAIN WHAT THIS IS?**

11 A. Yes. It is easiest to understand if this question is answered in parts. Local circuit
12 switching is the capability of a switching facility to establish a dedicated transmission
13 path between originating and terminating points and hold that path open for the duration
14 of a local call. From a facilities perspective, local circuit switching includes the line-side
15 and trunk-side facilities, plus the features, functions and capabilities of the switch.

16 The enterprise market is the FCC's term for what the Commission has
17 traditionally called the business market.⁴ However, the lines are not as clear as they are
18 at the state level since the FCC groups smaller businesses which it believes more closely
19 resemble residential customers as mass market customers, not enterprise customers.

20 A DS1 customer is a customer which is served by a local loop with DS1 capacity.
21 DS1 capacity is a 1.544 megabits per second digital signal comprised of 24 digital
22 channels at 64 kilobit per second capacity, typically carried over what is called a T-1
23 facility. While as explained above, the delineation between mass market and enterprise
24 customers in Pennsylvania is not completely clear and will be addressed by the

⁴ On the flip side, the FCC typically refers to the residential market as the "mass market."

1 Commission in the nine month TRO proceeding, it is clear that all DS1 customers are
2 enterprise customers under the FCC's terminology.

3 Taken together, this proceeding addresses whether the capability and functionality
4 of the incumbent local exchange carrier's switch should be continued to be made
5 available as a UNE to enterprise customers served by a local loop with DS1 capacity or
6 above. If not, CLECs would be required to provide their own switching capacity, either
7 through installation of their own local switches or through collocation arrangements at
8 the ILEC's switching facilities to serve every single DS1 customer since the ILEC's
9 switching capacity would no longer be available for that purpose.

10 **Q. YOU SPOKE EARLIER OF IMPAIRMENT. CAN YOU EXPLAIN WHAT**
11 **IMPAIRMENT IS AND WHY IT IS IMPORTANT TO THIS PROCEEDING?**

12 A. Sure. Impairment is both a legal term and a factual term. Impairment, as a legal term
13 originates in Section 251(d)(2) of the Telecommunications Act and, has been defined by
14 the FCC as follows: "A requesting carrier is impaired when lack of access to an ILEC's
15 network element poses a barrier or barriers to entry, including operational and economic
16 barriers, that are likely to make entry into a market uneconomic."⁵

17 While impairment is a legal standard, whether there is impairment is immersed in
18 a myriad of often complicated facts. Accordingly, it is our understanding that the
19 purpose of the record in this proceeding is to determine specifically whether CLECs are
20 impaired in Pennsylvania without access to the ILEC's unbundled local circuit switching

⁵ TRO at 9. While the statutory test under the Telecommunications Act is "necessary or impair," it is our understanding that because the FCC has determined that the impair standard is less demanding than the necessary standard, the FCC and the state commissions are only required to examine whether impairment exists.

1 to serve enterprise customers served by local loops at DS1 capacity or above. Hopefully,
2 when broken down, its not as complicated as it seems at first glance.

3 **Q. CAN YOU EXPLAIN HOW A CLEC WOULD SERVE A DS1 ENTERPRISE**
4 **CUSTOMER THROUGH THE USE OF LOCAL CIRCUIT SWITCHING FROM**
5 **THE ILEC?**

6 A. Yes. A CLEC would typically serve a DS1 enterprise customer through a combination of
7 local circuit switching, a DS1 (or higher capacity) local loop and transport facilities,
8 which together would allow the CLEC to serve the customer. When a CLEC serves a
9 customer without using its own switching capacity, loop or transport, the wholesale
10 service arrangement is commonly referred to as the Unbundled Network Element
11 Platform or "UNE-P."⁶ Because this proceeding addresses UNE-P in the content of DS1
12 or higher loops, we will refer to this specific wholesale arrangement as a "DS1 Platform."

13 With this background, we hope our testimony is understandable to readers who
14 are not immersed in the business world that we live in on a daily basis.

15 **III. THE FCC'S FINDINGS.**

16 **Q. HAS THE FCC BASED ITS NATIONAL NON-IMPAIRMENT RULE ON**
17 **NATIONAL FACTUAL FINDINGS?**

18 A. Yes. In fact the FCC based its national determination entirely on three specific factual
19 findings as follows; all of which are found in paragraph 421 of the TRO:

20 Finding No. 1 -- "The evidence in our record establishes that, in
21 most areas, competitive LECs can overcome barriers to serving
22 enterprise customers economically using their own switching
23 facilities in combination with unbundled loops (or loop facilities)."

⁶ When the CLEC provides its own switching capacity and leases a local loop from the ILEC, the wholesale service arrangement is commonly referred to as "UNE-L." For new customers, it is also possible that a CLEC would install its own DS1 or higher loop and utilize the switching capacity of the ILEC on an unbundled basis to provide service to that loop.

1 Finding No. 2 -- "The facilities used to provide DS1 capacity or
 2 above services to enterprise customers typically are not pre-wired
 3 to incumbent LEC switches, allowing competing carriers to avoid
 4 the costs and service disruptions associated with "hot cuts" – the
 5 manual process by which customer lines are migrated to
 6 competitor switches."

7 Finding No. 3 -- "Enterprise customers also generally offer
 8 increased revenue opportunities and are more willing to enter long-
 9 term contracts, allowing competitive LECs a greater ability to
 10 recover the nonrecurring costs associated with providing service
 11 using their own switches."

12 The first and the third findings pertain to whether there is economic impairment.

13 The second finding pertains to whether there is operational impairment. It is our
 14 understanding that if either type of impairment is found either throughout Pennsylvania
 15 or in a portion of Pennsylvania, this Commission will seek an exception to the national
 16 non-impairment rule for DS1 switching from the FCC on or before December 31, 2003,
 17 or by a date subsequently established by the FCC.

18 **Q. ARE THE FCC'S FACTUAL FINDINGS SUPPORTABLE UNDER A**
 19 **PENNSYLVANIA SPECIFIC GRANULAR APPROACH?**

20 A. No, they are not. A factual review of the Pennsylvania market and geographic sectors of
 21 the Pennsylvania market reveals that a Pennsylvania analysis supports much different
 22 findings, ultimately resulting in a clear picture of impairment in this case.

23 **1. FCC FINDING NO. 1 -- "The evidence in our record establishes that, in**
 24 **most areas, competitive LECs can overcome barriers to serving enterprise**
 25 **customers economically using their own switching facilities in combination**
 26 **with unbundled loops (or loop facilities)."**

27 **Q. IS THE FCC'S FINDING NO. 1 TRUE UNDER A PENNSYLVANIA SPECIFIC**
 28 **GRANULAR EVALUATION?**

29 A. No. Review of the historic deployment, scope of deployment, recent history of
 30 deployment and likely future deployment shows that Pennsylvania CLECs, even if they

1 deploy their own switches, can not overcome economic barriers to entry for DS1
2 enterprise customers around the state.

3 **Q. AREN'T CLECS USING SWITCHES TO SERVE DS1 CUSTOMERS IN**
4 **PENNSYLVANIA?**

5 A. Yes they are. However, given the long trail of business failures and bankruptcies in the
6 CLEC industry, there is a serious question as to whether the provision of service through
7 self provisioned switching is profitable and generating a return over some reasonable
8 period of time as demanded by investors.

9 With that said, although we are not privy to the facility inventories of other
10 CLECs, it is clear to us from our day-to-day operations that the deployment of switches
11 which serve or could serve DS1 customers has decreased dramatically over the past five
12 years. In fact, we are not aware of any substantial new switch deployment in
13 Pennsylvania over the last three years. This does not mean that no new switches which
14 serve DS1 customers have been deployed, only that any such activity has been relatively
15 minimal.

16 **Q. WHAT DO YOU ATTRIBUTE THIS TO?**

17 A. We attribute this to factors which represent the core of this proceeding. Investment
18 decisions in switches are driven almost entirely by market conditions. As in any other
19 business, a CLEC can only invest in switch deployment if it can satisfy its lenders and
20 investors that it will not only recover its costs over a reasonable period of time, but
21 generate an acceptable return. Of course, following deployment of a switch, the CLEC
22 must operate the switch, as well as provide service by any other available means, in a
23 manner which satisfies its obligations to these lenders and investors. While at one time it
24 appeared that the market conditions in Pennsylvania justified such investment in

1 switches, those market conditions have deteriorated and are not currently supporting
2 relatively substantial switch investment.

3 **Q. IS IT TRUE THAT CLECS WILL NOT RISK VALUABLE CAPITAL IN**
4 **SWITCHES IF OTHER LESS CAPITAL INTENSIVE ALTERNATIVES ARE**
5 **AVAILABLE?**

6 A. Absolutely not, although we hear this rhetoric routinely from ILECs. This claim simply
7 ignores business reality. The deployment of switches provides potential far-reaching
8 benefits for our companies and other CLECs, which benefits are necessary to our ultimate
9 survival as an industry. Those benefits include the ability to deploy new products, greater
10 flexibility in the ordering, provisioning and billing processes, greater potential
11 profitability and more direct control of the product. We all understand first hand the
12 immense difficulties caused by our dependence on ILECs which are also the dominant
13 retail competitor in our business. The business contradiction of relying on a monopoly
14 wholesaler will never result in the cost and quality of wholesale service which is
15 necessary for a healthy CLEC industry. Elimination of dependency on the ILEC switch
16 is a critical goal for each and everyone of us – a goal we all must ultimately achieve.
17 However, in the near term, that dependency is an unfortunate business necessity and to
18 prematurely eliminate unbundled switching runs the risk of eliminating CLEC switch
19 deployment, because CLECs will not be around to invest in switches or anything else.

20 **Q. CAN THE PANEL EXPLAIN HOW THE AVAILABILITY OF A PLATFORM**
21 **GENERATES THE ECONOMIES WHICH WOULD JUSTIFY SWITCH**
22 **INVESTMENT?**

23 A. Yes. Like any other business investment, the investment in a switch must result in a
24 product which attracts enough customers and generates enough revenues to justify the
25 original expenditure over a reasonable investment cycle. Deploying a switch when the

1 CLEC has no customers can not be justified in today's business environment in
2 Pennsylvania. This equation is equally true for DS1 customers.

3 The availability of a DS1 Platform enables CLECs to build a DS1 customer base,
4 creating economies that will then justify switch investment over time. How quickly this
5 occurs is dependent on the density of the areas in which the CLEC is considering
6 deployment, since a local switch can only reach the customers in a limited geographic
7 area, and advancements in switch technology. While expanding the coverage of the
8 switch through Enhanced Extended Links ("EELs") or through collocation is certainly an
9 option theoretically, these options are only available from a business perspective if the
10 additional costs associated with EELs and collocation, as those wholesale products are
11 offered in Pennsylvania by Verizon, can be justified and recovered from a business
12 perspective.

13 **Q. WHAT DO YOU MEAN WHEN YOU SAY THAT ADVANCEMENTS IN**
14 **SWITCH TECHNOLOGY WILL IMPACT INVESTMENT DECISIONS?**

15 A. Historic decisions made by CLECs to deploy switches in Pennsylvania have been made
16 based on whether economies of scale justified building completely redundant switching
17 environments that were and are in most regards similar to that of the Incumbent LEC. In
18 most instances, those economies were and are only attainable in densely populated areas
19 of the Commonwealth. Geographic location of a customer base has therefore been a
20 primary focus to facilities-based CLECs and has limited switch deployment in non-urban
21 areas thereby denying the benefits of competition to non-urban customers.

22 As switch technology advances to next generation networks, we believe that not
23 only will the geographic location of a customer base matter less, but the economies of
24 scale required to make switch deployment economically attractive will also be reduced.

1 In such an environment, CLECs would be seeking to justify investment in new
2 technologies and improved services for customers instead of in building redundant
3 technologies.

4 Without an available DS1 Platform with which to build statewide customer bases,
5 CLECs will not be part of the development of next generation network investment and
6 will be compelled to justify new investments in redundant legacy networks that may be
7 outdated long before the costs associated with their deployment are recovered, to the
8 detriment of Pennsylvania's network modernization efforts.

9 **Q. IS THIS PREMISE REGARDING PLATFORM APPLICABLE FOR**
10 **ENTERPRISE CUSTOMERS OR ONLY FOR MASS MARKET CUSTOMERS?**

11 A. It is true for all customers. While DS1 customers certainly provide more revenue per
12 customer than mass market customers it does not change the fact that a CLEC can not
13 economically support switch deployment unless it can first reach and than attract enough
14 customers and generate enough revenues to justify the original investment. As in the
15 mass market, the unrestricted availability of the DS1 Platform is a critical, necessary first
16 step for widespread switch deployment by CLECs, in particular outside of major
17 metropolitan areas. This is exactly why both this Commission and the FCC required
18 Verizon to offer a DS1 Platform to enable CLECs to serve DS1 customers in the first
19 place.

20 **Q. HAS VERIZON MADE A DS1 PLATFORM AVAILABLE TO CLECS IN**
21 **PENNSYLVANIA?**

22 A. Although the PUC required Verizon to make the DS1 Platform available more than four
23 years ago, the wholesale product it offered to CLECs was only usable if the customer was
24 willing to spend tens of thousands of dollars to install PRI capability in its customer
25 premises equipment. Although not impossible, it is difficult to convince a customer to

1 A. expend this amount of money to change service providers even when the upgrade enables
2 service with greatly enhanced capabilities, like those available through PRI. Verizon's
3 DS1 Platform product was only usable for PRI customers because only through PRI
4 capability could the product provide the CLEC with the call detail records ("CDR")
5 which would allow the CLEC to bill its customer for the CLEC's retail services. This
6 restriction on availability of Verizon's DS1 platform was far from minor since the vast
7 majority of DS1 customers do not have PRI at their customer service premises. As a
8 result, up until recently, Verizon's DS1 Platform was, in fact, only available to serve a
9 relatively small sector of the DS1 market.

10 **Q. MR. MALFARA, CAN YOU SPEAK DIRECTLY TO REMI'S EXPERIENCES**
11 **WITH DS1 PLATFORM AVAILABILITY?**

12 Yes. Verizon's tariff has committed Verizon to an unrestricted DS1 Platform, as
13 required by the Commission in its *Global Order*, since December 1, 1999, the effective
14 date of Section 3, 2nd Revised Sheet 8 of the Verizon Tariff PA – PUC No. 216.
15 Notwithstanding this apparent availability, it was not until late January 2003 that Remi
16 became the first carrier in the Commonwealth to successfully provision a two-way DS1
17 Platform (performed under a Verizon process known as a “First Office Application”) in
18 its native state to a non-PRI DS1 customer. Remi's attempt to order and provision a DS1
19 Platform began almost 8 months prior to the actual provisioning in June of 2002. While
20 the DS1 Platform was fully furnished in January of 2003, the fiasco did not end there.
21 After delay upon delay in responding to Remi's repeated attempts to resolve the issue,
22 Remi was finally informed by Verizon that it had no mechanism under which Verizon
23 could collect and transmit CDRs, which as explained previously was a necessity for Remi
24 to issue retail bills.

1 In fact, Verizon had not thought through the provision of DS1 Platform service
2 and had to subsequently create software to accommodate the provisioning and billing of
3 this offering. After provisioning this customer in January of 2003 (after an 8 month
4 delay), Remi did not begin receiving CDRs until approximately two weeks ago. During
5 this lengthy delay the customer was unable to receive call detail records vital to its
6 accounting practices as a law firm. Remi has not yet verified whether all CDRs are being
7 properly collected by Verizon and received by Remi. As a result of this lack of foresight
8 by Verizon and in the interest of protecting prospective customers, Remi was forced to
9 suspend sales of this critical component of our product matrix for more than one year of
10 our one and one half year existence.⁷

11 In the full year spent developing Remi's business plan throughout 2001, we
12 incorporated several capabilities into our product matrix that were dependent upon the
13 offerings outlined in Tariff 216 and in our interconnection agreement with Verizon PA.
14 The DS1 Platform was and is a critical component of our approach to multi-location
15 businesses and was branded by Remi as RemiPack24 service.

16 This lack of availability has severely curtailed our ability to compete for these
17 business customers in Pennsylvania. A year of planning with a very carefully constructed
18 product matrix should have been supported by UNEs purported to be available in
19 Verizon's tariff and Remi's interconnection agreement. Unfortunately, Remi found that
20 the DS1 Platform simply was not available. The result was that Remi could not attract
21 the customer base that was the very focus of its business plan because of Verizon's

⁷ Remi was beyond persistent in its attempts to require Verizon to provide a DS1 Platform to serve non-PRI customers. Other less persistent CLECs, including the other three PCC CLECs, simply gave up on the process when it became clear that the DS1 Platform was generally unusable from an operational perspective.

1 failure to provide the unrestricted DS1 Platform it was ordered to provide by both the
2 FCC and this Commission.

3 If these operational issues are really behind us, and we are somewhat skeptical
4 that they are, Remi now looks forward to incorporating unrestricted DS1 Platform, as we
5 originally intended, into our overall strategy to service multi-location customers
6 throughout Pennsylvania (assuming it continues to be available). It is well to keep in
7 mind that our ability to do so will be hampered by the fact that Verizon still has no
8 standard process for ordering DS1 Platform and that each order is processed by hand,
9 dramatically increasing the chances of error in the migration process. Maybe this story
10 explains why this proceeding, which threatens the availability of the DS1 Platform just
11 when it is finally becoming a usable wholesale product, is of such dire importance to our
12 business.

13 **Q. HAS THE UNAVAILABILITY OF A DS1 PLATFORM FOR NON-PRI**
14 **CUSTOMERS AFFECTED CLEC SWITCH DEPLOYMENT IN**
15 **PENNSYLVANIA, IN PARTICULAR OUTSIDE OF THE TWO MAJOR**
16 **METROPOLITAN AREAS?**

17 A. It certainly has for the PCC members. If we, as a group, had been provided the
18 opportunity to build-up our DS1 customer bases through a usable DS1 Platform, that
19 revenue opportunity would have undoubtedly justified additional investment decisions,
20 whether those decisions involved installation of a new switch or expansion of the
21 coverage of an existing switch through EELs or collocation. This additional investment
22 did not take place.

23 **Q. ARE CLECS DEPLOYING SWITCHES WHICH CAN ECONOMICALLY**
24 **SERVE DS1 CUSTOMERS OUTSIDE OF MAJOR METROPOLITAN AREAS?**

25 A. Not that we are aware of. Furthermore, as explained below, because of the terms and
26 conditions of wholesale service in Pennsylvania associated with expanding the coverage

1 of existing switches to serve customers outside of the metropolitan areas, there are
 2 relatively few DS1 customers being served by CLEC switches as one moves away from
 3 the cities and into the rural parts of Pennsylvania.

4 **Q. WHAT FACTORS LIMIT CLECS IN UTILIZING CLEC SWITCHES TO**
 5 **EXTEND SERVICE OUT TO DS1 CUSTOMERS IN OTHER AREAS?**

6 A. One of the major factors is another area in which Verizon is in violation of this
 7 Commission's four year old *Global Order* requirements -- the unavailability of a DS1
 8 EEL with concentration.⁸ EELs are critical to CLEC network expansion for the simple
 9 reason that they permit the CLECs to spread the recovery of its switch investment over a
 10 greater number of customers, central offices and remote terminals without incurring
 11 collocations costs which would otherwise be necessary -- collocations costs which are
 12 themselves prohibitive without the availability of a DS1 Platform to build up a customer
 13 base in a certain area. EELs have the potential to substantially reduce the CLECs average
 14 switching cost per customer and allows efficiencies that Verizon already enjoys as the
 15 owner of a network that was built and engineered (with guaranteed ratepayer funding) to
 16 accommodate 100% of the network. However, EELs are of very limited use without
 17 concentration, since otherwise the CLEC will incur exorbitant transport costs on a per
 18 customer basis in backhauling traffic to the CLEC's switch.

19 Like the DS1 Platform, DS1 EELs with concentration were specifically ordered
 20 by the Commission to be offered by Verizon⁹ and are included in Verizon's wholesale

⁸ An EEL is the combination of an unbundled loop, the potential for multiplexing and unbundled interoffice transport. Concentration is the function of increasing the ratio between loops and transport, thereby reducing both transport costs and wasted transport capacity by 75% to 90%.

⁹ *Global Order* at 91-92.

1 tariff. However, they simply were never provided. In fact, recently, Administrative Law
 2 Judge Gesoff expressly recognized that this four year old requirement remained
 3 unfulfilled by Verizon.¹⁰

4 Instead, when a CLEC attempts to order a DS1 EEL with concentration, the
 5 CLEC will be informed that it is the CLEC which must provide the concentration.¹¹ This
 6 requirement by Verizon, in violation of Commission and tariff requirements, significantly
 7 limits the usefulness of EELs to extend out the CLECs network..

8 **Q. ARE THERE OTHER FACTORS WHICH AFFECT EXPANSION OF SWITCH**
 9 **COVERAGE WHICH ARE SPECIFIC TO PENNSYLVANIA?**

10 A. Yes. Even aside from the lack of concentration, the pricing of EELs needed to expand
 11 switch coverage without incurring collocation costs are exorbitant. In order to provision
 12 an EEL to extend a CLEC's switch coverage outward into other exchanges, the CLEC
 13 must pay a substantial entrance facility charge which, particularly in combination with
 14 concentration costs, makes use of EELs prohibitively expensive for areas where an EEL
 15 is the only efficient means to serve DS1 customer from the CLEC's switch.

16 **Q. CAN'T A CLEC USE COLLOCATION TO SERVE CUSTOMERS OUTSIDE OF**
 17 **THE REACH OF THE CLEC'S LOCAL SWITCHES?**

18 A. Sure. But again, only if the economics are justified. However, collocations involve
 19 significant costs which are in part distance sensitive in nature. Accordingly, the ability to

¹⁰ *Verizon Pennsylvania, Inc.; Petition and Plan for Alternative Regulation Under Chapter 30; 2000 Biennial Update to Network Modernization Plan; R-00930715F002. (March 24, 2003. Rec. Dec.) at 83 ("Verizon is required to provide concentrated EELs in Pennsylvania and includes such an offering in Verizon Pa. P.U.C. - No. 216, Section 3.")*

¹¹ This is despite the fact that the Commission, in the *Global Order* could not have been clearer as to who had to provide the concentration. "BA-PA will provide all necessary multiplying as well as any necessary concentration to provide these combinations as part of the interoffice transport function." *Global Order* at 92.

1 use collocations to extend a CLECs network outside of the major metropolitan areas is
2 very limited as is reflected in Exhibit PCC-1.

3 **Q. MR. DULIN, AS A SWITCH BASED DS1 PROVIDER, WHAT IS YOUR**
4 **PERSPECTIVE ON THE AVAILABILITY OF THE DS1 PLATFORM?**

5 A. First of all, as indicated earlier in this testimony, the only reason ATX serves its DS1
6 customers exclusively through its own switches is because, from our perspective, the DS1
7 Platform offered by Verizon in Pennsylvania was not a usable wholesale product because
8 of operational deficiencies -- at least until very recently. From ATX's perspective, which
9 I realize may be slightly different than other CLECs, ATX had no commercial choice but
10 to serve DS1 customers, including PRI customers, through its own switches.

11 With that said, even with our switches, we are very restricted in our ability to
12 serve this customer base by pure geography. Because of economies of scope and scale, at
13 the time ATX was installing and purchasing its switches some time ago, ATX could only
14 justify switch investment in the metropolitan Philadelphia area. As a result, without
15 additional arrangements, ATX's switches are only capable of serving DS1 customers in
16 the coverage area which covers the most urban area of the Commonwealth.

17 It is easy to say that if ATX wants to serve other DS1 customers it should merely
18 go out and install more switches around the state. This simplistic view overlooks the fact
19 that switches are a multi-million dollar investment. Furthermore, the economies simply
20 can not support this notion and neither our lenders nor our investors would allow such a
21 misguided business plan.

22 In the Philadelphia LATA (228) alone, for example, this presumption ultimately
23 leads to the absurd outcome of CLECs installing more than 150 switches to optimally
24 serve the Verizon territory in the same LATA. Verizon relied on its monopoly customer

1 base, acquired prior to the Telecommunications Act of 1996, in order to deploy its more
2 than 150 switches. To presume that a CLEC, bearing a proportionately trivial percent of
3 the market share, can and should install enough switches to optimally serve this market
4 rejects business reality in favor of regulatory imagination.

5 A company like ATX will only deploy a switch where it is profitable to do so. Its
6 fiduciary duty to its shareholders mandates this. The removal of viable wholesale access
7 will not yield the result of forced-deployment, but rather fundamental market exclusion.
8 ATX will be excluded from offering service in markets incapable of economically
9 justifying the deployment of multiple switches, and customers in those markets will be
10 denied competitive alternatives. Given the disparate population distribution of
11 Pennsylvania, most geographic markets will be excluded on this basis.

12 Even as to operation of our own switches, to serve DS1 customers we must
13 engage in a daily struggle to overcome the operational deficiencies and market power of a
14 huge competitor, who unfortunately we are completely dependent on as a wholesale
15 provider. The availability of a commercially usable DS1 Platform would significantly
16 enhance our ability to expand our DS1 customer base, not only in the vast majority of
17 Pennsylvania that we cannot reach with our switches, but also within our switch coverage
18 area. From a businessman's perspective, to suggest that we have not been economically
19 impaired without a useable DS1 Platform and that we will not continue to be
20 economically impaired without the DS1 Platform is absurd.

21 **Q. CAN'T YOU EXTEND THE EXISTING COVERAGE OF YOUR SWITCHES**
22 **THROUGH COLLOCATION OR EELS?**

23 **A.** These options are available, but they are very limited because of circumstances unique to
24 Pennsylvania as described in the panel testimony above and as exemplified in the

1 business case exhibit sponsored by Mr. Schwencke (Exhibit PCC-1). There are
2 substantial costs associated with both EELs and collocation. Furthermore, both EELs and
3 collocation (coupled with transport) cause CLECs to incur wholesale costs which are
4 distance sensitive. Accordingly, the further a prospective customer is from a DS1 switch,
5 the less likely that either alternative will be economically viable. While we use these
6 options when they make economic sense, it remains economically unviable for ATX to
7 extend its switch coverage to serve DS1 customers outside of the Philadelphia
8 metropolitan area.

9 **Q. FOR THE PANEL, CAN YOU DESCRIBE THE SITUATION PERTAINING TO**
10 **THE ABILITY OF CLECS TO SERVE DS1 CUSTOMERS IN VERIZON**
11 **NORTH'S SERVICE TERRITORY?**

12 A. While there are some CLEC switches serving DS1 customers in isolated parts of Verizon
13 North service territory, generally speaking such opportunities are extremely limited and
14 the presence of operational and economic impairment is even more apparent than in
15 Verizon PA's service territory. Furthermore, Verizon North's DS1 Platform offering has
16 never been tested because it is so prohibitively expensive that a CLEC could not
17 conceivably use it to provide retail service in a manner that would attract any customers.

18 **Q. IS THERE ANY ABILITY FOR CLECS TO SERVE DS1 CUSTOMERS IN NON-**
19 **VERIZON TERRITORIES?**

20 A. No there is not. These companies continue to be protected by rural
21 exemption/suspensions. While we are aware that some limited facilities based
22 competition has been permitted by the Commission in these territories, as far as we are
23 aware, these companies do not offer and have never offered unbundled switching to serve
24 any customer, much less a DS1 customer. Nor are we aware of any CLEC switch serving
25 these areas since this would likely not be legally permitted. This, in and of itself,

1 demonstrates the absurdity of the application of the FCC's national non-impairment rule
2 to all of Pennsylvania.

3 **Q. ARE THE PCC MEMBERS INTERESTED IN SERVING DS1 CUSTOMERS IN**
4 **THESE AREAS?**

5 A. Yes. In particular, FSN would like to take advantage of business opportunities in the
6 service territory of North Pittsburgh Telephone Company ("NPTC"). In fact, if a
7 reasonably priced EEL product was available, FSN could serve DS1 customers in
8 NPTC's service territory through its existing switch..

9

10 **2. FCC FINDING NO. 2 -- "The facilities used to provide DS1**
11 **capacity or above services to enterprise customers typically are**
12 **not pre-wired to incumbent ILEC switches, allowing competing**
13 **carriers to avoid the costs and service disruptions associated**
14 **with "hot cuts" – the manual process by which customer lines**
15 **are migrated to competitor switches."**

16 **Q. IS THE FCC'S FINDING NO. 2 TRUE IN PENNSYLVANIA?**

17 A. No, nothing about the FCC's second factual finding is supportable in Pennsylvania.

18 **Q. IN PENNSYLVANIA, ARE ALL EXISTING ILEC DS1 OR ABOVE LOOPS PRE-**
19 **WIRED TO THE ILEC SWITCH OR THE SWITCH'S DISTRIBUTION FRAME?**

20 A. Yes, this would be the case for all existing DS1 customers served by an ILEC in
21 Pennsylvania.

22 **Q. CAN A PENNSYLVANIA ILEC CUSTOMER SERVED BY A DS1 LOOP**
23 **MIGRATE TO A CLEC SWITCH WITHOUT THE NEED FOR A MANUAL**
24 **HOT CUT?**

25 A. No. Our experience in Pennsylvania is quite different from the basic assumption upon
26 which the FCC based its national finding -- that CLECs can migrate service without
27 utilizing a manual hot cut. Each of our companies have substantial experience with DS1

1 customer migration as they occur in Verizon's service territory and it is this actual
2 Pennsylvania experience which should form the basis for a Pennsylvania specific finding.

3 When a CLEC acquires a commitment from an existing Verizon DS1 customer in
4 Pennsylvania, and places an order to migrate that customer, the first question is whether
5 there are spare loop facilities available from Verizon's central office to the customer
6 premises. If there is no spare facility available, Verizon has no established process (hot
7 cut or otherwise) to migrate the customer to the CLEC's switch-based service. Absent a
8 DS1 Platform, our companies and other CLECs will not be able to provide switch-based
9 local service to the DS1 customer at all unless Verizon, at some point in the future,
10 develops a migration process or agrees to build out loops to these customers for CLECs.
11 From a business perspective, this is an intolerable result which occurs frequently in
12 Pennsylvania and which was not even addressed by the FCC. If CLECs can not
13 technically provide switched-based local service to an entire sector of the DS1 market
14 without access to the DS1 Platform, it is hard to imagine how we are not impaired if this
15 option were eliminated.

16 Moving on, however, if a facility (spare loop) is available, a manual hot cut
17 process is still required between the ILEC and CLEC facilities, contrary to the FCC's
18 finding, the only difference being that the hot cut occurs at the customer premises rather
19 than at the central office. As described below, the fact that the manual hot cut process is
20 at the customer's location does not alleviate the problems identified by the FCC with hot
21 cuts generally. Only the development of a process like electronic loop provisioning or
22 the transition to next generation switching technology can address this problem.

1 **Q. IS THE PARALLEL DELIVERY PROCESS DESCRIBED BY THE FCC IN**
2 **PARAGRAPH 452 OF THE TRO AVAILABLE TO PENNSYLVANIA CLECS**
3 **GENERALLY IN THE DS1 MIGRATION PROCESS?**

4 A. No, it is not. The reality of these migrations is that customers very rarely have excess
5 capacity on their PBX equipment that would allow CLECs to test the operation of its
6 facilities with respect to the customer's unique PBX programming prior to the actual
7 cutover of those facilities. In fact, because these customers normally have complex
8 routing and translation configurations resident in the PBX, the cutover process is much
9 more involved than the hot cut process for analog lines. Though the physical link
10 configuration parameters such as line coding, framing and protocol can be tested prior to
11 cutover, configurations of logical parameters that involve definitions of trunk groups,
12 directional capabilities, Direct Inward Dialing parameters, Direct Outward Dialing
13 parameters, operational settings (PRI 23B+D, 23B+B, 24B, voice, data, call-by-call
14 configuration, etc.) cannot be tested without duplicate customer premise equipment
15 capacity that would, of course, only be needed during the actual migration process.
16 Finally, the number porting activities are exactly the same as those necessary in the mass
17 market hot cut process with the exception that DS1 customers typically have complex
18 routing schemes involving the requirement to support near simultaneous porting of
19 numbers and where a single telephone number may support huge amounts of traffic. The
20 subsequent damage, therefore, that occurs as a result of a badly coordinated number port
21 on the new relationship between customer and carrier is something that the relationship
22 between the CLEC and the customer may not survive.

23 As a group, we have not migrated any Pennsylvania DS1 customers that
24 possessed the requisite excess capacity necessary to use the parallel process described by
25 the FCC to avoid the risk of this live cutover and we do not believe it reasonable to think

1 we will in the future. Essentially, the FCC heavily relies on a scenario with DS1
 2 customers which likely does not exist in Pennsylvania and, if it does, is the rare exception
 3 rather than the rule.

4 **Q. EVEN IF THE SO CALLED PARALLEL PROCESS WERE AVAILABLE,**
 5 **WOULD IT ALLEVIATE THE NEED FOR MANUAL HOT CUTS IN THE DS1**
 6 **MIGRATION PROCESS IN PENNSYLVANIA?**

7 No, the hot cut would just take place at the customer premises, but would have
 8 essentially the same manual process and the same interaction between the parties. In fact,
 9 often, we find that the problems associated with the hot cut process at the central office
 10 are simply aggravated and more egregious when the hot cut moves to the customer
 11 location, as is the case with a DS1 migration. The fact that, as indicated above, there is no
 12 formal hot cut process for DS1 loops at the ILEC central office under this scenario does
 13 not remove the technical necessity that both a physical and logical facility replacement
 14 must occur in a tightly coordinated process involving many participants, including the
 15 ILEC. In these types of migrations, the required coordination between the customer, the
 16 CLEC, the interconnect company who supports the software and hardware of the
 17 customer premise equipment, the Numbering Plan Administration Center and the ILEC
 18 must be perfect and, even then, the customer may be out of service for significant lengths
 19 of time.

20 **Q. CAN YOU DESCRIBE THE STEPS IN THE HOT CUT PROCESS WHICH**
 21 **OCCURS IN A DS1 MIGRATION?**

22 **A.** Yes. the hot process is a multiple step process which includes the following steps:

- 23 1. Verify and define individual case processes and required additional capacity with
 24 customer and customer's phone system vendor
- 25 2. Notify LEC of migration and obtain CSR
- 26 3. Order facilities through VZ (if available)
- 27 4. Arrange hot cut migration time with LEC, customer and phone system vendor

- 1 5. Design and arrange PBX routing and translations reconfiguration with phone
- 2 system vendor
- 3 6. VZ provisions new facilities
- 4 7. Phone system vendor installs/verifies in-house wiring for new facility
- 5 8. Level 1 and Level 2 testing of new facility with Verizon and phone system vendor
- 6 9. Provision LNP Trigger in both losing and gaining LEC Class 5 switches at least 24
- 7 hours in advance
- 8 10. Activate the numbers in the NPAC at the assigned time and test each
- 9

10 **Q. DOES THE UNAVOIDABILITY OF THE HOT CUT PROCESS IN**
11 **PENNSYLVANIA CREATE ANY ISSUES WITH SERVICE DELAYS, SERVICE**
12 **INTERRUPTIONS OR SERVICE DEGRADATION?**

13 A. Yes, in fact as indicated previously, the potential for service delays, service interruption
14 or service degradation is of the same magnitude as it is with mass market migrations.

15 **Q. DO YOU ENCOUNTER OPERATIONAL IMPAIRMENT ISSUES IN THE HOT**
16 **CUT PROCESS AS A RESULT OF STEPS IN THE PROCESS OTHER THAN**
17 **THE ACTUAL TRANSFER OF WIRES?**

18 A. Yes we do. Because there are operational deficiencies in the process used by Verizon
19 for ordering DS1 migrations, which are particularly problematic if that migration to the
20 CLEC switch involves an EEL, the manual processes utilized by Verizon are all too
21 frequently affected by multiple human or system errors which can cause service delays,
22 interruptions or degradation. In many instances, the adverse impact on the CLEC and the
23 CLEC's customer are even worse than the problems caused by the actual transfer of
24 wires. For example, when CLECs make service commitments to customers and those
25 service commitments are not met because of Verizon errors, sometimes by a magnitude
26 of days, the CLEC's business relationship with the customer is seriously threatened, if not
27 destroyed.

28 **Q. DOES THIS DEMONSTRATE THAT THE ADVERSE IMPACT OF THE**
29 **HOTCUT PROCESS ON PENNSYLVANIA DS1 CUSTOMERS SPECIFICALLY**
30 **IS SUBSTANTIALLY THE SAME AS FOR MASS MARKET CUSTOMERS?**

31 A. Yes it does.

1 **Q. FOR THE PANEL, DO SERVICE DELAYS, SERVICE INTERRUPTIONS AND**
2 **SERVICE DEGRADATION ISSUES RESULTING FROM THE HOT CUT**
3 **PROCESS TO CLEC SWITCHING HAVE AN AFFECT ON YOUR ABILITY TO**
4 **ATTRACT AND RETAIN CUSTOMERS?**

5 A. Of course. No matter who is at fault in the hot cut process, it is the new carrier, the
6 CLEC, which the customer blames for any resulting problems. While in some
7 circumstances sophisticated enterprise customers may be more tolerant of minor service
8 interruptions than residential customers, each of our companies has lost customers we
9 could have acquired as a result of the hot cut process.

10 **Q. DOES THE HOT CUT PROCESS IMPOSE ANY ADDITIONAL COSTS ON**
11 **CLECS?**

12 A. Yes, very substantial costs. Because of the operational deficiencies in Verizon's DS1 hot
13 cut process, CLECs must take extraordinary steps to avoid lengthy service disruptions
14 and service degradation. The costs imposed on the CLEC to insert these safeguards into
15 the process are very substantial. In fact, the CLEC costs imposed by this process are
16 significant enough to affect the decision as to whether the CLEC can economically serve
17 the customer.

18 3. **FCC FINDING NO. 3 -- "Enterprise customers also generally offer increased**
19 **revenue opportunities and are more willing to enter long-term contracts,**
20 **allowing competitive LECs a greater ability to recover the nonrecurring costs**
21 **associated with providing service using their own switches."**

22 **Q. IS THE FCC'S THIRD FACTUAL FINDING SUPPORTABLE IN**
23 **PENNSYLVANIA?**

24 A. No, it is not.

25 **Q. DO YOU AGREE WITH THE FCC'S PREMISES THAT ENTERPRISE**
26 **CUSTOMERS GENERALLY OFFER INCREASED REVENUE**
27 **OPPORTUNITIES AND ARE MORE WILLING TO ENTER INTO LONG-**
28 **TERM CONTRACTS?**

29 A. Yes, we do. In fact, this is stating the obvious.

1 **Q. DOES THIS MEAN THAT THE ECONOMIES OF THE MARKET WILL**
2 **JUSTIFY SWITCH DEPLOYMENT INVESTMENT FOR YOUR**
3 **COMPANIES?**

4 A. No, and as we have explained in detail above, the decision as to whether to deploy a
5 switch or to invest in the expanded coverage of existing switches is far more complicated
6 than is reflected in the FCC's finding. Both strategies involve significant recurring and
7 nonrecurring expenditures. The lack of a DS1 Platform for most DS1 customers and the
8 lack of unbundled concentrated DS1 EELs, as ordered by this Commission, have
9 significantly impaired switch deployment and expanded switch coverage in Pennsylvania.
10 Until both of these wholesale arrangements have been offered on an unrestricted basis for
11 a significant period of time, the economics of scope and scale are not present in
12 Pennsylvania to seriously consider elimination of the unbundling requirement.

13 **Q. HOW DO THE ECONOMIES DIFFER BETWEEN PENNSYLVANIA'S TWO**
14 **BIG CITIES AND AREAS OUTSIDE OF THOSE METROPOLITAN AREAS?**

15 A. The economics vary dramatically. In the absence of the foregoing operational
16 impairment issues, in Philadelphia and Pittsburgh, the high density of DS1 customers
17 may justify the deployment of a switch to serve those customers, particularly if a CLEC
18 has been provided an opportunity to develop a DS1 customer base through a DS1
19 Platform Arrangement (which of course, has not occurred in Pennsylvania). Indeed,
20 CLECs have self-provisioned many switches -- albeit most of the switches were deployed
21 years ago -- which serve DS1 customers in the two major metropolitan areas.

22 This may also be true, although to a far lesser extent, in secondary markets in
23 Verizon's service territory, like Harrisburg and Wilkes Barre, which have relatively high
24 DS1 customer density in a particular exchange or area, again, absent the foregoing
25 operational impairment. However, it is certainly not true in the vast rural areas of the

1 Commonwealth. In these areas, which represent the majority of the Commonwealth and
 2 Verizon's service territory, the low density of DS1 customers results in economies of
 3 scope and scale which simply do not support switched based service by a CLEC.

4 **Q. DO LESS DENSE EXCHANGE AREAS AFFECT THE ECONOMIES OF**
 5 **SWITCH DEPLOYMENT AND COLLOCATION ACTIVITIES?**

6 A. Absolutely, and this does not mean that CLECs do not want to serve these areas, we do.
 7 However, without DS1 Platforms and reasonably priced concentrated EELs, service to
 8 DS1 customers in these areas by CLECs is unlikely. Like so many other instances, it
 9 seems as if the rural part of Pennsylvania gets left behind.

10 Clearly, the FCC recognized the large disparity of economies of scope and scale
 11 between urban and rural areas for the nation as a whole. For example, in discussing the
 12 mass market, the FCC cited to Regional Bell Operating Company evidence that because
 13 of density issues, switch-based entry in wire centers with more that 5,000 access lines
 14 was more feasible than for smaller, less dense wire centers.¹² Like the mass market, the
 15 viability of CLEC switch-based service for DS1 customers is highly dependent on the
 16 density of the exchange, since DS1 customers are clustered in large, dense wire centers.
 17 While we have not studied which Verizon wire centers in Pennsylvania exceed 5,000
 18 access lines or whether the 5,000 access lines per wire center is an appropriate density
 19 benchmark, we agree with the FCC that this type of factor deserves serious consideration
 20 by the Commission.

21 **Q. MR. SCHWENCKE, CAN YOU PROVIDE SPECIFIC BUSINESS CASES**
 22 **WHICH SUPPORT AND DEMONSTRATE THE TESTIMONY OF THE PANEL?**

¹² TRO at 472. While the FCC did not adopt this finding as its own, it did specifically ask the states to consider this and other factors in the states granular impairment analysis.

1 A. Yes. We have prepared an exhibit (Exhibit PCC-1) which provides a Wholesale
2 Cost/Retail Price Comparison. This analysis demonstrates the significant economies of
3 scope and scale which are required to recover the costs which a CLEC must pay to extend
4 its network to serve DS1 customers. It is important to understand that the analysis only
5 takes into account wholesale costs which are based on publicly available information and
6 does not account for recovery of FSN's (or any other CLEC's) own retail costs. Of
7 course, FSN must recover its retail costs as well in the prices it charges its DS1 customers
8 for service.

9 **Q. THROUGHOUT YOUR TESTIMONY, YOU HAVE TALKED ABOUT THE**
10 **ECONOMIC AND OPERATIONAL IMPAIRMENT THAT YOUR COMPANIES**
11 **AND OTHER CLECS WILL ENCOUNTER IF UNBUNDLED DS1 SWITCHING**
12 **IS ELIMINATED. WHEN DO YOU SEE THIS IMPAIRMENT ENDING?**

13 A. There has been an ongoing debate at the national level, and to a lesser extent within the
14 states, as to how to address the economic impairment issue, particularly in non-urban
15 areas, as well as the operational impairment issue caused by the necessary hot cuts
16 involved in Verizon's legacy system migration processes. Ultimately, the fix for both of
17 these types of impairments is quickly approaching but is not here yet.

18 The so-called next-generation network ("NGN"), including Voice over Internet
19 Protocol ("VoIP"), is quickly evolving into a technology that will not only serve to
20 eliminate the economic and operational impairment being experienced by our CLEC
21 industry, and, in particular, in the DS1 market, but holds virtually unlimited promise for
22 consumers as well as the Commonwealth's network modernization objectives. Once the
23 remaining technological problems are addressed, CLECs will be able to invest in
24 widespread deployment of this network. Thus, NGN will quickly eliminate the economic

1 and operational impairment issues associated with legacy systems that clearly exist today
2 for CLECs attempting to serve DS1 customers.

3 NGN will not only eliminate hot cuts, the primary source of operational
4 impairment, but will introduce a level of economic efficiency to the telecommunications
5 industry, including the CLEC industry, that has never been seen before. In fact, putting
6 aside the economic and operational impairment issues which we continue to encounter
7 with the use of the current network, the anticipated development and deployment of an
8 NGN makes continued CLEC investment in legacy technology impossible to finance,
9 thereby creating a separate basis for concluding that CLECs will be impaired if the DS1
10 platform becomes unavailable.

11 **Q. IS IT APPROPRIATE TO CONCLUDE THEREFORE THAT CLECS WILL BE**
12 **DISADVANTAGED OR IMPAIRED IF A DS1 PLATFORM IS NOT**
13 **AVAILABLE DURING THE TRANSITION TO NGN?**

14 A. Severely impaired. This evidence clearly demonstrates that, the DS1 Platform provides
15 the necessary transitional mechanism to migrate customers to NGN technology, after
16 which the DS1 Platform can and should be eliminated. To the extent DS1 Platform is no
17 longer available at the time of transition to NGN, the CLEC industry will be severely
18 disadvantaged in this migration to the detriment of Pennsylvania consumers and
19 businesses and the Pennsylvania economy generally.

20 **Q. WILL THE CONTINUED AVAILABILITY OF THE DS1 PLATFORM UNTIL**
21 **THIS TRANSITION OCCURS HAVE POSITIVE IMPLICATIONS FOR**
22 **NETWORK MODERNIZATION IN PENNSYLVANIA?**

23 A. Yes it will. To the extent that DS1 Platform remains available throughout the
24 Commonwealth, we have no doubt that it will serve as an important catalyst to robust
25 NGN deployment from the center of the big cities, deep into the rural areas of

1 Pennsylvania, and the PCC looks forward to the day (not so long from now) when we can
2 participate in that important effort.

3 **IV. STATE LAW ISSUES.**

4 **Q. CAN THE PANEL DETERMINE WHETHER DS1 CUSTOMERS ARE BELOW**
5 **OR ABOVE THE COMMISSION'S \$10,000 TBR BENCHMARK FOR**
6 **COMPETITION DESIGNATION OF SERVICE TO BUSINESS CUSTOMERS?**

7 A. No we can not, although as we understand it the delineation is important to the
8 application of Pennsylvania law to DS1 switching. If the DS1 customer falls below the
9 \$10,000 benchmark, the Commission has determined that barriers to CLEC switching
10 remain in serving that customer by any means. If the DS1 customer falls above the
11 \$10,000 benchmark, we have been informed by counsel that continued unbundling of
12 local circuit switching is required under state law.¹³ It also appears that the TRO
13 benchmark is to be measured using Verizon's rates and services. In any case, it is likely
14 that some DS1 customers fall below the benchmark, while others exceed it.

15 **Q. IS THE PENNSYLVANIA MARKET FOR CUSTOMERS WITH MORE THAN**
16 **\$10,000 IN TBR FULLY COMPETITIVE?**

17 A. No it is not, since as we testified above, an unrestricted DS1 Platform was not available
18 until recently and because we are economically and operationally impaired in providing
19 switched based services to DS1 customers. The designation of customers with TBR
20 between \$10,000 and \$80,000 as competitive in the 1999 *Global Order* was not based on
21 a factual review of that market, but instead was based on a sliding scale which reduced
22 the benchmark over time without any further review. Accordingly, the competitive
23 designation of these customers was based completely on speculation and as we have
24 described in this testimony, does not reflect actual market conditions.

¹³ See 66 Pa. C.S. § 3005(e)(1)

1 **Q. WILL EXISTING AND POTENTIAL FUTURE CUSTOMERS BE AFFECTED IF**
2 **IMPAIRMENT IS NOT FOUND IN THIS PROCEEDING?**

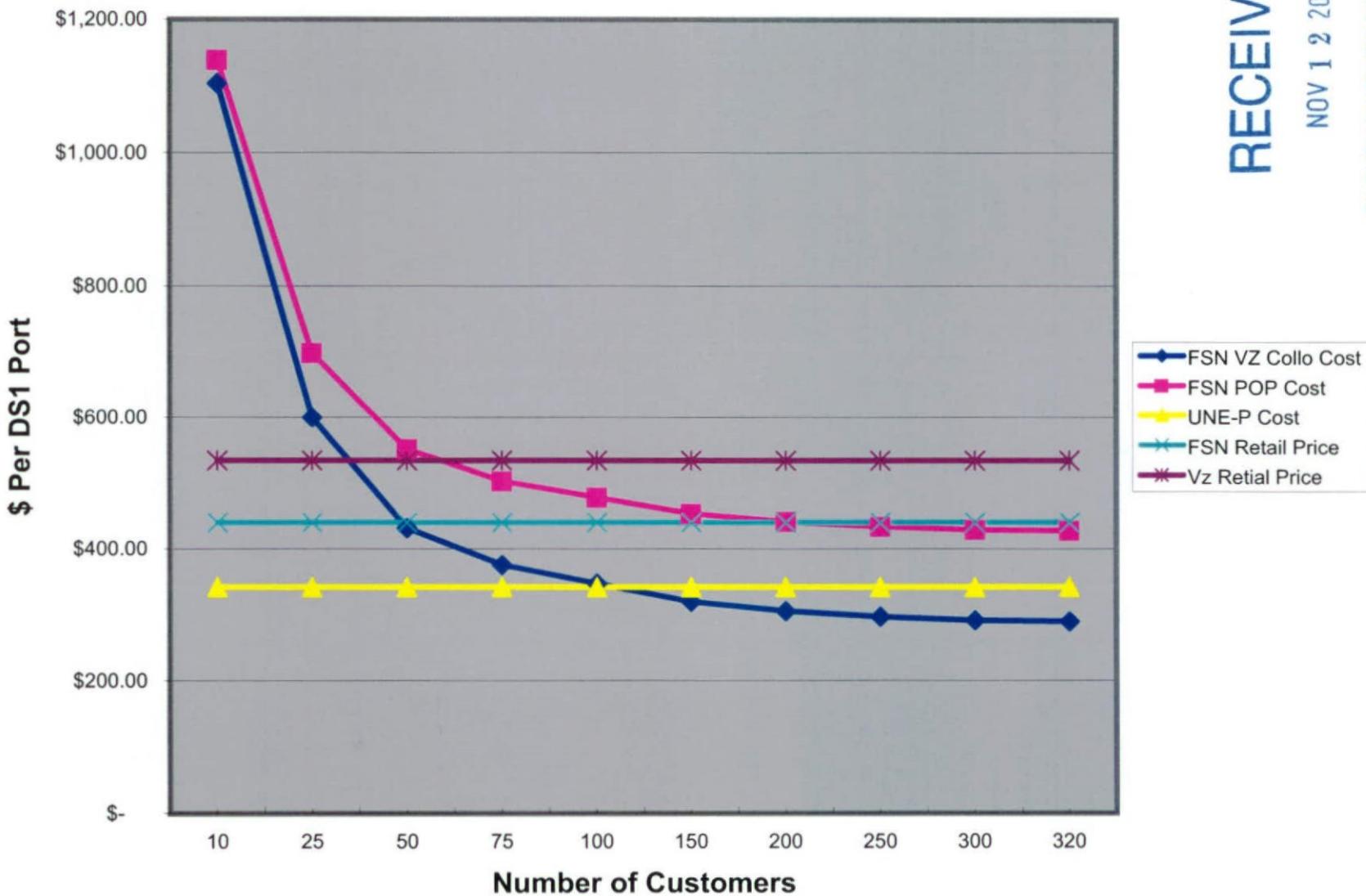
3 A. Very much affected. As described in this testimony, the PCC companies offer existing
4 customers savings and advanced services which are not available from Verizon through
5 the DS1 Platform. Furthermore, now that the DS1 Platform may be available for all DS1
6 customers, there are many additional DS1 customers who can take advantage of the
7 savings and advanced services which our companies, and other CLECs, can offer through
8 this wholesale service arrangement.

9 If the DS1 Platform is eliminated, existing customers will likely be forced (or
10 slammed) back to Verizon against the customers will and will lose the advantage they
11 chose under their existing service arrangement. Potential customers will be denied an
12 opportunity for lower rates and advanced services which would provide the potential for
13 significant value to the customers' respective businesses.

14 **Q. DOES THIS CONCLUDE THE PANEL'S TESTIMONY?**

15 A. Yes.

WHOLESALE COST/RETAIL PRICE COMPARISON



RECEIVED

NOV 12 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

	Collo	FSN	UNE	Sell	Verizon Sell
10	\$ 1,103.76	\$ 1,138.64	\$ 342.25	\$ 440.00	533.83
25	\$ 599.52	\$ 698.14	\$ 342.25	\$ 440.00	533.83
50	\$ 431.44	\$ 551.30	\$ 342.25	\$ 440.00	533.83
75	\$ 375.41	\$ 502.36	\$ 342.25	\$ 440.00	533.83
100	\$ 347.40	\$ 477.89	\$ 342.25	\$ 440.00	533.83
150	\$ 319.39	\$ 453.41	\$ 342.25	\$ 440.00	533.83
200	\$ 305.38	\$ 441.18	\$ 342.25	\$ 440.00	533.83
250	\$ 296.98	\$ 433.84	\$ 342.25	\$ 440.00	533.83
300	\$ 291.37	\$ 428.94	\$ 342.25	\$ 440.00	533.83
320	\$ 289.62	\$ 427.41	\$ 342.25	\$ 440.00	533.83

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

NOV 1 2 2003

RECEIVED

Location	Exchange	Density Cell	Miles from Pittsburgh
Carnegie	412-494	3	10.4
Hopewell	724-378	4	19.6
Burgettstov	724-947	4	21.4
Washington	724-229	4	24.4
Ligonier	724-238	4	39.3
Uniontown	724-437	4	39.4
Marion Cer	724-397	4	47.4
Farmingtor	724-329	4	49.0
Grove City	724-458	4	49.3
Greenville	724-588	4	69.5

37.0 Average Miles

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

NOV 12 2003

RECEIVED

Verizon Central Office Collocation Charges

# of DS1's	10
Months	60 *

	Price	Quantity	Total Cost	Per DS1	
Application Fee	\$5,000.00	\$1.00	\$5,000.00	\$8.33	*
DS1 Cross Connect	\$14.77	\$10.00	\$147.70	\$14.77	
Power per Amp	\$14.27	\$100.00	\$1,427.00	\$142.70	
Square Foot Floor Space	\$2.27	\$100.00	\$227.00	\$22.70	
Telephone Switch	\$400,000.00	\$1.00	\$400,000.00	<u>\$666.67</u>	*
				\$855.17	Total

FSN Site Charges

# of DS1's	10
Months	60 *

	Price	Quantity	Total Cost	Per DS1	
Application Fee	\$0.00	\$1.00	\$0.00	\$0.00	*
DS1 Cross Connect	\$0.00	\$10.00	\$0.00	\$0.00	
Power per Month	\$150.00	\$0.00	\$0.00	\$0.00	
Square Foot Floor Space	\$2.25	\$300.00	\$675.00	\$67.50	
Telephone Switch	\$400,000.00	\$1.00	\$400,000.00	<u>\$666.67</u>	*
				\$734.17	

Verizon Wholesale Pricing

	Now	ALJ's	Tentative
Entrance Facility	\$155.88	\$112.66	\$99.77
DS1 Port	\$92.70	\$86.04	\$47.36
Port Usage	\$0.001802	\$0.001019	\$0.001606
Customer Loop:			
Density Cell 1	\$117.90	\$76.02	\$87.81
Density Cell 2	\$120.62	\$105.76	\$93.80
Density Cell 3	\$146.42	\$116.02	\$102.36
Density Cell 4	\$191.17	\$150.06	\$133.49
Inter Office Mileage:			
Fixed Cost	\$35.22	\$52.95	\$50.67
Per Mile	\$0.60	\$3.71	\$3.54

PA PUBLIC UTILITY COMMISSION
 SECRETARY'S BUREAU
 NOV 1 2 2003
RECEIVED

Cost Calculator					
FSN Provides DS1 Port From Collocation					
		<u>Now</u>	<u>ALJ's</u>	<u>Tentative</u>	
		Verizon CO Costs	\$855.17	\$855.17	\$855.17
		E. Facility	\$0.00	\$0.00	\$0.00
D Cell	4	Cust Loop	\$191.17	\$150.06	\$133.49
Miles	37.00	IOF Mileage	\$22.20	\$137.27	\$130.98
		IOF Fixed	\$35.22	\$52.95	\$50.67
		Cost	\$1,103.76	\$1,195.45	\$1,170.31

Cost Calculator					
FSN Provides DS1 Port From FSN Site					
		<u>Now</u>	<u>ALJ's</u>	<u>Tentative</u>	
		FSN Site Costs	\$734.17	\$734.17	\$734.17
		E. Facility	\$155.88	\$112.66	\$99.77
D Cell	4	Cust Loop	\$191.17	\$150.06	\$133.49
Miles	37.00	IOF Mileage	\$22.20	\$137.27	\$130.98
		IOF Fixed	\$35.22	\$52.95	\$50.67
		Cost	\$1,138.64	\$1,187.11	\$1,149.08

Cost Calculator					
Verizon UNE-P					
		<u>Now</u>	<u>ALJ's</u>	<u>Tentative</u>	
D Cell	4	Cust Loop	\$191.17	\$150.06	\$133.49
Miles	Not Applicable	Cust Port	\$92.70	\$86.04	\$47.36
Minutes	32400	Port Usage	\$58.38	\$33.02	\$52.03
		Cost	\$342.25	\$269.12	\$232.88

RECEIVED
 NOV 12 2003
 PA PUBLIC UTILITY COMMISSION
 SECRETARY'S BUREAU



PROCOM

Communications for the masses

November 13, 2003

ORIGINAL

RECEIVED
03 NOV 17 AM 11:28
PENNSYLVANIA
SECRETARY'S BUREAU

Mr. James J. McNulty, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, Pennsylvania 17105-3265

DOCKETED

NOV 20 2003

RE: 1. Mountain Communications, LLC d/b/a ProCom
2. Docket No. I-00030100 – Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market

DOCUMENT

Dear Mr. McNulty,

Although Mountain Communications, LLC d/b/a ProCom did not file a brief in the above referenced proceeding, we would like formally state our position relative to the continued provisioning of circuit switching in the “newly defined” enterprise market. In your letter dated November 6, 2003 you requested additional briefs be filed relative to paragraphs 456-458 of the Triennial Review Order.

Since Mountain Communications serves customers mainly in the rural areas of the state, we are uncertain as to the PUC’s final determination relative to paragraphs 454 and 455.

More specifically Paragraph 454 states:

“Although the record shows no impairment on a national basis, we recognize that a geographically specific analysis could possibly be demonstrated that competitive carriers are impaired without access to unbundled incumbent LEC circuit switching for DS1 enterprise customers in a particular market. In particular, the record suggests that such factors make impairment more likely in rural areas.”

Paragraph 455 states:

“ While the record in this proceeding does not contain evidence identifying any particular markets where competitive carriers would be impaired without unbundled access to local circuit switching to serve enterprise customers, state commissions are uniquely positioned to evaluate local market conditions and determine whether DS1 enterprise customers should be granted access unbundled incumbent LEC circuit switching. To that end, we permit state commissions to rebut the national finding of no impairment by undertaking more granular analysis utilizing the economic and operational criteria contained herein.”

25



PROCOM

Communications for the masses

Page 2.

Based on FCC's findings outlined in these two paragraphs, it is our position that rural markets should be classified as being "impaired" and that unbundled access to circuit switching at the DS1 level should be granted to CLEC's serving those rural areas.

In that Mountain Communications is a small CLEC, our ability to produce testimony, operational and economic documentation, detailed studies, and other information requested by the PUC in this proceeding is very limited. However, since we feel that bringing competition to rural markets is as important as competition in the urban markets, we feel that our position should be taken into consideration.

Should the Commission wish to discuss this matter further, I can be contacted at 304-379-8276 or via email at lsisler@4-procom.com.

Thank you for your consideration.

Sincerely

Larry Sisler
Managing Member
Mountain Communications LLC dba ProCom

SECRETARY'S BUREAU

03 NOV 17 AM 11:28

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

(202) 955-9600

RECEIVED
NOV 19 AM 9:20
U.S. DEPT. OF JUSTICE
SECRETARY'S BUREAU

FACSIMILE
(202) 955-9792
www.kelleydrye.com

DIRECT LINE: (202) 955-9866
EMAIL: esoriano@kelleydrye.com

NEW YORK, NY
TYSONS CORNER, VA
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM
HONG KONG

AFFILIATE OFFICES
BANGKOK, THAILAND
JAKARTA, INDONESIA
MUMBAI, INDIA
TOKYO, JAPAN

November 14, 2003

DOCUMENT

I-00030100

The Honorable Robert A. Christanson
Chief Administrative Law Judge
Office of Administrative Law Judges
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

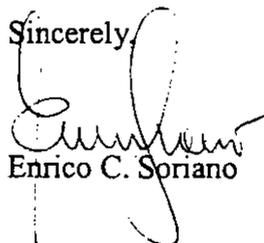
Re: Motion For Admission *Pro Hac Vice* of Steven A. Augustino, Genevieve Morelli, Ross A. Buntrock, Darius B. Withers, Erin W. Emmott, and Heather T. Hendrickson

Dear Judge Christanson:

Enclosed for your review and approval is an original and two copies of a Motion For Admission *Pro Hac Vice* of Steven A. Augustino, Genevieve Morelli, Ross A. Buntrock, Darius B. Withers, Erin W. Emmott and Heather T. Hendrickson. A duplicate copy has been provided for your convenience. Please date stamp the duplicate and return it in the self-addressed, postage-prepaid envelope.

Please feel free to contact the undersigned counsel at (202) 955-9600, if you have any questions regarding this matter.

Sincerely,



Enrico C. Soriano

ECS:pab
Enclosures

RECEIVED
03 NOV 19 AM 9:20
PENNSYLVANIA P.U.C.
PROPERTY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the)
Obligations of Incumbent)
Local Exchange Carriers)
To Unbundle Network Elements)
)
Investigation into the Obligations of)
Local Exchange Carriers to Unbundle)
Local Circuit Switching for the)
Enterprise Market)
)
Development of an Efficient Loop)
Migration Process)
_____)

Docket No.
I-00030099

Docket No.
I-00030100

Docket No.
M-0031754

DOCKETED
NOV 24 2003

DOCUMENT

**MOTION FOR ADMISSION *PRO HAC VICE* OF
STEVEN A. AUGUSTINO, GENEVIEVE MORELLI, ROSS A. BUNTROCK, DARIUS B.
WITHERS, ERIN W. EMMOTT, AND HEATHER T. HENDRICKSON**

NOW COMES Enrico C. Soriano, a member in good standing of the Bar of the Supreme Court of Pennsylvania, on behalf of XO Pennsylvania, Inc., Choice One Communications of Pennsylvania Inc., SNiP LiNK, LLC, Broadview Networks, Inc., Focal Communications Corporation of Pennsylvania, BullsEye Telecom, ARC Networks, Inc., d/b/a InfoHighway Communications Corporation, McGraw Communications, Inc., Metropolitan Telecommunications of PA, Inc., and Talk America Inc. (collectively, "the Parties"), and hereby respectfully moves for admission *pro hac vice* of the Parties out-of-state counsel. In support thereof, the following is stated:

1. Rule 301 of the Pennsylvania Bar Admission Rules permits an attorney qualified to practice in the courts of another jurisdiction to be admitted to the Bar of this Commonwealth for purposes limited to a particular matter. See Pa. B.A.R. Rule 301.

2. Steven A. Augustino, Genevieve Morelli, Ross A. Buntrock, Darius B. Withers, Erin W. Emmott, and Heather T. Hendrickson, the Parties' out-of-state attorneys, are qualified to practice in jurisdictions which accord reciprocal privileges to members of the Bar of this Commonwealth.

3. Mr. Augustino is a partner with the law firm of Kelley Drye & Warren LLP, 1200 19th Street, N.W., Suite 500, Washington, D.C. 20036-2423. He is a member in good standing of the Bars of the State of Maryland and the District of Columbia. Mr. Augustino has not been disbarred or suspended from the practice of law in the jurisdictions in which he is admitted, nor is he presently subject to pending disciplinary proceeding in any jurisdiction.

4. Ms. Morelli is a partner with the law firm of Kelley Drye & Warren LLP, 1200 19th Street, N.W., Suite 500, Washington, D.C. 20036-2423. She is a member in good standing of the Bar of the District of Columbia. Ms. Morelli has not been disbarred or suspended from the practice of law in any jurisdiction in which she is admitted, nor is she presently subject to pending disciplinary proceeding in any jurisdiction.

5. Mr. Buntrock is an associate with the law firm of Kelley Drye & Warren LLP, 1200 19th Street, N.W., Suite 500, Washington, D.C. 20036-2423. He is a member in good standing of the Bars of the Commonwealth of Virginia and the District of Columbia. Mr. Buntrock has not been disbarred or suspended from the practice of law in the jurisdictions in which he is admitted, nor is he presently subject to pending disciplinary proceeding in any jurisdiction.

6. Mr. Withers is an associate with the law firm of Kelley Drye & Warren LLP, 1200 19th Street, N.W., Suite 500, Washington, D.C. 20036-2423. He is a member in good standing of the Bars of the State of Maryland and the District of Columbia. Mr. Withers has not been

disbarred or suspended from the practice of law in any jurisdiction in which he is admitted, nor is he presently subject to pending disciplinary proceeding in any jurisdiction.

7. Ms. Emmott is an associate with the law firm of Kelley Drye & Warren LLP, 1200 19th Street, N.W., Suite 500, Washington, D.C. 20036-2423. She is a member in good standing of the Bars of the Commonwealth of Massachusetts and the District of Columbia. Ms. Emmott has not been disbarred or suspended from the practice of law in the jurisdictions in which she is admitted, nor is she presently subject to pending disciplinary proceeding in any jurisdiction.

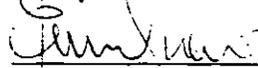
8. Ms. Hendrickson is an associate with the law firm of Kelley Drye & Warren LLP, 1200 19th Street, N.W., Suite 500, Washington, D.C. 20036-2423.. She is a member in good standing of the Bars of the Commonwealth of Virginia and the District of Columbia. Ms. Hendrickson has not been disbarred or suspended from the practice of law in any jurisdiction in which she is admitted, nor is she presently subject to pending disciplinary proceeding in any jurisdiction.

9. Mr. Augustino, Ms. Morelli, Mr. Buntrock, Mr. Withers, Ms. Emmott, and Ms. Hendrickson are the Parties' counsel in various federal and state matters, and are familiar with the Parties' business and the instant proceeding. Consequently, Mr. Augustino, Ms. Morelli, Mr. Buntrock, Mr. Withers, Ms. Emmott, and Ms. Hendrickson are best qualified to represent the Parties' interests in this proceeding.

10. Finally, Mr. Augustino, Ms. Morelli, Mr. Buntrock, Mr. Withers, Ms. Emmott, and Ms. Hendrickson all possess the requisite character and fitness to represent the Parties' in the Commonwealth for the purpose of this proceeding. They have agreed to abide by all applicable statutes and regulations governing the practice of law in Pennsylvania.

WHEREFORE, the undersigned movant respectfully requests that the Commission grant *pro hac vice* admission to Steven A. Augustino, Genevieve Morelli, Ross A. Buntrock, Darius B. Withers, Erin W. Emmott, and Heather T. Hendrickson, pursuant to Rule 301 of the Pennsylvania Bar Admission Rules.

Respectfully submitted,



Enrico C. Soriano*
Pennsylvania Bar No. 63933
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600
(202) 955-9792 (facsimile)

**Counsel for XO Pennsylvania, Inc.;
Choice One Communications of
Pennsylvania, SNiP LiNK, LLC,
Broadview Networks, Inc. and Focal
Communications Corporation of
Pennsylvania, BullsEye Telecom, ARC
Networks, Inc., d/b/a InfoHighway
Communications Corporation, McGraw
Communications, Inc., Metropolitan
Telecommunications of PA, Inc., and
Talk America Inc.**

Dated: November 14, 2003

*Also licensed to practice in New Jersey and the District of Columbia.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing document to be sent this day by first class U.S. Mail, postage prepaid, to the parties named below:

Robert A. Christanson
Chief Administrative Law Judge
Office of Administrative Law Judges
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

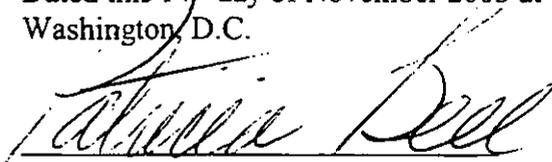
Office of Consumer Advocate
Forum Place, 5th Floor
555 Walnut Street
Harrisburg, PA 17101-1923

Office of Trial Staff
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor, F West
Harrisburg, PA 17120

Julia A. Conover
Vice-President and General Counsel
Verizon Pennsylvania, Inc.
1717 Arch Street, 32N
Philadelphia, Pennsylvania 19103

James J. McNulty, Secretary
Office of the Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, Pennsylvania 17120

Dated this 14th day of November 2003 at
Washington, D.C.



Patricia Bell, Secretary
KELLEY DRYE & WARREN LLP

RECEIVED
03 NOV 19 AM 9:20
PENNSYLVANIA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560 (In PA only)

IRWINA. POPOWSKY
Consumer Advocate

FAX (717) 783-7152
consumer@paoca.org

ORIGINAL

November 17, 2003

James J. McNulty, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

DOCKETED
NOV 20 2003

RECEIVED

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: Investigation into the Obligation of Incumbent
Local Exchange Carriers to Unbundle Local
Circuit Switching for The Enterprise Market
Docket No. I-00030100

Dear Secretary McNulty:

Please be advised that the Office of Consumer Advocate ("OCA") will not be filing a Main Brief in the above-referenced proceeding.

Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Sincerely,

Barrett C. Sheridan
Assistant Consumer Advocate

Enclosures

cc: All parties of record
Maryanne Martin/Law Bureau
Janet Tuzinski/FUS

*76936

DOCUMENT

117

CERTIFICATE OF SERVICE

Re: Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Local
Circuit Switching for The Enterprise Market
Docket No. I-00030100

I hereby certify that I have this day served a true copy of the foregoing document,
Office of Consumer Advocate's Letter Re: Not Filing a Brief, upon parties of record in this
proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a
participant), in the manner and upon the persons listed below:

Dated this 17th day of November, 2003.

SERVICE BY INTER-OFFICE MAIL

Kandace Melillo, Esq.
Office of Trial Staff
Pa. Public Utility Commission
400 North Street, Fl. 2 West
Harrisburg, PA 17120

SERVICE BY FIRST CLASS MAIL, POSTAGE PREPAID

Julia A. Conover, Esq.
William Petersen, Esq.
Verizon Pennsylvania Inc.
1717 Arch Street, 32N
Philadelphia, PA 19103

Patricia Armstrong
Thomas, Thomas, Armstrong & Niesen
212 Locust St., Suite 500
P.O. Box 9500
Harrisburg, PA 17108-9500

Ross A. Buntrock
Kelley, Drye & Warren, LLP
1200 Nineteenth Street, NW, Suite 500
Washington, DC 20036

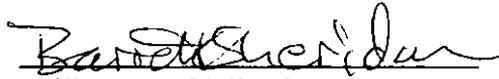
Alan Kohler, Esq.
Wolf, Block, Schorr & Solis-Cohen
212 Locust Street
Suite 300
Harrisburg, PA 17101

Norman J. Kennard
Hawke McKeon Sniscak & Kennard LLP
100 North Tenth Street
P.O. Box 1778
Harrisburg, PA 17108

Angela Jones, Esq.
Office of Small Business Advocate
300 North Second Street
1102 Commerce Bldg.
Harrisburg, PA 17101

Pennsylvania Telephone Association
P.O. Box 1169
Harrisburg, PA 17108-1169

Zsuzsuanna Benedek
Sprint
240 N. Third Street
Suite 201
Harrisburg, PA 17101



Philip F. McClelland
Senior Assistant Consumer Advocate
Barrett C. Sheridan
Assistant Consumer Advocate
Counsel for
Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048
*76652

RECEIVED
NOV 17 2003
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU



OFFICE OF SMALL BUSINESS ADVOCATE
 Suite 1102, Commerce Building
 300 North Second Street
 Harrisburg, Pennsylvania 17101

Carol F. Pennington
 Acting Small Business Advocate

(717) 783-2525
 (717) 783-2831(FAX)

November 17, 2003

HAND DELIVERED

James J. McNulty, Secretary
 Pennsylvania Public Utility Commission
 Commonwealth Keystone Building
 400 North Street
 Harrisburg, PA 17120

DOCKETED

NOV 20 2003

DOCUMENT

**Re: Investigation into the Obligations of Incumbent Local Exchange
 Carriers to Unbundle Local Circuit Switching for the Enterprise
 Market Docket No. I-00030100**

Dear Secretary McNulty:

Please be advised that the Office of Small Business Advocate ("OSBA") will not be filing a Brief in the above captioned proceeding. The OSBA fully supports the Office of Trial Staff's Brief in concluding there does exist an impairment in the Enterprise Market. Failure to provide access to unbundled local circuit switching impairs competitive carriers from providing service to end-use consumers. As evidenced by the enclosed certificate of service, all parties have been served as indicated.

If you have any questions, please contact me.

Sincerely,

Angela T. Jones
 Assistant Small Business Advocate

Enclosures

cc: Hon. Michael C. Schnierle
 Administrative Law Judge

Parties of Record

RECEIVED

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
 SECRETARY'S BUREAU

120

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of :
Incumbent Local Exchange Carriers to : **Docket No. I-00030100**
Unbundle Local Circuit Switching for :
The Enterprise Market :

CERTIFICATE OF SERVICE

I certify that I am serving a copy of the foregoing document by FAX and first class mail upon the persons addressed below:

Hon. Michael Schnierle
Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(hand delivered)

Julia A. Conover, Esquire
Vice President/General Counsel
William B. Petersen, Esquire
Verizon Pennsylvania, Inc.
1717 Arch Street, 32 North
Philadelphia, PA 19103
(215) 963-6023
(215) 563-2658 (fax)

Alan Kohler, Esquire
Daniel Clearfield, Esquire
Wolf, Block, Schorr and Solis-Cohen, LLP
212 Locust Street, Suite 300
Harrisburg, PA 17101
(717) 237-7160
(717) 237-7161

D. Mark Thomas, Esq.
Patricia Armstrong, Esq.
Thomas, Thomas, Armstrong & Niesen
212 Locust Street, Suite 500
P.O. Box 9500
Harrisburg, PA 17109-9500
(717) 255-7600
(717) 236-8278 (fax)

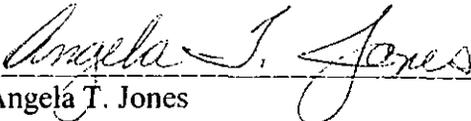
Barrett C. Sheridan, Esquire
Philip F. McClelland, Esquire
Office of Consumer Advocate
555 Walnut Street
5th FL Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048
(717) 783-7152 (fax)

Kandace F. Melillo, Esquire
Office of Trial Staff
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105
(717) 787-1976
(717) 772-2677 (fax)

Philip J. Macres, Esquire
Swidler Berlin Shereff Friedman
3000 K Street, NW
Washington, DC 20007
(202) 424-7500
(202) 424-7645 (fax)

Norman James Kennard, Esquire
Hawke McKeon Sniscak & Kennard
100 North Tenth Street
P.O. Box 1778
Harrisburg, PA 17105
(717) 236-1300
(717) 236-4841 (fax)

Genevieve Morelli, Esquire
Ross Buntrock, Esquire
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036
(202) 955-9600
(202) 955 9792 (fax)



Angela T. Jones
Assistant Small Business Advocate

Date: November 17, 2003

RECEIVED

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Thomas, Thomas, Armstrong & Niesen
Attorneys and Counsellors at Law

SUITE 500

212 LOCUST STREET

P. O. BOX 9500

HARRISBURG, PA 17108-9500

PATRICIA ARMSTRONG

Direct Dial: (717) 255-7627

E-Mail: parmstrong@ttanlaw.com

ORIGINAL
www.ttanlaw.com
FIRM: (717) 255-7600
FAX: (717) 238-8278

CHARLES E. THOMAS
(1913 - 1998)

November 17, 2003

RECEIVED

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

DOCUMENT

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

I-00030100

In re: Docket No. ~~I-00030099~~
Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle
Local Circuit Switching for the Enterprise Market

Dear Secretary McNulty:

Enclosed for filing on behalf of The Rural Company Coalition ("RCC") are an original and nine (9) copies of their Brief in the above referenced proceeding. Copies of the Brief have been served in accordance with the attached Certificate of Service.

If you have any questions, please contact the undersigned.

Very truly yours,

THOMAS, THOMAS, ARMSTRONG & NIESEN

By 
Patricia Armstrong

Enclosure

103

ORIGINAL

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligation of :
Incumbent Local Exchange Carriers to : Docket No.
Unbundle Local Circuit Switching for : I-00030100
the Enterprise Market :

DOCKETED
NOV 24 2003

DOCUMENT

**BRIEF
OF
THE RURAL COMPANY COALITION**

D. Mark Thomas
Patricia Armstrong
Regina L. Matz

Attorneys for
The Rural Company Coalition

THOMAS, THOMAS, ARMSTRONG & NIESEN
212 Locust Street
P.O. Box 9500
Harrisburg, PA 17108-9500
(717) 255-7600

RECEIVED

NOV 17 2003

Dated: November 17, 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

I. INTRODUCTION

On August 21, 2003, the FCC entered its *Triennial Review Order*,¹ adopting new rules to address an ILEC's obligation to continue to make unbundled network elements ("UNEs") available to competing carriers. In the *Triennial Review Order*, the FCC adopted certain rules for determining the existence of impairment under Section 251(d)(2) of the TCA-96 and set forth a new list of UNEs.

On October 3, 2003, the Commission entered its *Procedural Order* providing direction as to the process and procedure it would use to implement the FCC's *Triennial Review Order*. The time frame in the *Procedural Order* was slightly modified by Secretarial Letter of October 7, 2003.

Two Petitions to Initiate Proceedings were filed requesting an opportunity to rebut the national finding of no impairment for DSI local circuit switching for the enterprise market "in the Commonwealth of Pennsylvania." The first was a joint filing of Arc Networks, Inc., d/b/a InfoHighway ("InfoHighway") and Metropolitan Telecommunications Corporation of PA ("MetTel"). The second was filed by a group of CLEC's calling themselves the Pennsylvania Carriers' Coalition ("PCC"), consisting of Full Service Computing Corporation, t/a Full Service Network ("FSN"), Remi Retail Communications, LLC ("Remi"), ATX Licensing, Inc. ("ATX") and Line Systems, Inc. ("LSI") (jointly referred to as "Petitioners").

RECEIVED

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

¹*Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket No. 01-338 (rel. August 21, 2003).

The Rural Company Coalition ("RCC"),² (individually "Company" and collectively "Companies"), all small incumbent local exchange carriers serving *rural* portions of Pennsylvania and each designated a *rural* telephone company as defined in Section 3 of the Communications Act of 1934, as amended ("TCA-96") filed an answer to the Petitions, which is incorporated herein by reference stating that the RCC Companies were not properly within the scope of the proceeding and any relief sought must apply only to the service territories of Verizon, Verizon North and possibly Sprint.³ This brief is filed on behalf of the RCC. Given the subject matter of this brief, the RCC is not addressing any of the mandatory sections identified in the November 6, 2003 Secretarial Letter as they do not apply to the RCC. The RCC is addressing only one matter it deems appropriate.

II. INAPPLICABILITY TO RCC

The Commission in the *Procedural Order* states its direction from the *TRO* is to "determine whether ILECs in [Pennsylvania] must *continue* to provide access to certain network elements." *Procedural Order* at 11 (emphasis added). Thus, the *Procedural*

²RCC Companies participating herein are ALLTEL Pennsylvania, Inc., Armstrong Telephone Company - North, Armstrong Telephone Company - Pennsylvania, Bentleyville Telephone Company, Buffalo Valley Telephone Company, Commonwealth Telephone Company, Conestoga Telephone and Telegraph Company, D&E Telephone Company, Hickory Telephone Company, Lackawaxen Telecommunications Services, Inc., Laurel Highland Telephone Company, Marianna & Scenery Hill Telephone Company, The North-Eastern Pennsylvania Telephone Company, North Penn Telephone Company, North Pittsburgh Telephone Company, Palmerton Telephone Company, Pennsylvania Telephone Company, Pymatuning Independent Telephone Company, South Canaan Telephone Company, Venus Telephone Corporation, and Yukon-Waltz Telephone Company. The RCC files this Answer collectively in an effort to minimize administrative and procedural burdens. To the extent necessary, however, each Company reserved the right to address individually any company-specific matter raised during the pendency of this matter.

³On October 17, 2003, ARC Networks, Inc. d/b/a Infohighway and Metropolitan Telecommunications Corporation of Pa filed a Petition to Initiate Proceedings ("ARC Petition") at the instant docket. However, in conformance with the *Procedural Order* and the RCC's contentions herein, the ARC Petition specifically and exclusively refers to impairment without access to unbundled local switching to serve their *existing* enterprise market customers and seeks Commission review of any post-UNE prices for local switching proposed by *Verizon*. ARC Petition at 4. The RCC agrees with the procedural and substantive posture set forth in the ARC Petition, as it deals exclusively with Verizon and Verizon's existing UNE obligations.

Order established procedures to determine the impact of the FCC's *TRO* only on those companies currently providing UNEs, with emphasis on Verizon and in particular what UNEs should continue to be provided. Accordingly, the RCC respectfully submits that the *Procedural Order* was intended, and must be interpreted, to apply only to those ILECs *currently* providing UNEs, i.e. Verizon Pennsylvania, Inc. ("Verizon"), Verizon-North, Inc. ("Verizon North"), and possibly Sprint.

The *Procedural Order* does not apply to those ILECs that have been found by the Commission to be rural as that term is defined in Section 3 of TCA-96, i.e. RCC Companies. The RCC Companies do not at present have Section 251(c) unbundling obligations because of their rural telephone company exemptions under Section 251(f)(1) of TCA-96. In this regard, the Commission did not, and the RCC submits could not, in this proceeding intend in any way to impact these RCC Companies' exemptions under Section 251(f)(1), or otherwise make findings about, or impose upon the RCC Companies, unbundling and interconnection obligations they do not currently have. Further, in the *Procedural Order* the Commission certainly did not intend to undertake some theoretical analysis of impairment in the RCC Companies' rural service territories when there currently is *no* unbundled DS 1 local circuit switching being offered by the RCC Companies in their service territories, and thus there is no operational or economic impact to analyze and none was presented. The Petitioners presented only evidence relative to Verizon (including Verizon North). In fact, the Joint Procedural Stipulation submitted in this matter makes it abundantly clear that the proceeding only applies to Verizon and Verizon North as no other ILEC was included as a party and no evidence was submitted to address impairment, except as relates to Verizon.

The fact that the FCC in its *TRO* did not intend to address UNEs for companies such as RCC Companies with statutory exemptions from unbundling requirements is

clear on the face of the FCC's order. In the *TRO*, the FCC concluded as follows: "However, many rural LECs still retain the exemption for Section 251(c)(3) of the Act as required by Section 251(f) and as such, will not be subject to those particular unbundling requirements *until such time as the exemption is lifted.*" *TRO* at ¶119 (emphasis added).

In any specific proceeding seeking to terminate that statutory rural exemption, the Commission is required to address the specific request for UNEs within the context of the Section 251(f)(1) requirements.⁴

Pursuant to the terms of the *TRO*, a CLEC is not precluded from addressing the issue of impairment in the RCC Companies' rural service territories if and when the issue of the provision of UNEs in the rural service territories of the RCC Companies is ripe.⁵ In the *TRO*, the FCC provided state commissions the right to address the impairment issue upon changes in the specified operational and economic criteria. *TRO* at ¶ 455. Such a change in operational and economic criteria would include the removal of an RCC Company's rural exemption. At that time, and only at that time, would this Commission properly have before it the issue of whether the requesting CLEC is impaired without access to unbundled DS 1 local circuit switching for the purpose of serving enterprise customers in RCC Companies' service territories.

⁴Before a rural telephone company exemption is removed and a rural company required to provide UNEs, the Commission must determine whether there is a bona fide request for interconnection and whether a requesting CLEC has proven that such request is not unduly burdensome, is technically feasible, and is consistent with universal service.

⁵TCA-96 unequivocally allows for the removal of a rural telephone company exemption *only under specific and limited circumstances on consideration of precise evidence for which a requesting CLEC has the burden of proof.* See *Iowa Utilities Board et al. v. Federal Communications Commission*, 219 F.3d 744, 761 (8th Cir. 2000) ("*Iowa Utilities Board II*"), *aff'd* in part, *rev'd* in part, and *remanded on other grounds* in *Verizon Communications Inc. v. FCC*, 152 L.Ed. 2d 701, 122 S. Ct. 1646 (U.S. 2002). The United States Supreme Court's review of *Iowa Utilities Board II* affected limited pricing issues and did *not* impact the 8th Circuit's ruling regarding Section 251(f) rural protections, which was left undisturbed.

Given the state of the law on the rural exemption, it is abundantly clear, as recognized by the FCC in paragraph 119 of the *TRO*, that the unbundling requirement for RCC Companies is not at issue until such time as the exemption is removed. The issue of impairment in the service territories of the RCC Companies is not properly placed before the Commission in this proceeding, and is not ripe for consideration until after the RCC Companies' Section 251(f) issues are raised and resolved.

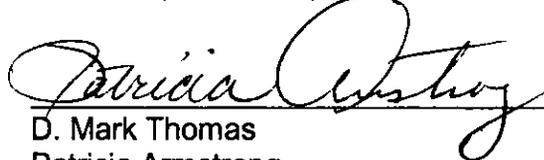
III. CONCLUSION

The Rural Company Coalition respectfully submits that this Commission must exclude from consideration in this proceeding the issue of impairment in the service territories of the RCC Companies, and deny any attempt, through vague references to state-wide impairment or generic references to ILECs, to place that issue before the Commission in this proceeding.

The Rural Company Coalition respectfully submits that the issue of impairment in the service territories of the RCC Companies is outside the scope of this proceeding, that any vague references regarding a finding of impairment in the service territories of the RCC Companies are premature and unsupported, and that the any relief or finding must be construed to apply only to those service territories of Verizon, Verizon-North and possibly Sprint.

Respectfully submitted,

THOMAS, THOMAS, ARMSTRONG & NIESEN



D. Mark Thomas
Patricia Armstrong
Regina L. Matz

Attorneys for
The Rural Company Coalition

THOMAS, THOMAS, ARMSTRONG & NIESEN
212 Locust Street
P.O. Box 9500
Harrisburg, PA 17108-9500
(717) 255-7600

Dated: November 17, 2003

F:\CLIENTS\UTILITY\Rural Company Coalition\FCC TRO\Briefs\Main Brief.wpd

RECEIVED

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligation of :
Incumbent Local Exchange Carriers to : Docket No.
Unbundle Local Circuit Switching for the : I-00030100
Enterprise Market :

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of November, 2003, served a true and correct copy of the foregoing Brief of The Rural Company Coalition upon the persons and in the manner listed below:

VIA HAND DELIVERY

Barrett Sheridan, Esquire
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101-1923

Kandace F. Melillo, Esquire
Office of Trial Staff
Pennsylvania Public Utility Commission
2nd Floor West
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

Angela T. Jones, Esquire
Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

Maryanne R. Martin, Esquire
Bureau of Fixed Utility Services
Pennsylvania Public Utility Commission
3rd Floor West
Commonwealth Keystone Building
Harrisburg, PA 17105-3265

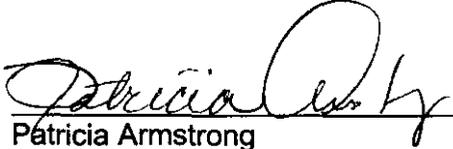
Alan Kohler, Esquire
Wolf Block Schorr & Solis-Cohen LLP
212 Locust Street Suite 300
Harrisburg, PA 17101

FIRST CLASS MAIL POSTAGE PREPAID

Julia A. Conover, Esquire
William Peterson, Esquire
Verizon Pennsylvania Inc.
1717 Arch Street, 32N
Philadelphia, PA 19103

Ross A. Buntrock, Esquire
Kelley, Drye & Warren, LLP
1200 Nineteenth Street, NW, Suite 500
Washington, DC 20036

Philip J. Marces, Esquire
Swidler Berlin Shereff Friedman LLP
3000 K Street NW Suite 300
Washington, DC 2007-5116


Patricia Armstrong

RECEIVED
NOV 17 2003
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

(202) 955-9600

ORIGINAL

FACSIMILE

(202) 955-9792

www.kelleydrye.com

DIRECT LINE: (202) 887-1284

EMAIL: hhendrickson@kelleydrye.com

NEW YORK, NY
TYSONS CORNER, VA
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ
BRUSSELS, BELGIUM
HONG KONG

AFFILIATE OFFICES
BANGKOK, THAILAND
JAKARTA, INDONESIA
MUMBAI, INDIA
TOKYO, JAPAN

November 17, 2003

RECEIVED

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

VIA OVERNIGHT MAIL AND ELECTRONIC MAIL

Mr. James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, Pennsylvania 17105

DOCUMENT

**Re: Docket No. I-00030100: Brief of ARC Networks, Inc. d/b/a
InfoHighway Communications Corp. and Metropolitan
Communications of PA, Inc.**

Dear Mr. McNulty:

Please find attached an original and three (3) copies of the Brief of ARC Networks, Inc. d/b/a InfoHighway Communications Corp. and Metropolitan Communications of PA, Inc. in Docket No. I-00030100.

Please date-stamp the duplicate copy of this filing and return it in the enclosed self-addressed, postage-paid envelope. If you have any questions regarding this filing, please contact the undersigned counsel at (202) 887-1284.

Respectfully submitted,

Heather T. Hendrickson

Enc.

cc: Janet Tuzinski – FUS Telecom Manager
Service List (via electronic and first class mail)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of)
Incumbent Local Exchange Carriers to)
Unbundle Local Circuit Switching for)
The Enterprise Market)
)
)
)
_____)

Docket No. I-00030100

DOCKETED

NOV 20 2003

**BRIEF OF ARC NETWORKS, INC. D/B/A INFOHIGHWAY
COMMUNICATIONS CORP. AND METROPOLITAN
COMMUNICATIONS OF PA, INC.**

RECEIVED

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Genevieve Morelli
Ross A. Buntrock
Heather T. Hendrickson
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW, Suite 500
Washington, DC 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)
gmorelli@kelleydrye.com
rbuntrock@kelleydrye.com
hhendrickson@kelleydrye.com

DOCUMENT

Counsel to ARC Networks, Inc. d/b/a InfoHighway
Communications Corp. and Metropolitan
Communications of PA, Inc.

November 17, 2003

would be impaired in the Commonwealth of Pennsylvania with respect to their ability to serve their existing installed base of DS1 enterprise customers without continued access to unbundled ILEC local switching (“ULS”). With respect to this limited market segment, the Commission should, based on the record of this proceeding, make an affirmative finding of impairment, and on the basis of that finding, seek a waiver from the FCC of the rebuttable finding of non-impairment in the enterprise market.

II. ARGUMENT

A. SUMMARY/OVERVIEW

Verizon has failed to rebut the evidence presented by either the Petitioners or the Pennsylvania Carriers’ Coalition (“PCC”) in this proceeding regarding the operational impairment they face in the absence of ULS to serve the enterprise market. Verizon, rather than rebutting the detailed and specific record evidence regarding the operational impairment that would be faced by competitors serving their installed base of DS1 UNE-P customers in the absence of ULS, has offered only generalities, factually unsupportable rhetoric and illogical arguments. Accordingly, based upon the evidence on the record, and Verizon’s failure to rebut it, this Commission should seek a waiver from the FCC of the national finding of non-impairment with respect to the installed UNE-P customer base of CLECs serving the enterprise market using ULS.

As the Petitioners explained in their Petition to Initiate Proceedings, in the TRO the FCC made a national finding of non-impairment with respect to enterprise customers.³ The

³ *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, Report and Order*

FCC relied upon three primary “facts” in making this finding: (1) incumbent local exchange carrier (“ILEC”) claims that competing carriers have installed as many as 1,300 switches; (2) a single record submission indicating that UNE-P carriers do not experience the same “hot cut” problems with enterprise customers as they do with mass market customers; and (3) the FCC’s assumption that, because enterprise customers can generate more significant revenue streams than mass market customers, UNE-P carriers are better able to cover the costs of providing service to these customers without access to a local switching UNE.⁴

In recognition of the fact that its non-impairment finding may be incorrect with respect to some market segments, the FCC created a procedural mechanism whereby enterprise UNE-P carriers can present data to individual state commissions showing that they are impaired without access to ILEC-supplied local switching. Specifically, the TRO provided that state commissions could undertake “a geographically specific analysis [that] could possibly demonstrate that competitive carriers are impaired without access to unbundled incumbent LEC local circuit switching for DS1 enterprise customers in a particular market,” and the FCC noted that UNE-P carriers could suffer specific “cost and operational disadvantages” that could make it economic to serve enterprise customers only through ILEC-supplied local switching in certain market segments.⁵ At bottom, the FCC concluded that state commissions “*must consider all relevant factors in determining whether entry is uneconomic in the absence of unbundled*

and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (Aug. 21, 2003). ¶¶451-58.

⁴ *Id.*, ¶¶451-52, n.1379-80.

⁵ *Id.*, ¶454.

access to local circuit switching.”⁶ In weighing all of the evidence supplied by the Petitioners herein, the Commission should make a finding of impairment and seek a waiver from the FCC.

B. OPERATIONAL CRITERIA

1. OTHER FACTORS THAT MAKE ENTRY UNECONOMIC FOR CLECS

The Petitioners, along with the members of the PCC, have demonstrated that impairment exists for them and other CLECs within the market defined as the existing installed base of UNE-P DS1 enterprise customers. The impairment is so severe that it is likely that the UNE platform CLECs will lose their entire installed base of DS1 enterprise customers to the ILECs if they are denied unbundled access to the ILECs’ local switching facilities. This customer loss will result not from the interplay of competitive forces, but from a fundamental inadequacy in the ILEC systems and the “parallel delivery process.”

As the Petitioners explained in their Initial Joint Declaration, in the TRO the FCC based its finding of “no impairment” on the fact that CLECs provisioning DS1 or higher loops do not use the hot cut process, which the FCC found results in impairment in the mass market. As described by the FCC:

[T]he conversion process for enterprise customers generally involves the initiation of service to the competitor’s new digital loop while the incumbent’s service remains in place. During the migration of an enterprise customer from analog services to a new digital loop, the enterprise customers remain on the incumbent’s analog facilities while the new digital loop is installed and service initiated. Similarly, where enterprise customers are being converted from the digital facilities, the competing carrier installs

⁶ *Id.*, ¶458 (emphasis added).

and initiates service on a new digital loop in parallel with the customer's existing service.⁷

The FCC concluded that since use of the parallel delivery process, rather than the hot cut process, means that a new line is activated before the existing service is terminated “enterprise customers avoid potentially lengthy disruption of service due to physical hot cuts, occasionally experiencing an outage of only 10 to 30 seconds for incoming calls as their numbers are updated in the industry database used to route calls.”⁸ But as the Petitioners have explained throughout this proceeding, even under ideal circumstances, the parallel service delivery process is extremely complex and routinely leads to substantial customer disruption. In fact, it is precisely this complex process of transferring a circuit from the ILEC to a CLEC, described by the Petitioners in great detail in the Petition to Initiate Proceedings and in the Rebuttal Declaration of Peter Karoczkai, that forms the basis for a finding that impairment exists.

As the record amply demonstrates, the parallel service delivery process is intricate, time consuming and expensive. As the Petitioners indicated in this proceeding, the parallel delivery process may require up to 5 different parties to be involved, including: Verizon, the end-user customer, the customer's equipment vendor and the UNE-P CLEC. Among the primary functions that must occur, the CLEC (switch provider) must order the new UNE DS1 loop from Verizon and provision its switch to meet the customer's requirements; Verizon must build the new UNE DS1 loop and port the customer's line numbers to the new CLEC. The customer must provide access to its premises and contact its equipment vendor; and the equipment vendor must test the new UNE DS1 facility and transfer the line at the same time as the number porting is done. The UNE-P CLEC must coordinate the whole transfer among all

⁷ *Id.*, ¶451 (notes omitted) (emphasis added).

⁸ *Id.*

the parties and disconnect the UNE-P DS1 line when complete. In addition, because Verizon fails to maintain circuit configuration information, CLECs are generally forced to configure the parallel circuit “blindly” and hope that we have configured the end user’s service appropriately.

Verizon never denies that the parallel provisioning process is disruptive, time consuming and fraught with error. Rather, Verizon’s witness, Ms. Berry, merely states that parallel provisioning is the accepted service delivery method for DS1 and higher capacity loops and that it does not make sense to use any other process.⁹ Verizon has never countered the evidence set forth by the Petitioners throughout the course of this proceeding, that the parallel provisioning process constitutes a major source of impairment in the enterprise DS1 market. In fact, Verizon admits the parallel provisioning process can result in end user disconnects because “the new facility is turned up only after the old one is disconnected and the equipment is not running two systems at once.”¹⁰ Ms. Berry testified that the Verizon Pennsylvania parallel service delivery process occurs in the following manner: “the new facility is turned up only after the old one is disconnected and the equipment is not running two systems at once.”¹¹ This process guarantees customer disruption. Ms. Berry and Verizon have failed to address, much less refute, the evidence that this service disruption, and the accompanying complex provisioning tasks necessitated by the parallel delivery process, result in operational impairment.

Moreover, Verizon’s witness testified that the traditional hot cut process will not work for DS1 loops because there is “complex equipment on both ends of the loop” that makes it very difficult to transfer a DS1 facility from one carrier to another¹² yet she does not offer any

⁹ Direct Testimony of Debra M. Berry, 7 (“Berry Direct”).

¹⁰ *Id.*

¹¹ *Id.* at 7, lines 9-11.

¹² *Id.*

proof to refute the Petitioner's evidence that the parallel provisioning process results in impairment. But as the Petitioners have demonstrated, a major source of impairment is the parallel provisioning process and the lack of any kind of reliable or accurate hot cut process for migrating DS1 facilities from an ILEC to a CLEC.¹³

2. DISCUSSION ON WHETHER OPERATIONAL CRITERIA FACTORS ARE SIGNIFICANT ENOUGH TO CONSTITUTE IMPAIRMENT AND HOW UNBUNDLING WILL OVERCOME THE ALLEGED IMPAIRMENT

As the Petitioners and the PCC have demonstrated, there is a substantial likelihood that CLEC would lose their existing DS1 UNE-P customers to Verizon if ULS were eliminated for the installed base of DS1 enterprise customers in Pennsylvania because a customer, given the choice of risking a service outage as CLECs attempt to locate alternate switching providers and undertake the tenuous process of transferring the customer's service to the new provider, or going back to receiving service from Verizon, where no risk of disruption in service exists because Verizon simply has to make a software billing change in order to begin providing service to customers, the customer will likely choose the risk-free option of returning to Verizon.

Based upon the evidence of operational impairment in this proceeding, the Commission should seek a waiver from the FCC to allow CLECs in Pennsylvania to continue to serve their installed DS1 customer base utilizing ULS, until such time as Verizon has implemented a loop migration system—including procedures to provide switch-port settings—to allow DS1 customers' circuits to be migrated between carriers.

¹³ Joint Declaration, 12.

III. CONCLUSION

For the foregoing reasons, the Commission should deny Verizon's Motion to Dismiss, Motion to Strike, and should seek a waiver from the FCC of its national finding of no impairment for DS1 enterprise customers as it applies to the existing installed DS1 customer base of competitive providers. The Commission should defer to a separate proceeding issues regarding the lawfulness of Verizon's post-251 pricing of local switching and other elements it is required to make available pursuant to section 271 of the federal Telecom Act.

Respectfully submitted,



Genevieve Morelli
Ross A. Buntrock
Heather T. Hendrickson
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW, Suite 500
Washington, DC 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)
gmorelli@kelleydrye.com
rbuntrock@kelleydrye.com
hhendrickson@kelleydrye.com

Counsel to ARC Networks, Inc. d/b/a InfoHighway
Communications Corp. and Metropolitan
Communications of PA, Inc.

November 17, 2003

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation into the Obligations of)
Incumbent Local Exchange Carriers to)
Unbundle Network Elements) Docket No. I-00030100

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of November, 2003, served a true copy of the foregoing Brief of ARC Networks, Inc. d/b/a InfoHighway Communications Corp and Metropolitan Communications of PA, Inc. upon the persons below via electronic and first-class mail, in accordance with the requirements of 52 Pa. Code §1.54:

Carol Pennington, Acting Director
Angela Jones, Esquire
Office of Small Business Advocate
300 North Second Street
Commerce Building, Suite 1102
Harrisburg, PA 17101

Patricia Armstrong, Esquire
D. Thomas, Esquire
R. L. Matz, Esquire
Thomas, Thomas, Armstrong and Neisen
212 Locust Street, Suite 500
Harrisburg, PA 17101

Kandace Melillo, Esquire
Charles Hoffman, Esquire
Pennsylvania Public Utility Commission
Office of Trial Staff
400 North Street
Harrisburg, PA 17120

Alan Kohler, Esquire
Daniel Clearfield, Esquire
Wolf, Block, Schorr and Solis-Cohen
212 Locust Street, Suite 300
Harrisburg, PA 17101

Maryanne Martin, Esquire
Kimberly A. Joyce, Esquire
Pennsylvania Public Utility Commission
Law Bureau
400 North Street, 3rd Floor
Harrisburg, PA 17120

Michelle Painter, Esquire
MCI WorldCom, Inc.
1133 19th Street, NW
Washington, DC 20036

Norm Kennard, Esquire
Hawke, McKeon, Sniscak and Kennard, LLP
100 North Tenth Street
Harrisburg, PA 17101

Irwin A. Popowsky, Esquire
Barrett Sheridan, Esquire
Phil McClelland, Esquire
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101-1923

Philip Macres, Esquire
T. E. Finn, Esquire
R. M. Blau, Esquire
Swidler Berlin Shereff Friedmann
3000 K Street, N.W.
Washington, D.C. 20007

Robert C. Barber, Esquire
AT&T Communications of PA, Inc.
3033 Chain Bridge Road
Oakton, VA 22185

Julia Conover
William Petersen
Suzan DeBusk Paiva
Stephen I. Bachman
Verizon
1717 Arch Street, 32N
Philadelphia, PA 19103

Melanie Lloyd (Expert Consultant)
7501 Callbram Lane
Austin, TX 78736

Sue Benedek
Sprint
240 North Third Street
Suite 201
Harrisburg, PA 17101

Timothy E. Wallick (Technical Expert)
Gary L. Yocca (Technical Expert)
Joseph Kubas (Technical Expert)
P. O. Box 3265
Harrisburg, PA 17105-3265

Pennsylvania Telephone Association
P.O. Box 1169
Harrisburg, PA 17108-1169

Allen Bucklew (Expert Witness)
J. W. Wilson & Associates Inc.
Rosslyn Plaza C, Suite 1104
1601 N. Kent Street
Arlington, VA 22209

RECEIVED

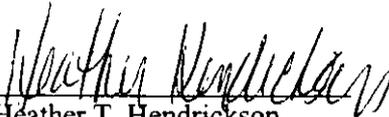
NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Nego Pile
Lightship Telecom LLC
1301 Virginia Drive
Suite 440
Fort Washington, PA 19034

Rowland L. Curry (Expert Consultant)
1509 Mearns Meadow Blvd.
Austin, TX 78758

Bob Loube (Expert Consultant)
10601 Cavalier Drive
Silver Spring, MD 20901


Heather T. Hendrickson
Kelley Drye & Warren LLP
1200 - 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600
Fax: (202) 955-9792
E-Mail: hhendrickson@kelleydrye.com



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

November 17, 2003

ORIGINAL

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

DOCUMENT

Re: Investigation Into The Obligations Of Incumbent
Local Exchange Carriers To Unbundle Local
Circuit Switching For The Enterprise Market

RECEIVED

NOV 17 2003

Docket No. I-00030100

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Dear Secretary McNulty:

Enclosed for filing please find an original and nine (9) copies of the **Main Brief** of the Office of Trial Staff (OTS) in the above-captioned proceeding.

Copies are being served on all active parties of record.

Sincerely,

Kandace F. Melillo

Kandace F. Melillo
Prosecutor
Office of Trial Staff

KFM:em

Enclosure

c: Parties of Record

124

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RE: INVESTIGATION INTO THE
OBLIGATIONS OF INCUMBENT
LOCAL EXCHANGE CARRIERS TO
UNBUNDLE LOCAL CIRCUIT SWITCHING
FOR THE ENTERPRISE MARKET

:
:
: Docket No.
: I-00030100
:
:

RECEIVED

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

MAIN BRIEF
OF THE
OFFICE OF TRIAL STAFF

DOCKETED
NOV 20 2003

DOCUMENT

Kandace F. Melillo
Prosecutor

Office of Trial Staff
Pennsylvania Public
Utility Commission

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-6155

Dated: November 17, 2003

TABLE OF CONTENTS

Page:

I. INTRODUCTION 1

II. SUMMARY OF ARGUMENT 5

III. ARGUMENT 6

A. Operational Criteria 6

 1. ILEC’s performance in provisioning loops..... 6

 2. Difficulties in obtaining collocation space due to lack of space or delays in provisioning by the ILEC..... 10

 3. Difficulties in obtaining cross-connects in an ILEC’s wire center 10

 4. Any other operational criteria that make entry uneconomic for CLECs 10

 5. Discussion on whether the operational criteria factors identified in 1-4 above are significant enough to constitute impairment and how unbundling will overcome the alleged impairment..... 12

B. Economic Criteria 14

 6. The “particular market(s)” in which entry is uneconomic in the absence of unbundled local circuit switching 14

C. Independent State Authority To Require Unbundling..... 17

IV. CONCLUSION..... 18

I. INTRODUCTION

As stated in the Commission's Procedural Order at this docket, Congress adopted a national policy of promoting local telecommunications competition through the enactment of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §§151 et seq. (TA-96). Pennsylvania had earlier provided for telecommunications competition, through the legislative enactment of Chapter 30, 66 Pa. C.S. §§3001 – 3009.

As part of TA-96, incumbent local exchange carriers (ILECs) have the duty to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.¹ 47 U.S.C. §251(c)(3). Subsection (d)(2) of Section 251(c)(3) of TA-96 provides the standard concerning what network elements should be made available pursuant to the duty set forth in Section 251(c). According to subsection (d)(2), the Federal Communications Commission (FCC), as the implementing and enforcing agency, is to consider, at a minimum, whether access to such network elements as are proprietary in nature is necessary; and, whether the failure to provide access to such network elements would **impair** the ability of a telecommunications carrier seeking access to provide the services that it seeks to offer. 47 U.S.C. §251(d)(2)(A) and (B).

¹ Section 252(d)(1) of TA-96, 47 U.S.C. §252(d)(1), provides that just and reasonable UNE rates must be based on cost, must be nondiscriminatory, and may include a reasonable profit. The FCC has defined "cost", for purposes of developing UNE rates, as "forward-looking long-run economic cost", also referred to as TELRIC (Total Element Long Run Incremental Cost). *See, In The Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98 et al., released August 8, 1996 (Local Competition Order), ¶672.

On February 20, 2003, the FCC adopted new rules concerning the obligation of ILECs to unbundle their network elements (“UNEs”) and make them available at TELRIC rates to competitive local exchange carriers (CLECs). These new rules were subsequently set forth in the FCC’s *Triennial Review Order*² (hereinafter “TRO”), released on August 21, 2003, which established a new standard for determining the existence of impairment under subsection 251(d)(2) of TA-96. Therein, the FCC, *inter alia*, established a national finding that CLECs are not impaired without unbundled local circuit switching with respect to DS1 enterprise customers³ that are served using loops at the DS1 capacity and above. TRO ¶451.

However, the FCC recognized that a more granular analysis could possibly demonstrate impairment, particularly in rural areas, and that state commissions are uniquely positioned to evaluate local market conditions and determine whether and where impairment exists. TRO ¶¶454, 455. Thus, an opportunity was provided for state commissions to rebut the national finding, using operational and economic criteria referenced in the TRO, and any other relevant operational and economic criteria that make entry uneconomic for CLECs. TRO ¶¶456-458. State commissions were given 90 days, or until December 31, 2003, to petition the FCC to waive the finding of no impairment, based upon evidence affirmatively establishing that CLECs are impaired

² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order (released August 21, 2003)(FCC 03-36), as corrected by errata, FCC 03-227 issued on September 17, 2003 (hereinafter “TRO”).

³ The enterprise market is defined by the FCC as a business customer market of typically medium to large businesses with a high demand for a variety of sophisticated telecommunications services. TRO ¶197, footnote 624.

without access to local circuit switching (unbundled local switching or ULS) to serve end users using DS1 capacity or above loops. TRO ¶455.

The specific operational criteria which the FCC directed the states to consider, in rebutting the no impairment finding, are: (1) ILEC performance in provisioning loops; (2) difficulties in obtaining collocation space due to lack of space or delays in provisioning by ILECs; and (3) difficulties in obtaining cross-connects in an ILEC's wire center. The FCC also requested that states consider evidence of whether these factors are impairing entrants in the enterprise market, and whether unbundling will overcome this impairment. TRO ¶456.

The specific economic criteria for rebutting impairment are as follows: (1) the state must weigh a CLEC's potential revenues from serving enterprise customers in a particular geographic market against the cost of entry into that market; (2) in determining entry costs, the state should consider the costs imposed by both operational and economic barriers to entry; and (3) the state is encouraged to consider whether CLECs could be price competitive, given the ILEC's retail rates in that geographic area. TRO ¶457. The FCC specifically stated that entry could be uneconomic, even in a potentially high revenue market, due to higher economic and operational costs such as untimely and unreliable loop provisioning and significant backhaul costs. TRO ¶458.

On October 3, 2003, the Commission entered a Procedural Order at this docket (*Procedural Order*) which, *inter alia*, provided an opportunity for CLECs to challenge the FCC's national finding of no impairment with respect to enterprise customers that are served using loops at the DS1 capacity and above, through the filing of

a Petition with the Commission. All Petitions were to be consolidated and assigned to an ALJ for hearings and the development of a record for certification to the Commission, to allow for a waiver filing with the FCC by December 31, 2003. The Office of Trial Staff (OTS) was directed to participate in this 90-day proceeding.

Subsequently, six CLECs joined in Petitions and submitted prepared statements, alleging that they would be impaired without access to unbundled local switching to serve existing or potential DS1 or above enterprise customers in Pennsylvania. The Petitions were assigned to ALJ Michael C. Schnierle (ALJ Schnierle), who held a Prehearing Conference to establish a procedural schedule. At this Prehearing Conference, held on October 24, 2003, the parties agreed to filing dates for Verizon Pa. Inc. (Verizon) testimony and CLEC rebuttal, with a November 7, 2003, hearing date.

Prior to November 7, the active parties⁴ stipulated that the prepared statements and three OTS discovery exhibits would be admitted into the record, without the need for cross-examination, and that the November 7 hearing could be cancelled. The parties' briefs are due on November 17, 2003, with no opportunity for reply briefs.

⁴ The active parties in this proceeding are the incumbent Verizon Pa., Inc. ("Verizon"), who is supporting the FCC finding,; Full Service Computing Corporation t/a Full Service Network ("FSN"), Remi Retail Communications, LLC ("Remi"), ATX Licensing, Inc. ("ATX"), and Line Systems, Inc. ("LSI") (collectively the "Pennsylvania Carriers' Coalition" or "PCC"); Arc Networks, Inc. d/b/a InfoHighway ("InfoHighway"); Metropolitan Telecommunications Corporation of PA ("MetTel") (all six competitors collectively referred to as the "CLECs"); the Office of Consumer Advocate ("OCA"); the Office of Trial Staff ("OTS") and the Office of Small Business Advocate ("OSBA").

II. SUMMARY OF ARGUMENT

The CLECs have met their burden of proof, based upon the stipulated record herein, in that they have established a prima facie case of impairment, using criteria set forth in the TRO. Verizon has not sufficiently rebutted the CLECs' prima facie case and therefore, the CLECs have prevailed.

In addition, as repeatedly affirmed by the Commission,⁵ there is independent state authority for unbundling requirements in 66 Pa. C.S. §3005(e)(1). Accordingly, even if the CLECs herein had not met their burden of proof, Verizon has already agreed to unbundle the basic service functions (bsfs) for all competitive services, when it accepted its Chapter 30 Plan.

Since the CLECs have demonstrated impairment unless provided access to unbundled local circuit switching with respect to DS1 enterprise customers that are served using loops at the DS1 capacity and above, Verizon is obligated to continue providing unbundled local circuit switching.

⁵ See, e.g., *Global Order*, 93 Pa. PUC 172, 210 (1999); *Petition of Verizon Pennsylvania, Inc. for a Determination That its Provision of Business Telecommunications Services to Customers Generating Less Than \$10,000 in Annual Total Billed Revenue is a Competitive Service Under Chapter 30 of the Public Utility Code*, Docket No. P-00021973, Opinion and Order entered August 13, 2003, pp. 24-26, reconsideration granted pending review on the merits on September 5, 2003; *Procedural Order*, p. 5.

III. ARGUMENT

A. Operational Criteria

1. ILEC's performance in provisioning loops

As indicated above, one of the operational criteria established by the FCC for rebutting the no impairment finding is an examination of whether ILEC performance in loop provisioning is impairing CLECs' ability to serve customers. TRO ¶456. On the basis of this criterion, the CLECs have established a prima facie case of operational impairment.

PCC witness Scott Dulin explained that a CLEC typically serves a DS1 enterprise customer through a combination of local circuit switching, a DS1 (or higher capacity) local loop and transport facilities. These network elements are currently available for purchase by CLECs from Verizon as a wholesale service arrangement commonly referred to as UNE-P (unbundled network element platform) or the "DS1 Platform"⁶, as it is referred to in this proceeding. PCC Statement (St.) 1.0, p. 15, lines 6-12. However, if the FCC finding of no impairment is permitted to stand in Pennsylvania, Verizon will no longer be required to provide the DS1 Platform to CLECs for serving enterprise customers.

The unavailability of the DS1 Platform would require that a CLEC provide its own switching capacity, either through installation of switches or through collocation

⁶ All of the CLECs in this proceeding consider the DS1 Platform an integral and essential part of their existing and/or future service to Pennsylvania consumers, particularly in rural areas. PCC St. 1.0, p. 1, lines 20-21; p. 3, lines 17-22; p. 7, line 19 - p. 8, line 14; p. 10, line 1 - p. 11-line 2; InfoHighway and MetTel St. 1.0, p. 4, line 17 - p. 5, line 2.

arrangements at the ILEC's switching facilities to serve every single DS1 customer. PCC St. 1.0, p. 14, lines 6-9. In order to use its own switch to provide service to customers, the CLEC must connect its switch to the ILEC loop, which entails the loop provisioning process. TRO ¶464.

The FCC found that, with respect to mass market customers, CLECs are impaired without access to unbundled local circuit switching due to the massive problems with loop provisioning—particularly the “hot cut” process.⁷ TRO ¶¶459-460, 464-473. The FCC further concluded, with respect to enterprise customers, that the facilities used to provide DS1 capacity or above services typically are not pre-wired to ILEC switches, allowing CLECs to avoid the costs and service disruptions associated with “hot cuts”. TRO ¶421. However, as established in the CLEC testimony herein, that FCC finding, which was critical to the finding of non-impairment, is simply not true in Pennsylvania. In Pennsylvania, all existing ILEC DS1 or above loops are prewired to the ILEC switch or distribution frame (a fact which was not disputed by Verizon). Consequently, as concluded by the PCC, a manual “hot cut” is required for customer migration. PCC St. 1.0, p. 29, lines 10-27.

Thus, all the documented problems in “hot cuts” found to constitute impairment by the FCC in the mass market, such as service delays, service interruption and service degradation, are equally applicable to the enterprise market at issue herein, and constitute operational impairment. PCC St. 1.0, p. 33, lines 10-31. This fact alone

⁷ The physical transfer of a customer's line from the ILEC switch to the CLEC switch currently requires a coordinated loop cut over or “hot cut” for each customer's line. TRO ¶465.

should distinguish Pennsylvania from the FCC's national finding of non-impairment in the enterprise market, and should result in the granting of a waiver by the FCC.

Furthermore, according to PCC witness Scott Dulin, the above-described migration using a "hot cut" process is only available for migrating an ILEC customer to a CLEC switch if spare loop facilities are available from Verizon's central office to the customer premise. If no spare facility is available, then Verizon has no established process (hot cut or otherwise) to migrate the customer, and CLECs will not be able to provide switch-based local service, absent the DS1 Platform. PCC St. 1.0, p. 30, lines 6-10. InfoHighway witness Peter Karoczkai and MetTel witness David Aronow also corroborated the PCC testimony about the lack of a process for migrating customer loops from ILEC to CLEC switches.⁸ InfoHighway and MetTel St. 1.0, p. 9, line 20 - p. 10, line 1. Verizon did not directly rebut the CLECs' testimony concerning operational difficulties with the "hot cut" process.

Another FCC finding, which was critical to the national finding of non-impairment in the enterprise market, is that, due to a parallel service delivery process for migrating enterprise customers, the ILEC's service to the customer is disconnected only after the CLEC's service over a new loop has been initiated. This process was found, by the FCC, to avoid potentially lengthy service disruptions involved with "hot cuts." TRO ¶451. However, this finding is also not applicable to Pennsylvania. Even Verizon witness Debra Berry acknowledged a service disruption to the customer as, under parallel

⁸ Verizon's website indicates that the standard provisioning time for a DS1 loop can range from 9 days minimum to more than several months, depending on facility availability. OTS Exhibit 1.

provisioning, “the new facility is turned up only after the old one is disconnected.”

Verizon St. 1.0, p. 7, lines 9-11.

Ms. Berry testified that, due to the complex equipment on both ends of the loop, parallel provisioning is recommended for migrating DS1 customers. Verizon St. 1.0, p. 7, lines 1-6. However, the PCC testified that the parallel delivery process described by the FCC is generally not available to Pennsylvania CLECs, in its experience, due to lack of required excess capacity and complexity. PCC St. 1.0, p. 31, lines 1-25; p. 32, lines 1-3. InfoHighway witness Peter Karoczkai and MetTel witness David Aronow testified that the parallel delivery is a costly and labor intensive process that is extremely prone to failure and causes disruption to the end-user. InfoHighway and MetTel St. 1.0, p. 11, lines 6-8; see also, OTS Exhibits 2 and 3. Verizon failed to rebut Mr. Karoczkai’s statements. InfoHighway St. 2.0, p. 2, lines 9-11.

The PCC also presented unrebutted testimony showing that operational impairment (and economic impairment) exists throughout Verizon North’s territory and that there is no ability for CLECs to serve DS1 customers service in non-Verizon territory. PCC St. 1.0, p. 28, line 9 – p. 29, line 2.

In conclusion, the CLECs have supplied substantial, significant and largely unrebutted testimony demonstrating operational impairment without access to the DS1 Platform. The CLECs have met their burden of proof, and a waiver from the FCC’s

non-impairment finding should be sought,⁹ based upon Verizon's performance in provisioning loops.

2. Difficulties in obtaining collocation space due to lack of space or delays in provisioning by the ILEC

The CLECs did not present evidence concerning this operational criterion, but based their impairment case on Verizon's inadequate loop provisioning process.

3. Difficulties in obtaining cross-connects in an ILEC's wire center.

The CLECs did not present evidence concerning this operational criterion, but based their impairment case on Verizon's inadequate loop provisioning process.

4. Any other operational criteria that make entry uneconomic for CLECs.

The PCC presented testimony concerning difficulties its members have had in using the DS1 Platform during the four years since the *Global Order*¹⁰ required Verizon to provide it. Specifically, until recently, this wholesale product was only usable if the customer was willing to spend tens of thousands of dollars to install PRI capability so that the CLEC could be provided with the call detail records ("CDR") which would allow for customer billing. PCC St. 1.0, p. 20, line 20 – p. 21, line 9.

Verizon had not thought through the provision of DS1 Platform service and had to subsequently create software to accommodate the provisioning and billing of this offering. Consequently, valuable time was lost when the CLECs could have been building up their DS1 customer bases. Had the CLECs been provided with billing capabilities at an earlier time, the revenue opportunities may have enabled the CLECs to

⁹ It is OTS' understanding that the PCC will present argument as to the particular geographic markets involved in impairment.

¹⁰ 93 Pa. PUC 172, 218 (1999).

expand their businesses through switch installations, so that they would be less dependent on Verizon switching. Now, at the point when the DS1 Platform is finally usable, Verizon seeks to discontinue it. PCC St. 1.0, p. 22, line 1 – p. 23, line 22.

Verizon has also refused to provide Enhanced Extended Loops (EELs) with concentration, although required by the *Global Order*.¹¹ This is another way that Verizon has operationally limited the CLECs' ability to expand their customer base and be in a position, economically, to justify installing switches or additional switches.¹² PCC St. 1.0, p. 24, line 4 – p. 25, line 25.

Verizon should not be permitted to profit from its own delays and its own disregard of the *Global Order*. These factors should be taken into account as additional operational impairments, and serve to enhance an already substantial basis upon which to seek an FCC waiver.

Another operational factor which should be considered is the labor intensive and time consuming additional operational steps that a CLEC would have to undertake to migrate its DS1 customer base to alternate switching facilities. A chart prepared by InfoHighway witness Peter Karoczkai and MetTel witness David Aronow shows eight separate steps required for the CLEC to migrate the customer. Verizon simply has one step—a billing change—to recapture the customer. This puts CLECs at a tremendous competitive disadvantage, and should be considered, along with the other

¹¹ 93 Pa. PUC 172, 219 (1999).

¹² As testified to by Remi witness David Malfara, "EELs have the potential to substantially reduce the CLECs' average switching cost per customer and allows efficiencies that Verizon already enjoys. . .". PCC St. 1.0, p. 24, lines 13-14.

indications of impairment, if CLECs are not provided the DS1 Platform. InfoHighway and MetTel St. 1.0, p. 12, line 1 – p. 13, line 10; OTS Exhibit 2.

5. Discussion on whether the operational criteria factors identified in 1-4 above are significant enough to constitute impairment and how unbundling will overcome the alleged impairment.

As stated above, the operational problems due to Verizon's loop provisioning process are clearly significant enough to constitute impairment. First of all the FCC's national finding of no impairment is based upon certain findings. These are (1) that the facilities used to provide DS1 capacity or above services are not pre-wired to ILEC switches, allowing CLECs to avoid the costs and service disruptions associated with "hot cuts"; and, (2) that, due to the parallel delivery process, the ILEC's service to the customer is disconnected only after the CLEC's service over a new loop has been initiated, thereby avoiding service disruptions involved with "hot cuts." TRO ¶¶421, 451. However, the testimony herein establishes that these two critical findings are not at all applicable in Pennsylvania. PCC St. 1.0, p. 29, lines 10-27; Verizon St. 1.0, p. 7, lines 9-11. Since these two findings, crucial to the finding of no impairment, are not true in Pennsylvania, the FCC's finding of non-impairment should be waived for Pennsylvania.

Indeed, all the documented problems with "hot cuts", found by the FCC to constitute impairment in the mass market, such as service delays, service interruption, and service degradation, are equally applicable to the enterprise market at issue herein, and constitute operational impairment. PCC St. 1.0, p. 33, lines 10-31.

Issues of fairness also come into play here as Verizon has operationally and economically impeded the CLECs through its failure to timely provide for CLEC billing

under the DS1 Platform and its refusal to provide EELs with concentration. Thus, the CLECs were unable to achieve independence from Verizon's switch, as they might have done if they had been enabled to expand their customer base at an earlier date. PCC St. 1.0, p. 20, line 20 – p. 23, line 22.

The continued availability of the DS1 Platform is necessary to allow the CLECs to keep and expand their customer base, particularly in more rural areas of the Commonwealth, and to avoid customer service disruptions and degradations currently associated with "hot cuts" and parallel delivery, when a CLEC customer is migrated off of the ILEC switch. PCC St. 1.0, p. 9, lines 3-5; PCC St. 1.0, p. 33, lines 15-27; p. 35, line 13 – p. 36, line 9; InfoHighway and MetTel St. 1.0, p. 11, lines 6-8.

Based upon the foregoing, the CLECs have established a prima facie case of operational impairment, using the criteria set forth in the TRO. While the burden of proof does not shift during the course of the proceeding, the burden of going forward with the evidence shifts to the opposing party once the CLEC established a prima facie case. Verizon, which is the only party supporting the FCC presumption of no impairment, must rebut the prima facie case to shift the burden of going forward back to the CLECs.¹³ Verizon has not rebutted the CLECs' prima facie case and therefore, the CLECs have met their burden of proof.

Since the CLECs have demonstrated impairment unless provided access to unbundled local circuit switching with respect to DS1 enterprise customers that are served using loops at the DS1 capacity and above, Verizon is obligated to continue

¹³ See, *Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98 (1980).

providing unbundled local circuit switching.

B. Economic Criteria

In the *Procedural Order* entered at this docket, the Commission recognized that, under the TRO,¹⁴ a state commission must demonstrate either that operational or economic barriers exist in a particular geographic market, or both, in order to receive a waiver of the no impairment finding. *Procedural Order*, p. 8. OTS has elected to concentrate primarily on the operational impairment issues in this Main Brief, but understands that the CLECs will be further addressing the economic issues. OTS will address the first economic issue, which concerns the economics of entering rural markets in the absence of unbundled local circuit switching.

6. The “particular market(s)” in which entry is uneconomic in the absence of unbundled local circuit switching.

As indicated above, one of the economic criteria established by the FCC for rebutting the no impairment finding is whether entry into a particular market is uneconomic in the absence of unbundled local switching. TRO ¶457. The evidence herein clearly establishes that entry into the more rural markets of Pennsylvania is not economically feasible without access to the DS1 Platform. PCC St. 1.0, p. 7, line 19 – p. 8, line 7; p. 10, line 12 – p. 11, line 2; p. 35, line 13 – p. 36, line 2.

Verizon witness Debra Berry did not challenge the CLECs’ statements that expansion of service into rural Pennsylvania would be more expensive. Instead,

¹⁴ See also, TRO Appendix B, §51.319(d)(3)(i).

Ms. Berry contended that a single CLEC switch could be extended to serve an entire LATA or state, or multiple LATAs and/or states. Verizon St. 1.0, p.4, lines 3-15.

However, as pointed out by the PCC in rebuttal, a switch can only serve a finite surrounding area unless the service area is expanded either through use of collocation or EELs, each of which involve significant recurring and non-recurring costs which must be recovered. For example, both the use of EELS and collocation involve backhaul costs which are distance-sensitive—the further away the customer is located from the CLEC switch, the higher the wholesale cost to serve the customer. See, Exhibit PCC -1, attached to PCC St. 1.0. These wholesale costs impose severe economic restrictions on a CLEC's ability to extend its switch coverage to serve DS1 customers. Furthermore, EELs are not available to cross a LATA boundary and backhaul costs in a collocation scenario are priced even higher if the collocation is in a different LATA than the actual switch. PCC St. 1.1, p. 6, line 14 – p. 8, line 14.

In response to an OTS informational request, the PCC indicated that, based upon the present EEL pricing structure, a collocated CLEC switch must service 38 DS1 customers at a rate equal to what Verizon charges at retail to simply recover its wholesale costs, and would need to serve over 50 DS1 customers at FSN's lower retail rate. OTS Exhibit 1; Exhibit PCC-1. These costs reflect service to a customer located 37 miles from a CLEC switch and increase with distance, such that, if the distance exceeds 37 miles, even more DS1 customers would be required to be served to recover wholesale costs. Exhibit PCC-1. Also, the analysis only takes into account wholesale costs which are based on publicly available information and fail to account for any CLEC retail costs

(which also must be recovered in the prices the CLEC charges for service). This demonstrates the significant economies of scale and scope which are required to recover the costs which a CLEC must pay to extend its network to serve DS1 customers, and results in service being limited to denser population areas of the state, unless the DS1 Platform is available. PCC St. 1.0, p, 37, lines 1-8.

As succinctly stated by Scott Dulin from ATX:

A local switch primarily serves the immediately surrounding geographical area from its physical location. For ATX in Pennsylvania, this area is the Philadelphia metropolitan area. Since the geographic coverage or reach of a local switch is economically restricted by the cost elements of loop/collocation/transport distance, ATX cannot expand its DS1 customer base outward from a given market without the availability of a product line that limits the substantial costs resulting from transporting traffic over great distances from switch to end user. DS1 Platform is the only product that accommodates this problem for DS1 customers outside the optimal range of a competitive LEC switch as well as in more rural geographic regions.

PCC St. 1.0, p. 10, line 18 – p. 11, line 2.

In conclusion, the particular market(s) in which CLEC entry is uneconomic is unquestionably the less urban areas of the state, in the absence of unbundled local switching. Since it is the policy of the Commonwealth, pursuant to Chapter 30, to “[p]romote and encourage the provision of competitive services by a variety of service providers on equal terms throughout all geographic areas of this Commonwealth”, the Commission should seek a waiver from the FCC so that unbundled local circuit switching can continue to be available for purchase by CLECs. 66 Pa. C.S. §3001(7).

C. Independent State Authority To Require Unbundling

Even if the CLECs had not met their burden of proof concerning impairment, this Commission has repeatedly held¹⁵ that there is independent state authority for requiring unbundling of competitive services¹⁶ in 66 Pa. C.S. §3305(e)(1).

Verizon will likely contend that this statutory provision has been preempted by a federal agency's (FCC's) interpretation of federal law (TA-96). The TRO states that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations." TRO ¶187. However, as brought out by PCC in its Answer to Verizon's Motion to Dismiss at this docket, the unbundling obligation was part of a "package deal" in Chapter 30. Verizon filed for and received approval of an Alternative Regulation Plan, under Chapter 30, and has been enjoying freedom from earnings constraints and other benefits of alternative regulation for many years. In return for these benefits, Verizon must also accept Chapter 30's obligations; one of which is to unbundle the basic service functions (bsfs) of all competitive services. 66 Pa. C.S. §3005(e)(1).

Verizon has, in effect, entered into an agreement with the Commonwealth in 1994,¹⁷ to comply with the obligations of Chapter 30, in exchange for freedom from rate base/rate of return regulation. Its compliance with this existing agreement does not in any way constitute a "creation, modification or elimination" of unbundling obligations.

¹⁵ See, footnote 5, *supra*.

¹⁶ In the *Global Order*, 93 PA. PUC 172, 281-282, business services provided to customers generating \$10,000 or more in total annual billed revenue were declared competitive, pursuant to a timeline. Certainly, at least some of the DS1 enterprise customers generate \$10,000 or more in annual total billed revenue. PCC St. 1.0, p. 39, lines 4-14. If the DS1 customer generates less than \$10,000 in annual total billed revenue, the Commission has declared, in effect, that barriers to entry and therefore impairment remain for CLECs. See, *Petition of Verizon, supra*, Docket No. P-00021973.

¹⁷ See, *Re Bell Atlantic- Pennsylvania, Inc.*, 82 Pa. PUC 194 (1994).

IV. CONCLUSION

For all the foregoing reasons, the Commission should file a petition with the FCC requesting a waiver of the finding of no impairment for CLECs with respect to unbundled local circuit switching for DS1 enterprise customers that are served using loops at the DS1 capacity and above.

Respectfully submitted,

Kandace F. Melillo

Kandace F. Melillo

Prosecutor

Office of Trial Staff

Pa. Public Utility Commission

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-6155
E-mail: kmelillo@state.pa.us

Dated: November 17, 2003

RECEIVED

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation Into The Obligations Of :
Incumbent Local Exchange Carriers To :
Unbundle Local Circuit Switching : Docket No. I-00030100
For The Enterprise Market :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Main Brief** of the Office of Trial Staff, dated November 17, 2003, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below:

Philip F. McClelland, Esquire
Barrett C. Sheridan, Esquire
Office of Consumer Advocate
555 Walnut Street
Forum Place - 5th Floor
Harrisburg, PA 17101-1923

Angela T. Jones, Esquire
Office of Small Business Advocate
Commerce Building - Suite 1102
300 North 2nd Street
Harrisburg, PA 17101

Julia A. Conover, Esquire
William B. Peterson, Esquire
Suzan DeBusk Paiva, Esquire
Verizon Communications
1717 Arch Street, 32 NW
Philadelphia, PA 19103

Alan C. Kohler, Esquire
Wolf, Block, Schorr and
Solis-Cohen LLP
212 Locust Street
Suite 300
Harrisburg, PA 17101

Ross A. Buntrock, Esquire
Genevieve Morelli, Esquire
Kelley Drye & Warren LLP
1200 Nineteenth Street, NW
Suite 500
Washington, DC 20036

Russell M. Blau, Esquire
Philip J. Macres, Esquire
Tamar E. Finn, Esquire
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007-5116

Maryanne Martin, Esquire
Kimberly A. Joyce, Esquire
Pa. Public Utility Commission
Law Bureau
P.O. Box 3265
Harrisburg, PA 17105-3265

Patricia Armstrong, Esquire
Regina L. Matz, Esquire
Thomas Thomas Armstrong & Niesen
212 Locust Street
Suite 500
Harrisburg, PA 17108

Norman Kennard, Esquire
Hawke McKeon Sniscak & Kennard
100 North Tenth Street
P.O. Box 1778
Harrisburg, PA 17105-1778

Robert A. Rosenthal, Director
Pa. Public Utility Commission
Bureau of Fixed Utility Services
P.O. Box 3265
Harrisburg, PA 17105-3265

Janet Tuzinski, Telecomm. Manager
Pa. Public Utility Commission
Bureau of Fixed Utility Services
P.O. Box 3265
Harrisburg, PA 17105-3265

Michelle Painter, Esquire
MCI WorldCom Communications, Inc.
1133 19th Street, NW
Washington, DC 20036

Honorable Michael C. Schnierle
Administrative Law Judge
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Kandace F. Melillo
Kandace F. Melillo
Prosecutor
Office of Trial Staff

Dated: November 17, 2003
Docket No. I-00030100

RECEIVED
NOV 17 2003
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the :
Obligation of Incumbent : Docket No.
Local Exchange Carriers : I-00030100
to Unbundle Local Circuit :
Switching for the Enterprise Market :

ORIGINAL

RECEIVED

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BRIEF OF VERIZON PENNSYLVANIA INC.
AND VERIZON NORTH INC.

DOCKETED

NOV 20 2003

EXPURGATED VERSION

DOCUMENT

Julia A. Conover
William B. Petersen
Suzan DeBusk Paiva
1717 Arch Street, 32N
Philadelphia, PA 19103
(215) 963-6001
fax (215) 563-2658
e-mail: Julia.a.conover@verizon.com
William.b.petersen@verizon.com
Suzan.d.paiva@verizon.com

Counsel for Verizon Pennsylvania Inc.
and Verizon North Inc.

November 17, 2003

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	3
III.	ARGUMENT	7
A.	The Petitions Fail To Provide Evidence That Addresses The FCC’s Mandatory Impairment Criteria And Therefore Cannot Meet Their Burden Of Proof	7
1.	Operational Criteria	8
a.	ILEC’s performance in provisioning loops.....	8
b.	Difficulties in obtaining collocation space due to lack of space or delays in provisioning by the ILEC	10
c.	Difficulties in obtaining cross-connects in an ILEC’s wirecenter.....	11
d.	Any other operational criteria that allegedly make entry uneconomic for CLECs.....	11
i.	The arguments about loop migration are outside the scope of this proceeding and constitute improper attempts to second guess the FCC	11
ii.	The PCC petitioners’ complaints about the existing DS1 UNE-platform product are irrelevant.....	14
iii.	The PCC petitioners’ complaints about concentrated EELS are incorrect and contrary to the TRO.....	14
e.	Whether operational factors are significant enough to constitute impairment and how unbundling will overcome the alleged impairment.....	16
2.	Economic Criteria	16
a.	CLECs’ potential revenues from serving enterprise customers	17
b.	Prices entrants are likely to be able to charge.....	18
c.	CLECs’ cost of entry into each particular market	18

d.	The particular markets in which entry is allegedly uneconomic in the absence of unbundled local switching	21
e.	Any other economic criteria that allegedly make entry uneconomic for CLECs.....	21
B.	There Is Ample Evidence To Show That Pennsylvania Fits Squarely Within The FCC’s Finding Of “No Impairment” For Circuit Switching For Enterprise Customers	21
C.	The Petitioners’ Claims Are Largely Outside The Scope Of This 90-Day Proceeding And Should Be Stricken Or Dismissed.....	26
1.	There Is No Basis To Grant Relief Only For InfoHighway’s Small Embedded Base Of Customers, And The TRO Has Other Provisions To Care For The Transition Of These Customers.....	26
2.	This Commission Lacks Jurisdiction To Review “Post-UNE Prices” For Local Switching, But Even If It Had Such Authority It Could Not Do So In This 90-Day Proceeding	27
3.	This Commission Has No Authority To Address Petitioners’ Procedural Complaints About The 90 Day Process Established By The FCC.....	29
4.	Petitioners’ Claims Under State Law Are Preempted, And In Any Event Are Not Within The Scope Of A 90 Day Proceeding	29
D.	The Second Circuit Has Explicitly Vacated The Administrative Stay That The Petitioners Relied Upon.....	33
IV.	CONCLUSION.....	35

TABLE OF AUTHORITIES
CASES

Crosby v. National Foreign Trade Council, 530 U.S. 363, 379 (2000) 32

Geier v. American Honda Motor Company, Inc., 529 U.S. 861, 874-86 (2000) 32

Manhattan Telecom. Corp. v. FCC, No. 03-40606(L) (2d Cir. November 3, 2003) 34

Wisconsin Bell, Inc. v. Bie, 340 F.3d 441, 445 (7th Cir. August 12, 2003) 32

REGULATORY OPINIONS

Consultative Report of the Pennsylvania Public Utility Commission, *In the Matter of Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, at 22 (June 25, 2001) (“Consultative Report”) 23

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking (rel. November 5, 1999) (the “UNE Remand Order”) 25,33

Investigation into the Obligation of Incumbent Local Exchange carriers to Unbundle Local Circuit Switching for the Enterprise Market, I-00030100 (Opinion and Order entered October 3, 2003) (“Procedural Order”) 2,3,6

Joint Petition of Nextlink Pennsylvania, Inc., No. P-00991648-1649 (Opinion and Order entered September 30, 1999) (“Global Order”) 15

Review of 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, FCC 03-36 (rel. August 21, 2003) (“TRO”) passim

STATUTES AND REGULATIONS

47 U.S.C. § 251(d)(2)(B) 4

47 U.S.C. § 251(d)(3)(C) 33

47 U.S.C. § 261(c) 33

47 U.S.C. § 271 28

47 C.F.R. § 51.317 30

47 C.F.R. § 51.319(d)(3)(i) 8

Verizon Pennsylvania Inc. and Verizon North Inc. (collectively “Verizon”) submit this Brief in accordance with the Commission’s briefing instructions.

I. INTRODUCTION

Competitors are actively using their own switching to serve enterprise customers in Pennsylvania, as evidenced by the presence of over 50 CLEC switches here and by the fact that 99% of the unbundled high capacity loops Verizon provides to competitors are used with non-Verizon switching. As this Commission has already recognized, facilities-based competitors are also serving a significant number of lines using their own high capacity loops and switching. Clearly, Pennsylvania falls squarely within the Federal Communications Commission’s (“FCC”) national finding that competitors are not impaired without access to ILEC switching when serving enterprise customers using high capacity loops.

In light of these facts, it is not surprising that most of the active Pennsylvania CLECs have *not* asked this Commission to challenge the FCC’s elimination of switching as an unbundled network element (“UNE”) for enterprise customers served with high capacity loops. Only two petitions to initiate proceedings were filed by a collection of six CLECs, one of which has since decided to “refrain from participation.”¹ These two defective petitions fail even to address the FCC’s mandatory criteria and must be rejected.

The FCC’s *Triennial Review Order* (“TRO”) made a “national finding” that local switching is not a UNE for “enterprise customers that are served using loops at the DS1 capacity and above,” holding that competitors are not “impaired” without access to unbundled switching because there are “few barriers to deploying competitive switches to

¹ Letter from Metropolitan Telecommunications Corporation of PA (“MetTel”) to Commission, October 31, 2003.

service customers in the enterprise market at the DS1 capacity and above”² The *TRO* gave state commissions 90 days from its effective date – or until December 31, 2003 -- to petition the FCC to “waive” this national finding regarding enterprise switching for a particular market if the state commission can demonstrate impairment for enterprise switching by applying specific and mandatory criteria set forth by the FCC.³ This limited delegation of authority allows the states to undertake “a more granular analysis utilizing the economic and operational criteria contained herein” and to present that analysis to the FCC if, under those specific factors, the state commission can make an “affirmative finding of impairment.”⁴

This Commission “tentatively concluded” that there is no impairment for enterprise switching in Pennsylvania, but provided the opportunity for any “CLEC seeking to persuade the Commission” to file a petition for waiver “to make a showing to rebut the national finding.”⁵ The petitions filed here have not made such a showing.

These petitions are devoid of the detailed and specific facts this Commission sought as part of its *Procedural Order* – the same specific facts that the FCC will require if **this Commission** attempts to make an “affirmative finding” of impairment for enterprise switching. Instead, these CLECs simply reargue the same case they presented to the FCC

² *Review of 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, FCC 03-36 (rel. August 21, 2003) (“*TRO*”) ¶ 451.

³ *Id.* ¶¶ 456-57.

⁴ *Id.* ¶ 455.

⁵ *Investigation into the Obligation of Incumbent Local Exchange carriers to Unbundle Local Circuit Switching for the Enterprise Market*, I-00030100 (Opinion and Order entered October 3, 2003) (“*Procedural Order*”) at 8.

and contend the FCC reached the wrong conclusion – which is not the purpose of the 90-day proceeding. These petitions consist entirely of irrelevant theories and opinions, as well as requests for relief that this Commission is without authority to grant.

Both petitions fall well short of making a case for “impairment” under the FCC’s mandatory criteria, failing to offer any relevant evidence to show that a CLEC that wishes to enter the local exchange service market for enterprise customers would suffer any “operational or economic impairment” in the absence of unbundled switching.⁶ This Commission made clear that the petitioners bear “the burden of proving impairment,” and the CLECs have not met that burden.⁷ To the contrary, the record here shows that competing carriers are actively serving the enterprise market in Pennsylvania using their own switching and there is no impairment.⁸

Accordingly, the petitions should be dismissed as facially invalid⁹ or denied on the merits, and this Commission should decline to file a petition with the FCC for waiver of the “no impairment” finding relating to enterprise switching in Pennsylvania.

II. BACKGROUND

On August 21, 2003, the FCC released its long-awaited *TRO*. Among many other findings, the *TRO* made a national finding of “no impairment” for unbundled switching used to serve enterprise customers at DS1 capacity and above, and set forth a limited and

⁶ See *TRO* ¶ 451.

⁷ *Procedural Order* at 8.

⁸ See VZ St. 1.0 (Berry Direct) at 3, 5-6.

⁹ On October 24, 2003, Verizon filed a motion to dismiss the petitions in this proceeding. That motion remains open for a ruling by this Commission.

specific process by which state commissions might challenge this finding before the FCC via a “90-day proceeding.”¹⁰

The *TRO*'s “national finding” of no impairment for enterprise switching was based on evidence that there are “few barriers to deploying competitive switches to service customers in the enterprise market at the DS1 capacity and above”¹¹ The FCC found that there was no operational or economic impairment without access to unbundled switching for such customers, and concluded that “denial of access to unbundled switching would not impair a competitor’s ability to serve the enterprise markets, including all customers which are served by the competitor over loops of DS1 capacity and above.”¹²

The FCC’s national finding can only be displaced *by the FCC itself*, upon review of petitions for waiver filed with the FCC by state commissions, based on factors explicitly enumerated in the *TRO*.¹³ Any such petition must be filed within 90 days from the effective date of the Order, or by December 31, 2003.¹⁴ The FCC directed that state

¹⁰ The FCC’s finding of “no impairment” means that the FCC has found that circuit switching for DS1 capacity and above does not qualify under 47 U.S.C. § 251(d)(2)(B) as a network element that must be unbundled under the federal Telecommunications Act. Therefore it also does not qualify for TELRIC pricing, which is authorized by the Act only for elements that qualify for unbundling under section 251 of the Act. *See id.* ¶ 656 (“Contrary to the claims of some of the commenters, TELRIC pricing for . . . network elements that have been removed from the list of section 251 UNEs is neither mandated by the statute nor necessary to protect the public interest. Rather, Congress established a pricing standard under section 252 for network elements unbundled pursuant to section 251 **where impairment is found to exist.**”) (emphasis in original). A finding of no impairment also eliminates any obligation on the part of an ILEC to “bundle” the network element with other network elements.

¹¹ *TRO* ¶ 451.

¹² *Id.* ¶ 452-53.

¹³ *Id.* ¶ 428, note 1315.

¹⁴ *Id.* ¶ 455. The *TRO* was published in the Federal Register Tuesday, September 2, 2003 and, pursuant to ¶ 830, was effective in 30 days, on October 2, 2003.

commissions may petition the FCC to rebut the national finding of “no impairment” based on “specific” operational and economic evidence that differentiates the state from the national situation in which the FCC found no impairment.¹⁵

The only evidence that is relevant to demonstrate operational impairment is evidence to show that the “incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent’s wire center, are making entry uneconomic for competitive LECs.”¹⁶ The only evidence that is relevant to demonstrate economic impairment is evidence that weighs “competitive LECs’ potential revenues from serving enterprise customers in a particular market against the cost of entry into that market.”¹⁷ As will be demonstrated below, the petitioners have not put forth the necessary detailed, state-specific evidence on these issues that would be essential to support a Commission petition for waiver to the FCC. Finally, the FCC was explicit that the economic analysis in any 90-day proceeding cannot be based on any one carrier’s individual business plan.¹⁸

The Commission is not free to reconsider the policy determinations and factual criteria set forth by the FCC, but rather must conform its inquiry to them. According to the FCC:

While we delegate to the states a role in the implementation of our federal unbundling requirements for certain network elements that require ... [a] more granular approach, we make clear that any action taken by the states

¹⁵ TRO ¶ 421.

¹⁶ *Id.* ¶ 456.

¹⁷ *Id.* ¶ 457.

¹⁸ *Id.* ¶ 457.

pursuant to this delegated authority must be in conformance with the Act and the regulations we set forth herein.¹⁹

Only factual showings that conform to the factors explicitly enumerated in the TRO are properly raised in a 90-day proceeding.

This Commission issued a *Procedural Order* on October 2 that, among other things, directed any “CLEC seeking to persuade the Commission to make a showing to rebut the national finding” of no impairment with respect to local switching combined with DS1 capacity and higher loops to file a Petition to Initiate setting forth all applicable matters of law, policy and fact. “Given the national finding of no impairment, we tentatively conclude there is no impairment in Pennsylvania. Therefore, any CLEC desiring to contest the presumption of nonimpairment must bear the burden of proving impairment.”²⁰

Two Petitions to Initiate Proceedings were filed. The first petition was a joint filing of Arc Networks, Inc. d/b/a InfoHighway (“InfoHighway”) and Metropolitan Telecommunications Corporation of PA (“MetTel”). This petition was supported by the Initial Joint Declaration of Peter Karoczkai and David Aronow (InfoHighway/MetTel Statement 1.0). MetTel, however, has since declared that it will “refrain from further participation” in this proceeding.²¹ The second petition was filed by a group of CLECs calling themselves the Pennsylvania Carriers’ Coalition (“PCC”), consisting of Full Service Computing Corporation t/a Full Service Network (“FSN”), Remi Retail Communications, LLC (“Remi”), ATX Licensing, Inc. (“ATX”) and Line Systems, Inc.

¹⁹ *Id.* ¶ 186.

²⁰ *Procedural Order* at 8.

²¹ Given MetTel’s withdrawal, this Brief will refer to the InfoHighway/MetTel submission as the InfoHighway submission.

("LSI"). This petition was supported by the Direct Testimony of David Schwencke, David Malfara and Scott Dulin (PCC Statement 1.0).

On October 24, 2003, Verizon filed a Motion to Dismiss, Motion to Strike and Response to the Petitions, along with the supporting testimony of Debra M. Berry (Verizon Statement 1.0).

On October 31, 2003 the petitioners responded to Verizon's motions and filed rebuttal testimony, consisting of the Rebuttal Declaration of Peter Karoczkai (InfoHighway Statement 2.0) and the Rebuttal Testimony of David Schwencke, David Malfara and Scott Dulin (PCC Statement 1.1).

The parties by Stipulation agreed to admit the foregoing testimony into the record along with three exhibits proffered by the Office of Trial Staff ("OTS"), to waive cross examination on all of the witnesses whose testimony was admitted and to dispense with any hearing in this proceeding.

III. ARGUMENT

A. The Petitions Fail To Provide Evidence That Addresses The FCC's Mandatory Impairment Criteria And Therefore Cannot Meet Their Burden Of Proof

The InfoHighway and PCC petitions fail to make a sufficient showing regarding the mandatory operational and economic impairment criteria set forth in the *TRO*. As this Commission recognized in its *Procedural Order* and in its November 6, 2003 Secretarial Letter on briefing, the Commission "must" examine the "mandatory" criteria set forth by the FCC. The Commission's Secretarial Letter requires the parties to organize their briefs in sections corresponding to the specific criteria, and then to "address such other matters as they deem proper." This section contains Verizon's discussion of the mandatory criteria.

1. Operational Criteria

In order to rebut the FCC's finding of no impairment for enterprise switching, the Commission "must" consider whether specific "operational factors" are impairing competitors from deploying their own switches for use serving the enterprise customer market.²² These factors are whether entrants as a whole have been subjected to difficulties in obtaining: (1) standalone loops; (2) collocation space; or (3) cross-connects. InfoHighway and the PCC have failed to provide any relevant evidence on these operational factors.

a. ILEC's performance in provisioning loops

There is no evidence in the record demonstrating that Verizon is performing poorly in provisioning standalone high capacity loops to CLECs in Pennsylvania. To the contrary, the only relevant evidence shows that Verizon's performance has been very good.

In connection with these operational issues, the FCC noted that the state commissions should consider the results of the ILEC's performance metrics and standards.²³ The petitioners have cited no performance metrics in support of their claims, because these metrics squarely refute their claims. A review of Verizon PA's most recent Carrier-to-Carrier (C2C) reports in Pennsylvania for the last three months, June, July and August, demonstrates that Verizon PA is providing the CLECs with very good service in these areas. For example, Verizon PA has consistently satisfied the 95% standard for OR-

²² TRO ¶ 456; 47 C.F.R. § 51.319(d)(3)(i).

²³ TRO ¶ 456 ("state commissions must consider whether incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive LECs . . . state commissions [should] consider evidence, [including] performance metrics and standard for BOCs . . .")

1-06 “% On Time LSRC/ASR Facility Check DS-1” in each month. In some months 99% of the orders were processed on time. As for provisioning, a review of the key timeliness and quality metrics demonstrates that Verizon PA is providing very good service to CLECs on DS-1 loops. Verizon PA has consistently provided parity service on PR-4-01 “% Missed Appointment -Verizon - DS-1” and PR-6-01 “% Installation Troubles Reported with 30 Days.”²⁴

The PCC’s rebuttal testimony attempts to discount the relevance of this evidence of good performance (evidence the FCC specifically directed this Commission to consider), by arguing that it is “immaterial” that Verizon has provided timely order confirmations and excellent performance on making appointments and providing quality installation to CLECs relating to provisioning standalone DS1 loops.²⁵ In contrast to Verizon’s documented performance metrics, the PCC witnesses rely on unsubstantiated theorization that end-user customers could experience service outages under certain circumstances even under the FCC-approved parallel provisioning process, a claim that even if it is true is not unique or specific to Pennsylvania. Moreover, the PCC does not give even one documented instance where the theoretical potential for outages it discusses has actually occurred, and admits that such outages are not evident from the performance metrics.²⁶ It is plain that neither the PCC nor InfoHighway has met its burden of proof to demonstrate that Verizon’s performance in provisioning standalone high-capacity loops to CLECs in Pennsylvania is so poor as to cause impairment.

²⁴ VZ St 1.0 (Berry Direct) at 8-9.

²⁵ PCC St. 1.1 at 14.

²⁶ *Id.*

The relevant provisioning issue for the purposes of this proceeding, moreover, concerns Verizon's provisioning of standalone loops to be used with CLEC switches, not the provisioning of UNE-Platform arrangements used to serve enterprise customers – the only provisioning process that the CLECs' theories address. Under the FCC's ruling, these UNE-Platforms would not be available, and therefore it makes no sense to argue that alleged difficulties obtaining platforms are at all relevant to proving "impairment." Whether the petitioners' complaints about Verizon's provisioning of high-capacity UNE-Platforms are accurate or not, they say nothing about the availability of the high capacity loops that CLECs use in conjunction with their own switches in this market – which are the only relevant loops for the impairment analysis. The fact remains that 99% of the unbundled DS1 and higher standalone loops Verizon provisions in Pennsylvania are used in conjunction with non-Verizon switches and that Verizon's metrics establish good performance in provisioning those loops.²⁷

b. Difficulties in obtaining collocation space due to lack of space or delays in provisioning by the ILEC

The petitioners have made no attempt whatsoever to demonstrate that CLECs have had "difficulties in obtaining collocation space due to lack of space or delays in provisioning" by Verizon so as to impair their ability to serve enterprise customers without unbundled switching. The *only* evidence in the record shows that based on Commission-approved performance metrics, Verizon PA has provided the CLECs with excellent service on collocation, and no CLEC has alleged that it has had difficulties in obtaining collocation space in Verizon's Pennsylvania territory.²⁸ The PCC and InfoHighway have not met

²⁷ VZ St. 1.0 (Berry Direct) at 6, 8-9.

²⁸ *Id.* at 9.

their burden of proving that difficulties in obtaining collocation space are a source of impairment to CLECs without access to unbundled switching.

c. Difficulties in obtaining cross-connects in an ILEC's wirecenter

The petitioners likewise have made no attempt to show that CLECs have had “difficulties in obtaining cross-connects” in Verizon’s central offices. The only evidence of record on this issue shows that “Verizon knows of no complaints from the CLECs regarding cross connects related to DS-1 UNE Loop products in Pennsylvania.”²⁹ Again, the PCC and InfoHighway have not met their burden of proving that difficulties in obtaining cross-connects are a source of impairment to CLECs without access to unbundled switching.

d. Any other operational criteria that allegedly make entry uneconomic for CLECs

i. The arguments about loop migration are outside the scope of this proceeding and constitute improper attempts to second guess the FCC

The only “operational” issue the petitioners raise has to do with the parallel provisioning process and the lack of a procedure to perform “hot cuts” for high capacity loops. These arguments are not relevant to the Commission’s limited inquiry in this 90 day proceeding, first, because they are outside the scope of the operational criteria the FCC directed the Commission to utilize (which are the only proper issues to be considered in this proceeding), and second, because they do not raise issues unique to Pennsylvania but rather ask this Commission to improperly second-guess the FCC’s own findings. As the FCC noted, “we have made a nationwide finding that switching for enterprise customers

²⁹ *Id.* at 9.

should not be unbundled, which states can displace only by filing a petition for waiver with this Commission *based on explicitly enumerated factors*.”³⁰

The FCC recognized that parallel delivery is how service is generally initiated for CLEC high capacity loops, and that the traditional “hot-cut” that is used for ordinary voice loops is not used for high capacity loops. As the FCC found, parallel delivery “generally involves the initiation of service to the competitors’ new digital loop while the incumbent’s service remains in place. . . [W]here enterprise customers are being converted from the digital facilities, the competing carrier installs and initiates service on a new digital loop in parallel with the customer’s existing service. . . . [T]he incumbent’s service is disconnected only after the competitor’s service over a new loop has been initiated.”³¹ The FCC concluded that as a result of this parallel delivery process “competitive carriers neither incur the costs of hot cuts nor experience the quality degradation associated with the cut over process to serve customers with loops with DS1 capacity and above.”³²

Essentially, these petitioners ask the Commission to second-guess the FCC and to conclude that the parallel provisioning process and the absence of a high capacity hot cut procedure constitutes a basis for impairment – an argument that should be raised on appeal and not in this limited 90 day case. InfoHighway candidly admits that the basis for its claim is that the “parallel delivery” process discussed at length by the FCC is “not as seamless or efficient as the FCC’s description would have one believe,” and that it will therefore be “labor intensive and time consuming” for these parties to move their existing

³⁰ TRO ¶ 455, n. 1395 (emphasis added).

³¹ TRO ¶ 451.

³² *Id.*

customers to another switching provider.³³ Rather than coming forward with the mandatory state-specific evidence, these petitioners are asking this Commission to review the *same* generic type of evidence and arguments that were duly considered by the FCC, and to find that the FCC “fundamentally misunderstood” the facts that were before it and the FCC’s “logic is deficient.”³⁴ This Commission is not sitting as a Court of Appeals to review and second-guess the FCC’s findings, but rather “any action taken by the states pursuant to this delegated authority must be in conformance with the Act and the regulations we set forth” in the *TRO*.³⁵

The FCC considered the parallel provisioning process in detail, and the petitioners have added nothing Pennsylvania-specific to this argument. While petitioners complain about the “complexity” of the process of installing or modifying service for DS1 and higher customers, the fact is that these services are more complex than ordinary voice services and it is not surprising that more work would be required by the carriers and the end user to coordinate all of the equipment necessary for service. Not only will there be multiplexing equipment on the telephone company end, but the end-user will also have complex customer premises equipment that needs to be configured to the service being provided. It is natural that there be more cost and work involved in provisioning more complex service, but as the FCC recognized, these customers also provide more revenue opportunities and may enter into long term contracts.

³³ InfoHighway/MetTel St. 1.0 (Declaration of Karoczkai, etc.) at 11-12.

³⁴ *Id.* at 5 and 9.

³⁵ *TRO* ¶ 186.

ii. The PCC petitioners' complaints about the existing DS1 UNE-platform product are irrelevant

The PCC petitioners' complaints about Verizon's past efforts to work with Remi and others to make the DS1 UNE P product meet their needs for call detail records are completely irrelevant to the impairment issue.³⁶ The question is whether CLECs are impaired in serving enterprise customers *without* access to unbundled Verizon's switching. Alleged difficulties in obtaining Verizon switching – which is what these complaints actually are – cannot be relevant to the question of whether impairment would exist in a world where unbundled Verizon switching is not available. Additionally, the fact that the vast majority of CLECs are serving DS1 and higher customers without using Verizon's switching shows that they are not impaired.

iii. The PCC petitioners' complaints about concentrated EELS are incorrect and contrary to the TRO

The PCC petitioners incorrectly claim that Verizon PA is not offering the “EELS with concentration” required by the *Global Order*.³⁷ An Enhanced Extended Loop (“EEL”) is a combination of loop and transport where a CLEC uses its own switch. Petitioners apparently are raising the same argument MCI has made in the NMP case, that Verizon should not only provide EELs with concentration, but should also own the concentrating equipment for the CLEC.³⁸

The Commission in the *Global Order* required Verizon PA to offer “[v]oice grade and DS-0 loops with DS-1 [and DS-3] transport with concentration,” through December

³⁶ PCC St. 1.0 at 20-21.

³⁷ PCC St. 1.0 at 25.

³⁸ *Verizon Pennsylvania Inc. Petition and Plan for Alternative Form of Regulation Under Chapter 30, Petition to Amend Network Modernization Plan, P-00930715F0002.*

31, 2003.³⁹ The Commission made clear that its EEL requirements were contingent on “the CLEC’s usage of EEL combinations [being] consistent with federal law and any applicable FCC decisions.”⁴⁰ Verizon PA for many years has had a tariffed offering of this product, but has always required the CLECs to provide the concentrating equipment.

In the *TRO* the FCC rejected the demand to require “TELRIC-priced EELs with concentration.” stating

We decline . . . to establish at this time rules requiring concentration. The record demonstrates that DS0 EELs could increase loop costs and may raise several additional operational issues. Accordingly, we are not convinced, based on the limited record before us, that we should require incumbent LECs to include concentration when they provide UNEs to requesting carriers.⁴¹

In light of the *TRO*, the entire issue of concentrated EELs will have to be reevaluated and any concentration requirement is likely preempted (and is certainly no longer consistent with federal decisions as the *Global Order* recognized must be the case). In any event, however, the *TRO* precludes imposing the additional requirement that Verizon PA actually own the concentrating equipment for the CLEC. Moreover, since the FCC does not even require concentrated EELs, the lack of concentrated EELs cannot be a state-specific reason to find impairment.

Finally, the petitioners’ complaints about the need for concentrated EELS are contrary to the evidence, which shows that under Verizon’s current tariff and policy on concentration equipment Verizon is currently provisioning over 5,000 high capacity EELs – a number that far outstrips the number of high capacity UNE-P arrangements in service.

³⁹ *Joint Petition of Nextlink Pennsylvania, Inc.*, No. P-00991648-1649 (Opinion and Order entered September 30, 1999) (“*Global Order*”) at 91-92.

⁴⁰ *Id.*

⁴¹ *TRO* ¶ 492.

e. **Whether operational factors are significant enough to constitute impairment and how unbundling will overcome the alleged impairment**

As discussed in detail in the preceding subsections, the petitioners have not met their burden of proving the existence of relevant operational factors significant enough to constitute impairment.

2. Economic Criteria

In order to rebut the FCC's finding of no impairment for enterprise switching, the Commission "must find that entry into a particular market is uneconomic in the absence of unbundled local circuit switching."⁴² The Commission must weigh CLECs' potential revenues from serving enterprise customers against the costs of entry, and must consider "all likely revenues to be gained from entering the enterprise market (not necessarily any carrier's individual business plan), including revenues derived from local exchange and data services." The petitioners have not met their burden of proving economic impairment for any particular market in Pennsylvania under the standards outlined by the FCC.

InfoHighway makes no real effort to demonstrate economic impairment at all. It provides no data as to potential revenues or costs and fails even to state a claim under the FCC's strict standards for a 90-day case. In fact, InfoHighway candidly admits that it has not really attempted to demonstrate impairment, lamenting that the FCC has set an "impossible task" and that it cannot "prepare and submit the impairment data needed."⁴³ InfoHighway's claim that it is "certain that there are many areas throughout the state of Pennsylvania in which carriers are economically impaired from providing DS1 enterprise service in the absence of ULS" is insufficient on its face.

⁴² TRO ¶ 457.

⁴³ InfoHighway/MetTel St. 1.0 (Declaration of Karoczkai, etc.) at 15.

While the PCC provided an attachment to its direct testimony stated to be FSN's "business case" for profitably serving DS1 customers, this document also is insufficient on its face to demonstrate economic impairment. The document purports to demonstrate how many DS1 customers FSN believes it must serve under its own business plan for its costs to be less than FSN's rates for DS1 service, both using the UNE platform and using FSN's own switch (either with the DS1 port provided from a collocation arrangement or from an FSN site). This "study," which lacks detail or even an adequate explanation, is faulty because it does not address the FCC's mandatory economic impairment factors that this Commission must consider in deciding whether it wishes to challenge the FCC's national finding of no impairment and improperly focuses only on FSN's own business strategy. Verizon will address below first the petitioners' failure to address the mandatory economic impairment criteria and second the irrelevance of evidence based on FSN's own business strategy.

a. CLECs' potential revenues from serving enterprise customers

In order to rebut the FCC's national finding of no impairment for enterprise switching, the Commission must consider "all likely revenues to be gained from entering the enterprise market (not necessarily any carrier's individual business plan), including revenues derived from local exchange and data services."⁴⁴

InfoHighway does not even attempt to present evidence of likely revenues. The PCC's "business case" is also faulty on this issue because it merely posits, without explanation, a dollar amount that FSN contends it would charge customers for a DS1 loop. It completely ignores revenues that could be gained from other high capacity services or

⁴⁴ TRO ¶ 457.

the additional revenues that can be obtained from entering the enterprise market (such as for data and local exchange service) – the specific revenue the FCC directed this Commission to consider. The FCC specifically recognized that “DS1 enterprise customers are typically medium or large business customers with high demand for a variety of sophisticated telecommunications services,” that they “purchase extensive local services, resulting in significant revenues to the service provider,” and that they are “more receptive to entering into long-term contracts.”⁴⁵ Petitioners addressed none of these potential sources of CLEC revenue.

b. Prices entrants are likely to be able to charge

The Commission must also consider “the prices that entrants are likely to be able to charge,” which must include the “prevailing rates the incumbents charge to the different classes of customers in the different parts of the state.”⁴⁶ FSN’s business case contains one price that it contends Verizon charges for a comparable DS1 loop, and does not specifically consider the prices to different classes of customers or different parts of the state.

c. CLECs’ cost of entry into each particular market

The FCC directed the states to consider whether the costs (both operational and economic) of entry into a particular market outweigh the potential revenue discussed in the previous subsection of this brief. InfoHighway presents no specific evidence of the costs of entry. The PCC “business plan” contains vague and speculative references to potential costs, but is improperly focused only on FSN’s business plan.

⁴⁵ *Id.* ¶ 452.

⁴⁶ *Id.* ¶ 457.

The PCC petitioners' complaints about their own business strategies are irrelevant. In the *TRO* the FCC emphasized that unbundling cannot be ordered "merely because certain competitors or entrants with certain business plans are impaired."⁴⁷ An economic investigation in any 90-day proceeding must be focused on all CLECs, not just the petitioners here. Although no other CLECs have requested a 90-day case, any impairment determination must still be based on whether CLECs in general are impaired, not whether a single CLEC believes it is impaired, given its particular business plan.

FSN's "business case" is based entirely on FSN's own business strategy, and does not even address the other CLECs that make up the enterprise market. FSN's assumptions do not necessarily hold true for other CLECs. For example, FSN assumes the "average" customer distance from the switch is 37 miles, and calculates transport costs based on that distance, but there is no basis to assume that would be the case for all CLECs. FSN also assumes it would purchase transport from Verizon rather than self-provisioning or purchasing from another provider, but there is no basis to assume that would be the case for all CLECs. FSN assumes its line mix would be exclusively DS1s, but there is no basis to assume that would be the case for all CLECs. FSN assumes it would pay \$400,000 for a switch rather than buying a less expensive switch or sharing with another carrier, but there is no basis to assume that would be the case for all CLECs. In short, FSN has failed to demonstrate that no CLEC entry strategy using its own switch would be economic. Notably, even the PCC's own business case, which fails to consider all the other sources of revenue available and makes improbable cost increasing assumption such as an average distance from the switch of 37 miles, shows that the CLEC's costs would be less than

⁴⁷ *Id.* ¶ 115.

Verizon's purported "sell" price when somewhere between 25 and 50 DS1 loops are served by the CLEC switch – an admission that it is economically possible to serve high capacity customers with the CLEC's own switch even under FSN's business plan.

But even if FSN's "study" convincingly demonstrated that its business plan without unbundled switching was uneconomic – which it does not – this conclusion too would be irrelevant for purposes of this Commission's analysis because unbundling cannot be ordered "merely because certain competitors or entrants with certain business plans are impaired."⁴⁸ The FCC has emphasized that the only CLEC costs that are applicable for purposes of impairment are those that for CLECs in general "are sufficient to prevent economic entry." Costs that "any new entrant would bear" – such as the cost of a switch – may not be considered an impairment.⁴⁹

The FCC concluded that "[t]he record demonstrates that competitive LECs are competing successfully in the provision of switched services, using a collocation network with associated backhaul transport, to medium and large enterprise customers, without unbundled local circuit switching."⁵⁰ The overwhelming majority of active CLECs in Pennsylvania have not challenged this national finding, and the record shows that they are serving high capacity customers using their own switching. Of the five CLECs that have challenged the finding, only one has even bothered to submit evidence regarding its costs and revenues, and this evidence is irrelevant and/or speculative and unfounded. All of these facts strongly suggest that CLECs "have the opportunity to earn revenues that

⁴⁸ *Id.*

⁴⁹ *Id.* ¶ 454 n. 1392.

⁵⁰ *Id.* ¶ 453.

outweigh the costs associated with entry” and are therefore not impaired.⁵¹ FSN’s business case does not alter this conclusion.

d. The particular markets in which entry is allegedly uneconomic in the absence of unbundled local switching

The petitioners have not provided specific evidence regarding Pennsylvania markets where entry is uneconomic because they have not shown entry to be uneconomic anywhere. They have not presented a specific weighing of the costs of entry versus all of the potential revenues for high capacity customers in different geographical areas. While PCC suggests that it is easier for CLECs to provide high capacity service using their own switching in the major metropolitan areas of Philadelphia and Pittsburgh, they do not in fact demonstrate that it would be uneconomic to provide such service elsewhere in Pennsylvania, nor do they provide any evidence upon which this Commission could rely to draw a line between geographic locations where impairment exists or does not exist.

e. Any other economic criteria that allegedly make entry uneconomic for CLECs

The Commission is limited to considering the economic criteria set forth in the *TRO*. Petitioners have submitted no economic evidence other than what was discussed above.

B. There Is Ample Evidence To Show That Pennsylvania Fits Squarely Within The FCC’s Finding Of “No Impairment” For Circuit Switching For Enterprise Customers

The petitioners have come forward with no real evidence to demonstrate that competitors are impaired without access to unbundled switching for customers using loops of DS1 capacity or above. In fact, there is ample evidence that competitors are *not*

⁵¹ *Id.* ¶ 458.

impaired, and that the situation in Pennsylvania is no different from the national situation in this regard.

The PCC makes the unsupported claim that CLECs are not deploying switches in Pennsylvania, but the evidence shows otherwise. The record of competitive switch deployment in Pennsylvania establishes that competitors are already serving customers of all kinds using their own switches on a widespread basis throughout the Commonwealth. Competing carriers operate at least 54 known local circuit switches that are physically located within Pennsylvania, and approximately 24 competing carriers of all sizes have deployed local circuit switches in Pennsylvania.⁵² This Pennsylvania-specific information is consistent with the record nationwide, where competing carriers operate approximately 1,300 circuit switches, including more than 500 within Verizon's 30-state region.⁵³

It is also evident even from the patterns of UNE leasing that CLECs in Pennsylvania are actually using their own switching to serve enterprise customers with DS1 and higher capacity loops. Putting aside for the moment those CLECs that use both their own switching and their own loop facilities, Verizon's own records of UNE provisioning demonstrate that the vast majority of CLECs serving customers with Verizon high-capacity loops are doing so through their own switching or some other non-Verizon source of switching. This fact is evident from comparing the number of DS1 and higher UNE platform arrangements that Verizon provisions with the number of DS1 and higher loops and EELs that Verizon provisions without providing the switching. Verizon PA and Verizon North combined provide competitors approximately **[BEGIN VERIZON**

⁵² Verizon St. 1.0 (Berry Direct) at 3.

⁵³ See *id* at 3-4 (Citing Telcordia, February 2003 LERG; NPRG CLEC Report 2003 at Chapter 5).

PROPRIETARY] [END VERIZON PROPRIETARY] DS1 or faster loops, comprised of **[BEGIN VERIZON PROPRIETARY] [END VERIZON PROPRIETARY]** stand-alone DS1 or DS3 loops plus **[BEGIN VERIZON PROPRIETARY] [END VERIZON PROPRIETARY]** EELs with a DS1 or DS3 loop at the end. In comparison, CLECs are using Verizon's switching, i.e. DS1 & ISDN-PRI UNE-Ps or resale, to serve less than 100 customers. This means that for about 99% of all DS1 and higher UNE loops that competitors use in Pennsylvania, they have chosen to use their own (or some other competitor's) switching, not Verizon's.⁵⁴

The PCC petitioners claim that compared to the number of high capacity loops Verizon has terminated for its own retail service, the number of unbundled high capacity loops shows low CLEC penetration into this market.⁵⁵ However, even accepting the PCC's numbers for the sake of argument only, the PCC's analysis is invalid because it fails to account for the number of customers served by CLECs that provision both their own high-capacity loops and their own switching. While Verizon is not privy to this figure, this Commission in its Consultative Report to the FCC in connection with Verizon's section 271 application reported that facilities-based CLECs had deployed over 600,000 lines in Pennsylvania as of 2001, and it would be logical to assume that many of these lines are serving high capacity enterprise customers.⁵⁶

⁵⁴ VZ St. 1.0 (Berry Direct) at 5- 6.

⁵⁵ PCC St.1.1 at 10.

⁵⁶ Consultative Report of the Pennsylvania Public Utility Commission, *In the Matter of Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, at 22 (June 25, 2001) ("*Consultative Report*").

Clearly, CLECs are not impaired in serving this market without Verizon switching. Rather, the vast majority of CLECs are using their own switching and therefore did not petition this Commission to initiate a 90 day case. Indeed, Petitioners ATX and FSN both admitted the having their own switches in Pennsylvania from which they serve DS1 customers.⁵⁷ All of these facts belie the PCC petitioners' completely unsupported assertion that deployment of switches that could serve DS1 customers has "decreased dramatically" in recent years, and shows to the contrary that CLECs are still actively serving such customers with their own switching.

While the PCC petitioners argue that CLECs are limited in their ability to serve high capacity customers with their own switching, PCC member ATX had quite a different story to tell the FCC during the Triennial Review. ATX told the FCC that "ATX has learned (as have most other CLECs that ATX is familiar with) that local switching facilities *can* be used to compete for larger customers desiring high-speed digital services, while unbundled local switching is appropriate to serve the needs of smaller analog customers."⁵⁸ ATX's claim in this case that it actually uses its own switches instead of UNE-P to serve such customers confirms ATX's statement.

This objective evidence, none of which was cited by the petitioners, demonstrates that there has been significant switch deployment by CLECs in Pennsylvania, that a far greater number of CLECs are providing DS1 and higher capacity service using their own switches than are using Verizon's switching, and that Verizon's performance in the provisioning areas tagged as relevant by the FCC has consistently been excellent.

⁵⁷ PCC St. 1.0 at 3, 9.

⁵⁸ Letter from Michael A. Peterson of ATX to FCC Commissioner Kevin Martin dated January 22, 2003 in docket 01-338 (available on FCC's searchable website).

The PCC attempts to discount this substantial evidence of switch deployment by claiming that a local switch primarily serves the surrounding geographical area and cannot be extended to serve larger areas, but this claim is untrue.⁵⁹ In fact, a single switch can serve an entire LATA or state, or multiple LATAs and/or states.⁶⁰ For example, AT&T claims that the switches of its CLEC affiliate, TCG, can “connect virtually any qualifying customer in a LATA.”⁶¹ Therefore, even competitors with switches located in Philadelphia and Pittsburgh are capable of serving the entire state. In fact, it is not even necessary for the CLEC switch to be located in this state to serve customers in Pennsylvania. The PCC petitioners have not presented sufficient evidence to prove their vague and unsubstantiated claims that without Verizon’s switching it is too expensive to serve high capacity customers in certain undefined “rural” areas. Indeed, the PCC petitioners admit that “[f]rom a purely technical perspective . . . a CLEC switch can be connected to a loop on the other side of a state or even in another state.”⁶² They simply claim that it is too expensive to do so, but as discussed above they have not actually met their burden of proving economic impairment.

⁵⁹ PCC St. 1.0 at 10.

⁶⁰ *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking (rel. November 5, 1999) (the “*UNE Remand Order*”) ¶ 261 (“[S]witches deployed by competitive LECs may be able to serve a larger geographic area than switches deployed by the incumbent LEC, thereby reducing the direct, fixed cost of purchasing circuit switching capacity and allowing requesting carriers to create their own switching efficiencies.”).

⁶¹ VZ St. 1.0 (Berry Direct) at 4 (citing Panel Direct Testimony of AT&T Communications of NJ, L.P. et al., Docket No. TO00110893 (February 25, 2003), at 75.)

⁶² PCC St. 1.1 at 7.

The PCC petitioners admit that “certainly some CLECs are serving DS1 customers with their own switches,” but make an unconvincing attempt to argue that the extent of such service is not as great as Verizon portrays. But it is the petitioners, not Verizon, that have the burden of proof here. Self-serving, vague and unsubstantiated opinions, such as the PCC witnesses’ claim that switch deployment is “stagnant” and the LERG is not “accurate or up-to-date” are not sufficient to prove impairment under the specific operational and economic criteria the FCC requires.

C. The Petitioners’ Claims Are Largely Outside The Scope Of This 90-Day Proceeding And Should Be Stricken Or Dismissed

1. There Is No Basis To Grant Relief Only For InfoHighway’s Small Embedded Base Of Customers, And The TRO Has Other Provisions To Care For The Transition Of These Customers

InfoHighway argues impairment and asks this Commission to seek a waiver *only* for its embedded base of customers and not for the purchase of new DS1 loops in the future. It has come forward with no evidence, however, to demonstrate impairment for its embedded base, or to differentiate Pennsylvania from the national situation already considered by the FCC when it made its finding of no impairment without unbundled access to switching for DS1 and higher customers.

InfoHighway has marked the number of its existing DS1 UNE-Platform customers in its embedded base as Highly Confidential, but this number (which has been provided to the Commission) is extremely small.⁶³ Indeed, the evidence discussed above shows this number to be only a very small fraction of the high capacity customers served by CLECs in Pennsylvania using Verizon’s loops and CLEC switching. To the extent that

⁶³ InfoHighWay/MetTel St. 1.0 at 10.

InfoHighway is simply concerned with the mechanics of transition away from the UNE environment for Verizon's switching, the *TRO* sets forth a transition implementation framework under the negotiation provisions of the Act and existing interconnection agreements.⁶⁴ If the dispute is simply over the price for them to continue to use Verizon's switching on a temporary or permanent basis, it is not a proper subject for an impairment argument in a 90 day case. Indeed, whether Verizon is complying with the transition framework is not a proper issue to be raised in a 90 day proceeding (and is premature at this point in any event).

2. This Commission Lacks Jurisdiction To Review "Post-UNE Prices" For Local Switching, But Even If It Had Such Authority It Could Not Do So In This 90-Day Proceeding

InfoHighway asks this Commission to require Verizon to continue to charge its current (TELRIC-based) switching rate going forward, even where the FCC has ruled that switching is not required to be unbundled under section 251 of the Act.⁶⁵ This Commission does not have the authority to grant InfoHighway's demand.

The FCC has made clear that TELRIC pricing only applies to UNEs required under section 251. "Contrary to the claims of some of the commenters, TELRIC pricing for . . . network elements that have been removed from the list of section 251 UNEs is neither mandated by the statute nor necessary to protect the public interest. Rather, Congress established a pricing standard under section 252 for network elements unbundled pursuant to section 251 *where impairment is found to exist.*"⁶⁶ Therefore, the Commission is

⁶⁴ *TRO* ¶¶ 700-706.

⁶⁵ InfoHighway/MetTel St. 1.0 at 14.

⁶⁶ *TRO* ¶ 656 (emphasis in original).

without authority to impose TELRIC pricing where there is no impairment and switching is not a section 251 UNE.

InfoHighway also argues that this Commission should determine that Verizon is still required to unbundled switching under section 271 of the Act, and should impose TELRIC pricing under section 271. Both the Section 271 of the statute and the *TRO* itself make clear, however, that jurisdiction to review the pricing for any switching that might be required under section 271 of the Act (relating to long distance authority) lies exclusively with the FCC. First, section 271 of the Act itself makes clear that *only the FCC* may determine if section 271's obligations have been met, and that a state commission's role is limited to "consultation" before 271 authority is given.⁶⁷ Second, in the *TRO*, the FCC stated that "[i]n the event that a BOC has already received section 271 authorization, section 271(d)(6) grants *the Commission* [*i.e.*, the FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271."⁶⁸ As to the pricing of a network element that must be unbundled solely by virtue of a 271 obligation, the *TRO* is clear that state commissions have *no* role. The pricing is not based on TELRIC but on the "just and reasonable" standard of sections 201 and 202, and this standard "is a fact-specific inquiry that *the Commission* [*i.e.*, the FCC] will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)."⁶⁹

⁶⁷ 47 U.S.C. § 271.

⁶⁸ *TRO* ¶ 665.

⁶⁹ *Id.* ¶ 664. This standard can be satisfied, for example, by evidence that a rate has been adopted as a result of an arms-length agreement.

There is no basis, therefore, for Petitioners to demand that the Commission require TELRIC pricing to continue to apply to switching that is not required to be unbundled under section 251.

3. This Commission Has No Authority To Address Petitioners' Procedural Complaints About The 90 Day Process Established By The FCC

InfoHighway contends that the FCC “erred in adopting a universal finding of no impairment to serve the DS1 market” because it failed to provide adequate time and tools to rebut that finding.⁷⁰ It argues that the FCC has required this Commission to do the “impossible.”⁷¹ These arguments are not properly made to this Commission. Rather, Petitioners should assert them to the Court of Appeals, where these Petitioners are active participants.

4. Petitioners' Claims Under State Law Are Preempted, And In Any Event Are Not Within The Scope Of A 90 Day Proceeding

Since it is unquestionable that the FCC has made a national finding that switching does not qualify for unbundling under section 251 of the Telecommunications Act for DS1 or higher customers, and since petitioners were not able to muster the necessary evidence to rebut this finding of no impairment, petitioners attempt to argue that the unbundled access they seek is required under state law. First they argue that the UNE Platform consisting of high capacity loops is required by the *Global Order*. Second, they argue that the “basic service function” language of 66 Pa.C.S. § 3005(e) still requires switching to be unbundled.

⁷⁰ InfoHighway/MetTel St. 1.0 at 5.

⁷¹ *Id.* at 7.

None of these arguments are properly considered in a 90 day proceeding. The FCC was very specific on the factors the Commission can present in a petition for waiver, and they relate only to the question of whether there is impairment under section 251 of the Act. This Commission cannot petition the FCC on the basis of state law. Therefore, state law arguments are irrelevant to this limited and highly expedited proceeding.

More importantly, if the impairment test is not satisfied and the FCC's national finding that switching for high capacity customers should not be unbundled continues to apply, this Commission would be preempted from requiring unbundling under state law. The FCC expressly "limit[ed] the states' delegated authority to the specific areas and network elements identified in this Order."⁷² The FCC determined that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations."⁷³ Accordingly, the FCC rejected arguments by some carriers that "states may impose any unbundling framework they deem proper under state law, without regard to the federal regime."⁷⁴

The FCC cited "long-standing federal preemption principles" to conclude that states may not "enact or maintain a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in this Order."⁷⁵ In particular, the FCC found that the state authority preserved by the Act under the savings provision in Section 251(d)(3) is narrow and "is limited to state unbundling actions that are consistent with the

⁷² TRO ¶ 189.

⁷³ *Id.* ¶ 187.

⁷⁴ *Id.* ¶ 192. The FCC eliminated the provisions of 47 C.F.R. § 51.317 that previously gave states discretion to create additional unbundled network elements ("UNE"). See Appendix B – Final Rules, 47 C.F.R. § 51.317. States no longer have this discretion.

⁷⁵ TRO ¶ 192.

requirements of section 251 and do not ‘substantially prevent’ the implementation of the federal regulatory regime.”⁷⁶ The FCC cautioned that any state attempt to require unbundling where the FCC has already made a national finding of no impairment or declined to require unbundling would be unlikely to survive scrutiny under a preemption analysis:

If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and ‘substantially prevent’ implementation of the federal regime, in violation of section 251(d)(3)(C).⁷⁷

The FCC further noted that even *existing* state requirements that are inconsistent with the FCC’s new framework would frustrate its implementation and therefore cannot stand: “[i]t will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.”⁷⁸

The FCC expressly rejected the argument that a state commission’s unbundling requirements are not preempted if they share a common regulatory goal with the federal scheme, but differ from the FCC’s rules.⁷⁹ That argument is contrary to “long-standing federal preemption principles.”⁸⁰ The U.S. Supreme Court has repeatedly held that state

⁷⁶ *Id.* ¶ 193.

⁷⁷ *Id.* ¶ 195.

⁷⁸ *Id.*

⁷⁹ *Id.* ¶ 193.

⁸⁰ *Id.* ¶ 193, n.614 (“AT&T’s argument that the validity of state unbundling regulations [under section 251(d)(3)] must be measured solely against the Act and its purposes fails to recognize that the [FCC] is charged with implementing the Act and its purposes are fully consistent with the Act’s purposes”).

regulations are preempted, even if they share a “common goal” with federal law, where they differ in the *means* chosen to further that goal. “The fact of a common end hardly neutralizes conflicting means.”⁸¹ In fact, the Seventh Circuit recently ruled that a tariff requirement imposed by the Wisconsin Public Service Commission was preempted by the Act, even though the tariff requirement “promotes the procompetitive policy of the federal act.”⁸² The court held that “[a] conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution’s Supremacy Clause to resolve the conflict in favor of federal law.”⁸³ Thus, even if a state commission’s unbundling requirements share with the federal Act a common goal of promoting competition, this is insufficient to overcome federal preemption principles.

The states, in short, cannot reverse an FCC policy determination by requiring unbundling in an area in which the FCC has already concluded that unbundling would be contrary to the goals and requirements of the Act. Section 251(d)(3) of the Act makes this clear by prohibiting state commissions from establishing access and interconnection regulations unless such regulations would be “consistent with the requirements of [§ 251]” and would not “substantially prevent implementation of [§ 251] and the purposes of this

⁸¹ *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379 (2000) (citing cases). See also *Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861, 874-86 (2000) (preempting state tort action that would have required all automobile manufacturers immediately to install airbags in favor of any other passive restraint systems because it “stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed” and thus conflicted with “important means-related federal objectives”).

⁸² *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 445 (7th Cir. August 12, 2003).

⁸³ *Id.* at 443.

part.”⁸⁴ The FCC recognized as much in the *UNE Remand Order* when it explained that § 251(d)(3) does not permit states to add additional unbundling obligations that do not “meet the requirements of section 251 *and the national policy framework instituted in this Order.*”⁸⁵

Therefore, *any* unbundling requirement that goes beyond the FCC’s regulations would alter the careful balance established by the FCC, and thus would “substantially prevent implementation of [§ 251] and the purposes of this part.” As a result, a state may not impose broad unbundling requirements in an area when the FCC and the federal courts have already determined that the policies of the Act either preclude unbundling entirely, or else require strict limitations on the scope of the unbundling obligation.

The only other source the CLECs have cited for potential state law unbundling authority is 66 Pa. C.S. § 3005(e)(1), which requires an ILEC to “unbundle each basic service function on which the competitive service depends and ... make the basic service functions separately available to any customer...” Even if this statute applied here, it still could not be used to require unbundling in a manner that is inconsistent with the federal regime regarding unbundling, so any attempt to order unbundling in the face of the FCC’s national finding of no impairment would still be preempted.

D. The Second Circuit Has Explicitly Vacated The Administrative Stay That The Petitioners Relied Upon

InfoHighway and MetTel claim that an administrative stay entered by the United States Court of Appeals for the Second Circuit binds this Commission and stays the

⁸⁴ 47 U.S.C. § 251(d)(3)(C); see also *id.* §261(c).

⁸⁵ *UNE Remand Order*, ¶ 154 (emphasis added).

portions of the *TRO* that address the 90 day proceeding on enterprise switching. In fact, MetTel has determined not to proceed with this case in reliance on this stay.

If there had previously been any doubt about the status of the Second Circuit stay, it was eliminated by the Second Circuit's issuance on November 3, 2003 of an Order transferring all matters to the DC Circuit and stating that "[t]he temporary administrative stays entered on October 6, 2003 and October 7, 2003 are accordingly vacated and the stay motions will be decided by the transferee court."⁸⁶ Therefore, the FCC's 90 day deadline is clearly binding.⁸⁷

⁸⁶ *Manhattan Telecom. Corp. v. FCC*, No. 03-40606(L) (2d Cir., Order entered November 3, 2003) (attached hereto as Exhibit A).

⁸⁷ In any event, the Second Circuit's administrative stay was never effective and binding on this Commission because the Second Circuit lacked jurisdiction to stay this proceeding, and only entered its administrative stay – a stay that was entered without any review on the merits by any judge – because InfoHighway and MetTel (represented by the same counsel that represents them in this case) withheld from the Second Circuit the fact that all petitions for review of the FCC's *TRO* had been consolidated in another circuit pursuant to 28 U.S.C. § 2112(a). The CLECs seeking a stay in the Second Circuit waited six weeks after the FCC had released its *TRO* before seeking this stay, and two weeks after all petitions for review of the *TRO* (past, present, and future) had been ordered transferred to the United States Court of Appeals for the Eighth Circuit by the Judicial Panel on Multidistrict Litigation pursuant to the procedures of 28 U.S.C. § 2112(a). Perhaps most significantly, these CLECs filed their stay petitions with the Second Circuit shortly after the Eighth Circuit transferred all petitions for review to the D.C. Circuit.

IV. CONCLUSION

For the foregoing reasons, the Petitions to Initiate 90-day proceedings filed by InfoHighway and MetTel and by the PCC should be denied and this Commission should decline to file a petition with the FCC for waiver of the "no impairment" finding relating to enterprise switching in Pennsylvania.



Julia A. Conover
William B. Petersen
Suzan DeBusk Paiva
1717 Arch Street, 32N
Philadelphia, PA 19103
(215) 963-6001
fax (215) 563-2658
e-mail: Julia.a.conover@verizon.com
William.b.petersen@verizon.com
Suzan.d.paiva@verizon.com

Counsel for Verizon Pennsylvania Inc. and
Verizon North Inc.

November 17, 2003

ATTACHMENT A

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of November, two thousand and three,

Present:

Hon. Wilfred Feinberg,
Hon. Amalya L. Kearse,
Hon. Reena Raggi,
Circuit Judges,



Manhattan Telecommunications Corp.,

Petitioners,

v.

03-40606(L)

Federal Communications Commission and
United States of America,

Respondents..

InfoHighway Communications Corp.,

Petitioners,

v.

03-40608(Con)

Federal Communications Commission and
United States of America,

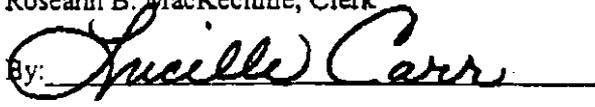
Respondents.

Petitioners move for a stay of portions of the FCC's Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (FCC 03-36) pending resolution of their petitions for review of the order. Petitioners also move to transfer these cases and their motions for a stay to the United States Court of Appeals for the District of Columbia Circuit. LMDI Telecommunications, Inc., BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., United States Telecom Association, and the Verizon telephone companies move to intervene. On September 16, 2003, the Judicial Panel on Multidistrict Litigation randomly selected the Eight Circuit to consolidate the petitions for review of this FCC order. On September 30, 2003, the Eighth Circuit transferred the consolidated cases to the

D.C. Circuit. *Eschelon Telecom, Inc. V. Federal Communications Commission*, 03-3212 (8th Cir.). Upon due consideration, it is ORDERED, the above-captioned petitions for review all all pending motions are transferred to the District of Columbia Circuit. *See* 28 U.S.C. § 2112(a)(5). The temporary administrative stays entered on October 6, 2003 and October 7, 2003 are accordingly vacated and the stay motions will be decided by the transferee court. The Clerk is directed to transmit the original file, all pending motions, and a certified copy of this order to the United States Court of Appeals for the District of Columbia Circuit.

FOR THE COURT:

Roseann B. MacKechnie, Clerk

By: 

212 Locust Street, Suite 300, Harrisburg, Pennsylvania 17101
Tel: (717) 237-7160 □ Fax: (717) 237-7161 □ www.WolfBlock.com

Alan C. Kohler
Direct Dial: (717) 237-7172
Direct Fax: (717) 237-2752
E-mail: akohler@wolfblock.com

ORIGINAL

November 17, 2003

VIA HAND DELIVERY DOCUMENT

RECEIVED

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

James McNulty
Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg., 2nd
Floor, 400 North Street P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Investigation into the Obligation Incumbent of Local
Exchange Carriers to Unbundle Local Circuit Switching
for the Enterprise Market; I-00030100

Dear Secretary McNulty:

Enclosed please find the original and nine (9) copies of Pennsylvania Carriers'
Coalition's Brief in the above-referenced matter. As evidenced by the attached Certificate of
Service, all parties of record have been served.

Thank you for your attention to this matter.

Respectfully submitted,

Alan C. Kohler

For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

ACK/smw

cc: The Honorable Michael C. Schnierle
Parties of Record

DSH:38837.1/FUL022-216383

116

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the :
Obligation of Incumbent : Docket No.
Local Exchange Carriers : I-00030100
to Unbundle Local Circuit :
Switching for the Enterprise Market :

RECEIVED

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BRIEF OF PETITIONER
PENNSYLVANIA CARRIERS' COALITION

(Full Service Computing Corporation t/a Full Service Network, Remi Retail
Communications, LLC, ATX Licensing, Inc. and Line Systems, Inc.)

DOCKETED
NOV 20 2003

Daniel Clearfield, Esq.
Alan Kohler, Esq.
Wolf, Block, Schorr and Solis-Cohen LLP
212 Locust Street, Suite 300
Harrisburg, PA 17101
(717) 237-7172
akohler@wolfblock.com

Counsel for the Petitioner
Pennsylvania Carriers' Coalition

Dated: November 17, 2003

DOCUMENT

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. EXECUTIVE SUMMARY, STATEMENT OF INTEREST AND THE PUBLIC INTEREST	5
II. STATEMENT OF THE CASE.....	7
III. INTRODUCTION AND BACKGROUND	9
IV. SUMMARY OF EVIDENTIARY RECORD AND LEGAL ARGUMENT	14
V. ARGUMENT	23
A. Operational Criteria	23
1. ILEC's Performance in Provisioning Loops	24
2. Difficulties in Obtaining Collocation Space Or Delays in Process by the ILEC.....	34
3. Difficulties in Obtaining Cross Connects in the ILEC's <u>Wirecenter</u>	34
4. Any other Operational Criteria That Make Entry Uneconomic for <u>CLECs</u>	34
5. Discussion on Whether Operational Criteria Factors Identified in 1-4 Are Significant Enough to Constitute Impairment and How <u>Unbundling Will Overcome the Alleged Impairment</u>	38
B. Economic Criteria	40
6. The "Particular Markets" in Which Entry Is Uneconomic in the <u>Absence of Unbundling Local Circuit Switching</u>	40
7. CLEC's Potential Revenues From Serving Enterprise Customers in Each Particular Market Identified in Six Above Against the Cost of Entry into that Market (Not Necessarily any Carriers Individual Business Plan. (All Revenues Include Revenues Derived From <u>Local Exchange and Data Services</u>).	42

8.	Price Entrants Are Likely to be Able to Charge After Considering the Prevailing Retail Rates the ILEC Charges to Different Classes of Customers in Different Parts of Pennsylvania.....	46
9.	CLECs Costs of Entry Into Each Particular Market Identified in the Number 6 Above, Including Costs Imposed by Both Operational and Economic Barriers to Entry.....	48
6.	Any Other Economic Criteria That Makes Entry Uneconomic for CLECs.....	51
C.	State Law Issues.....	53
VI.	CONCLUSION.....	58

TABLE OF AUTHORITIES

	<u>PAGE</u>
<i>Milkie v. Pennsylvania Public Utility Commission</i> , 768 A.2d 1217, 1220 (Pa. Cmwlth 2001)	29
<i>United States Telecom Ass'n v. FCC</i> , 290 F.3d 415 (D.C. Cir. 2002) (USTA),	8
<i>WorldCom, Inc. v. United States Telecom Ass'n</i> , 123 S.Ct 1571 (2003 Mem.)	8

Administrative Cases

<i>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</i> , CC Docket No. 96-98 Report and Order and Fourth <i>Further</i> Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999)	7
<i>In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers</i> , CC Docket No. 01-338 (August 21, 2003).	<i>passim</i>
<i>Joint Petition of Nextlink Pennsylvania, Inc. et. al.</i> , P-00991648, P-00991649	<i>passim</i>
<i>Petition of MCI for Emergency Declaratory Ruling and Enforcement of Interconnect Agreement with Bell Atlantic-Pennsylvania, Inc.</i> , Docket No. A-310236F0002, (December 11, 2001)	55
<i>Petition of Verizon Pennsylvania, Inc. for a Determination That its Provision of Business Telecommunications Services to Customers Generating Less Than \$10,000 in Annual Total Billed Revenue is a Competitive Service Under Chapter 30 of the Public Utility Code</i> , P-00021973 (August 12, 2003).....	19, 20, 52
<i>Verizon Pennsylvania, Inc.; Petition and Plan for Alternative Regulation Under Chapter 30; 2000 Biennial Update to Network Modernization Plan</i> ; R-00930715F002. (March 24, 2003)	47

Statutes

47 U.S.C. § 251(d)(2)	7
66 Pa. C.S. § 3002	51

66 Pa. C.S. § 3004(b)55
66 Pa. C.S. § 300555
66 Pa. C.S. §3005(e) 51

I. EXECUTIVE SUMMARY, STATEMENT OF INTEREST AND THE PUBLIC INTEREST

As reflected in its Petition to Initiate Proceedings submitted on October 17, 2003, the Pennsylvania Carriers' Coalition ("PCC"), an informal coalition comprised of Full Service Computing Corporation t/a Full Service Network ("FSN"), Remi Retail Communications, LLC. ("Remi"), ATX Licensing, Inc. ("ATX") and Line Systems, Inc. ("LSI"), submits this Brief to the Commission in support of its Petition and its testimony filed and introduced in this important proceeding. The PCC is a group of Pennsylvania competitive local exchange carriers ("CLECs") which either operate entirely in Pennsylvania or conduct their main business in Pennsylvania,¹ have their offices in Pennsylvania and employ Pennsylvanians in providing local exchange and other telecommunications services to their Pennsylvania customers.

It is with this Pennsylvania focus in mind that the PCC requests the Commission to find, based on a granular evaluation and the Pennsylvania specific evidentiary record before the agency, that Pennsylvania CLECs are impaired without the availability of unbundled local circuit switching for DS1 (and higher capacity) enterprise customers in Pennsylvania ("DS1 Switching"). The Commission's evaluation of the record will reveal that not only are carriers serving the Pennsylvania enterprise market impaired without access to unbundled local circuit switching for customers served with DS1 (and higher) loops ("DS1 Customers"), but that absent a Pennsylvania finding of impairment, CLECs serving Pennsylvania enterprise customers will face an imminent threat to the enterprise portion of their business which may force customers back to incumbent local exchange carriers ("ILECs") and, in particular, Verizon Pennsylvania, Inc. ("Verizon"). Furthermore, absent an impairment finding, a CLEC's opportunities to attract future enterprise customers will be severely limited, if not completely eliminated. Based on such

¹ FSN and Remi conduct their business entirely within the Commonwealth.

findings of significant operational and economic impairment throughout the Commonwealth of Pennsylvania, the PCC requests the Commission to timely petition the FCC for a waiver or exclusion from the FCC's national non-impairment rule that requesting telecommunications carriers are not impaired without access to local circuit switching to serve end users using DS1 capacity and above loops.

The effect of allowing the national non-impairment finding to stand in Pennsylvania is to eliminate the Unbundled Network Element Platform wholesale service arrangement as a means of serving any Pennsylvania DS1 Customer ("DS1 Platform").² This will not only have an extremely detrimental impact on CLECs, like PCC members, but will have a detrimental impact on the customers they serve or would have served in the future. As the record reflects, PCC members offer DS1 customers significant savings over the retail rates offered by Verizon along with certain advanced services that simply aren't available from Verizon.³ Accordingly, these customers will lose those savings and efficiency enhancing services if they are forced back to Verizon against their will as a result of the outcome of this proceeding.

Furthermore, by taking away competitive options, future customers will lose the potential for the future savings, including leverage in the negotiations process, and advanced services which could and would be offered by CLECs in the future. As to advanced services in particular, the wrong outcome in this proceeding could impede the introduction of next

² **This is despite the fact that, as explained below and as demonstrated in the Testimony, although Verizon tariffed the DS1 Platform in 1999, as required by the Commission's Order in *Joint Petition of Nextlink Pennsylvania, Inc. et. al.*, P-00991648, P-00991649 (September 30, 1999) ("*Global Order*"), from a practical perspective, a DS1 Platform was not made commercially available to CLECs in Pennsylvania to serve the vast majority of DS1 customers until the 3rd week of September, 2003 -- less than two months ago.**

³ PCC-1 (Direct-Revised) at 3-9.

generation switching technology and related advanced services in Pennsylvania, which technology represents the logical evolution of the competitive market for consumers.

The damage does not stop there. As discussed below, removal of the competitive pressure on Verizon may eliminate the only rate controls which currently protect the retail rates of certain DS1 enterprise customers' service, if the customer generates more than \$10,000 in TBR, since Verizon's local service to those customers has been designated as "competitive," and their rates have been completely deregulated.⁴ The outcome is the worst of all outcomes for consumers -- an unregulated monopoly.

Accordingly, while the PCC members accept the restrictions placed on this proceeding by the FCC, and have demonstrated conclusively through evidence that CLECs will be operationally and economically impaired without unbundled DS1 Switching, it is also undeniably true that the public interest, from the perspective of Pennsylvania DS1 Customers, strongly supports the continued availability of this wholesale product. The Commission should not lose sight of the public interest, the overriding factor which governs all of the agency's adjudications, in deciding this matter.

II. STATEMENT OF THE CASE

On August 21, 2003, the Federal Communications Commission ("FCC") issued its *Triennial Review Order* ("*TRO*"). In the *TRO*, the FCC reached a national finding of non-impairment for unbundled local circuit switching used to serve customers utilizing a DS1 local loop (or higher capacity).⁵

⁴ See *Global Order* at 248-49.

⁵ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (August 21, 2003). A DS1 Customer is a customer which is served through a local loop with capacity of at least 1.544 megabits per second, digital signal comprised of 24 digital channels at 64 kilobit per second

While the FCC reached a national finding of non-impairment for DS1 Switching, the finding was tentative in that the FCC deferred to the state commissions as to whether there is or will be impairment in all or part of a given state.⁶ The states have been provided ninety days to conduct this state specific analysis, referred to as a "granular" analysis, and to petition the FCC to waive the national finding of non-impairment in markets where impairment is found to exist. This proceeding to evaluate the existence of impairment without DS1 Switching has come to be known as the "90 Day Proceeding."

On October 3, 2003, the Commission entered a Procedural Order setting forth the procedures that will govern this matter. On October 17, 2003, the PCC submitted a Petition to Initiate Proceedings.⁷ Attached to the Petition is the Direct Testimony of David Schwencke, President and CEO of FSN, David Malfara, President and CEO of Remi and Scott Dulin, Senior Vice President of ATX.

On October 24, 2003, a Prehearing Conference was held before the assigned presiding officer, Administrative Law Judge ("ALJ") Michael C. Schnierle. On October 21, 2003, Verizon

capacity which is typically carried over what is called a T-1 facility. PCC St. 1 (Direct-Revised) at 13.

⁶ *TRO* at 455. ("While the record in this case does not contain evidence identifying any particular markets where competitive carriers would be impaired without unbundled access to local circuit switching to some enterprise customers, state commissions are uniquely positioned to evaluate local market conditions and determine whether DS1 enterprise customers should be granted access to unbundled ILEC circuit switching. To that end, we permit state commissions to rebut the national finding of no impairment by undertaking a more granular analysis utilizing the economic and operational criteria contained herein.")

⁷ A Petition to Initiate Proceedings was also filed by ARC Networks, Inc., d/b/a Infohighway and Metropolitan Telecommunications Corporation of PA which also included Direct Testimony. The Office of Consumer Advocate ("OCA"), the Office of Trial Staff ("OTS"), the Office of Small Business Advocate ("OSBA"), the Rural Company Coalition ("RCC") MCI Telecommunications and Lightship Telecom, L.L.C. intervened in the proceedings.

submitted direct testimony responding to the PCC testimony. On October 31, 2003, the PCC and Infohighway submitted rebuttal testimony. On November 3, 2003, the active parties to the proceeding submitted a Protective Order Stipulation clarifying the application of the Protective Order to this proceeding.

On November 10, 2003, the active parties submitted a Stipulation which waived cross-examination on the testimony that had been submitted, as well as three OTS exhibits. It was agreed through the Stipulation that the Direct Testimony, Rebuttal Testimony and OTS exhibits would comprise the evidentiary record of this proceeding.

On November 6, 2003, the Commission issued a Secretarial Letter establishing the requirements governing the briefs in this matter. This Brief is submitted in response to and in compliance with those directives.

III. INTRODUCTION AND BACKGROUND

This 90 Day Proceeding is the first of what is likely to be many Commission cases involving application of what has come to be known as the "necessary and impair" standard under Section 251(d)(2) of the Telecommunications Act of 1996, 47 U.S.C. § 251(d)(2), 47 U.S.C. (d)(2). Under this statutory provision, an incumbent local exchange carrier ("ILEC") must make available unbundled network elements ("UNEs") to CLECs when "(a) access to such network elements as are proprietary in nature is necessary" and when "(b) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

The proper application of this "necessary and impair" standard has bounced around in the federal courts for years and is now subject to final adjudication.⁸ The *TRO* represents the FCC's

⁸ *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

initial attempt to apply the common law developed by the federal courts. Of course, this first attempt will undoubtedly be the subject of years of federal court litigation in and of itself.

Although the statutory test as to whether a UNE must be offered by an ILEC under Section 251 is a two-prong test -- necessary and impair -- the FCC has determined that the "impair" standard is a less demanding standard than the "necessary" standard.⁹ In other words, if a CLEC is not impaired without access to a UNE, then the availability of the UNE is, by definition, not necessary, and vice versa. Accordingly, under the FCC's interpretation there is no need to separately analyze the "necessary" standard. If CLECs are impaired without access, the UNE must continue to be made available; if not, the element is no longer required to be offered by the ILEC on an unbundled basis under Section 251.

Through the *TRO*, the FCC has attempted to apply the "necessary and impair" standard to each existing UNE on a national basis. One of the primary UNEs which is addressed by the *TRO* is local circuit switching.¹⁰

In the *TRO*, the FCC divides its analysis as to local circuit switching into two general markets -- the mass market and the enterprise market.¹¹ The mass market is the FCC's

Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*) reversed and remanded in part sub. nom. *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (USTA), cert. denied sub nom. *WorldCom, Inc. v. United States Telecom Ass'n*, 123 S.Ct 1571 (2003 Mem.) (cert. denied after adoption of this Order, but before release).

⁹ *TRO* at ¶ 71.

¹⁰ Local circuit switching is the capability of a switching facility to establish a dedicated transmission path between originating and terminating points and hold that path open for the duration of a local call. From a facilities perspective, local circuit switching includes the line-side and trunk-side facilities, plus the features, functions and capabilities of the switch. PCC-1 (Direct-Revised) at 13.

¹¹ *TRO* at ¶ 419.

terminology for the residential market and for smaller business customers which more closely resemble residential customers than larger business customers. The remaining business customers are termed enterprise customers.¹²

As to the mass market, the FCC reached a national finding that CLECs are impaired without access to local circuit switching as a UNE. As to a portion of the enterprise market, the FCC created an overarching and rebuttable finding that CLECs are unimpaired without access to DS1 Switching.¹³ As explained above, as to both markets, the FCC assigned discretion to the states to evaluate whether the national finding is appropriate, based on a granular analysis of the specific conditions of particular markets within a state.

As to DS1 Switching, the specific subject of this proceeding, the FCC based its determination of non-impairment entirely on three factual findings which, from the FCC's perspective, distinguished the DS1 Customer market from the mass market where impairment on a national scale was found. These three specific factual findings which are provided for in paragraph 421 of the *TRO* are as follows:

Finding No. 1 -- "The evidence in our record establishes that, in most areas, competitive LECs can overcome barriers to serving enterprise customers economically using their own switching facilities in combination with unbundled loops (or loop facilities)."

Finding No. 2 -- "The facilities used to provide DS1 capacity or above services to enterprise customers typically are not pre-wired to incumbent LEC switches, allowing competing carriers to avoid the costs and service disruptions associated with "hot cuts" -- the manual process by which customer lines are migrated to competitor switches."

¹² PCC-1 (Direct-Revised) at 13; *TRO* at ¶ 430.

¹³ *TRO* at ¶ 419. As to the remainder of the enterprise market -- business customers served by four or more DS0 loops -- the issue was left to state review within the nine month proceeding.

Finding No. 3 -- "Enterprise customers also generally offer increased revenue opportunities and are more willing to enter long-term contracts, allowing competitive LECs a greater ability to recover the nonrecurring costs associated with providing service using their own switches."

However, the FCC specifically recognized that these national factual findings may not hold true in many markets.¹⁴ As fully set forth below, the state specific record in this proceeding firmly demonstrates that none of the three factual findings upon which the FCC based its national impairment presumption are supportable in any of Pennsylvania's DS1 markets.

If the Commission does not seek a waiver of the FCC's non-impairment rule for DS1 Switching, there will be an abrupt change in the wholesale service offerings which Verizon is required to offer in Pennsylvania. In the *Global Order*, the Commission required Verizon to offer CLECs a UNE-P wholesale service arrangement for all customers at or below \$80,000 of Total Billed Revenue ("TBR").¹⁵ This standard, by definition, required Verizon to make UNE-P available to CLECs to serve DS1 Customers and DS3 Customers as well. The current federal rule requires local circuit switching for all customers except those customers with four or more lines in the top 50 Metropolitan Statistic Areas ("MSAs") subject to the availability of Enhanced Extended Links ("EELs"). Under the combined standard, as reflected in Verizon's tariff, Verizon is currently required to provide UNE-P to CLECs to serve all customers except those with more than \$80,000 in TBR in the urban centers of the cities of Philadelphia and Pittsburgh – a total of

¹⁴ *TRO* at ¶ 421 ("We recognize, however, that special circumstances may create impairment without access to unbundled local circuit switches to serve enterprise customers in particular markets.")

¹⁵ *Global Order* at 90.

12 wire centers.¹⁶ Accordingly, absent a non-impairment waiver, the current regime requiring UNE-P for most business customers will be eradicated.

Unfortunately, as the record reflects and as Verizon does not dispute, Verizon (in violation of the *Global Order* and its own Tariff) did not make a commercially usable DS1 Platform available to CLECs until mid-September of 2003 (and then on a trial basis), except to serve the relatively small number of DS1 customers with Primary Rate Interface ("PRI") capability in their customer premise equipment.¹⁷ Accordingly, if the Commission does not seek a non-impairment waiver, Verizon will be left off the hook from offering a DS1 Platform to serve the vast majority of DS1 customers only months after it first made the wholesale service arrangement commercially available to a CLEC. The (unrebutted) record reflects that this blatant failure on the part of Verizon precluded the PCC members from building customer bases that could have justified the installation of new switches and expanded the coverage of existing switches.¹⁸

The result of this failure and other Pennsylvania specific market conditions, as fully outlined below, has resulted in a paltry CLEC penetration rate of less than 8% in the DS1 (or higher) market in Verizon's service territory, less than half of the CLEC market penetration for Pennsylvania as a whole, and less than the residential market penetration in Verizon's service territory.¹⁹ The bottom line is that the numbers do not lie and the operational and economic

¹⁶ See Verizon Pa. P.U.C. - No. 216, Section 3, 1st Revised Sheet 5E and 5F. The 12 wire centers are Evergreen, Locust, Market, Penntpacker, Dewey, King of Prussia, Paoli, Wayne, West Chester, Downtown, Wilksburg, and Perrysville. The areas or marketys served by these wire centers are jointly referred to as "Urban Centers").

¹⁷ PCC-1 (Direct-Revised) at 20-23; PCC St. 1.1 (Rebuttal) at 9.

¹⁸ PCC-1 (Direct-Revised) at 23.

¹⁹ PCC-1 (Direct-Revised) at 10.

impairment for switch-based service to DS1 Customers has taken a dramatic toll on the development of meaningful competition in that market in Pennsylvania.

IV. SUMMARY OF EVIDENTIARY RECORD AND LEGAL ARGUMENT

This case comes down to a Commission decision as to whether the myriad of facts introduced into the record by PCC and other CLECs -- which facts are entirely unrebutted by Verizon -- are adequate to meet the CLECs' *prima facie* evidentiary burden to demonstrate either operational or economic impairment in all DS1 markets in Pennsylvania or in parts of the state. In fact, review of the extensive record in this proceeding reveals that Verizon has chosen not to rebut a single fact introduced by a CLEC witness. While Verizon's very limited testimony in this proceeding attempts to explain away several of the facts relied on the by PCC panel, even that limited testimony, once rebutted, hurts rather than helps its cause. Indeed, a summary of the many facts supporting a finding of operational and economic impairment -- **and each fact is completely unrebutted in the record** - reveals that the PCC and other CLEC participants have overwhelmingly met their *prima facie* case.²⁰

As to operational impairment, the unrebutted record reveals that the FCC's second factual finding is simply not true in Pennsylvania.²¹ First, if there is no pre-existing spare loop facility from the central office to the customer premises, as frequently occurs in Pennsylvania, a migration from an ILEC switch to a CLEC switch is completely unavailable and CLECs are shut

²⁰ In addition to providing very limited evidence in this proceeding, Verizon voluntarily waived its right to cross-examine CLEC witnesses. *See*, November 10, 2003 Joint Procedural Stipulation.

²¹ "The facilities used to provide DS1 capacity or above services to enterprise customers typically are not pre-wired to incumbent LEC switches, allowing competing carriers to avoid the costs and service disruptions associated with 'hot cuts' -- manual process by which customer lines are migrated to competition's switches." *TRO* at ¶ 421.

out from serving these DS1 customers on a local switched-based basis.²² Second, if a spare facility is available, the parallel migration process relied upon by the FCC, under which the new service is activated before the old service is terminated, is not available in Pennsylvania.²³ In fact, in all cases, the migration process in Pennsylvania requires termination of the existing service before the new service is activated.²⁴ The result is that the DS1 migration process in Pennsylvania cannot be executed without a significant and risk-laden customer outage under which the customer is **out of service** until the new service is tested for proper link-level operations, the new service is tested for proper routing and translation operation and the telephone numbers are ported.²⁵ Furthermore, the manual processes utilized by Verizon are all too frequently affected by multiple human or system errors which cause service delays, interruptions or degradations. Because of these Verizon deficiencies, CLECs frequently miss service commitment to customers by a magnitude of days.²⁶ All of these problems severely hurt a CLEC's relationship with its customers and frequently cause the CLEC to lose customers back to Verizon.²⁷

²² PCC-1 (Direct-Revised) at 30.

²³ PCC-1 (Direct-Revised) at 32-33; PCC-1.1 (Rebuttal) at 11-12, in contrast to *TRO* at ¶ 451 ("Specifically, the conversion process for enterprise customers generally involves the initiation of service to the competitor's new digital loop while the incumbent's service remains in place.")

²⁴ PCC-1 (Direct-Revised) at 31-32; PCC-1.1 (Rebuttal) at 11-13. Furthermore, Verizon witness Berry admits this is the case in her testimony. *Verizon St. No. 1.0 (Berry)* at 7. ("... generally the new facility is tuned up only after the old one is disconnected.")

²⁵ PCC-1 (Direct-Revised) at 32-33; PCC-1.1 (Rebuttal) at 12-13 in contrast to *TRO* at ¶ 451 ("Thus, enterprise customers avoid potentially lengthy disruptions of service due to physical hot cuts, occasionally experiencing an outage of only 10 to 30 seconds.")

²⁶ PCC-1 (Direct-Revised) at 33.

²⁷ PCC-1 (Direct-Revised) at 34.

To make matters worse, the manual hot cut process for DS1 migration is forced on CLECs by Verizon in Pennsylvania. This mandatory manual hot cut process occurs at the customer premises and shifts the burden and cost of the hot cut process to the CLEC. The customer premises hot cut process is even more problematic than the central office hot cut process used for mass market migrations, because of varying physical and environmental conditions in each customer premises, and stands in direct contrast to the billing change Verizon must complete in order to migrate a UNE-P customer back to Verizon.²⁸ CLECs must incur substantial costs in order to minimize the customer disruptions caused by this process, and these costs significantly impact customer service decisions.²⁹

Taken together, the evidence is conclusive that the migration process for DS1 customers actually causes more operational impairment in Pennsylvania than for the mass market. This operational impairment places CLECs at a severe competitive disadvantage in Pennsylvania as compared to the ILEC.³⁰ Clearly, the PCC has effectively rebutted every aspect of the FCC's operational impairment analysis justifying and requiring the Commission to seek a statewide non-impairment waiver from the FCC for each particular market in Pennsylvania.

²⁸ PCC-1.1 (Rebuttal) at 14; Initial Joint Declaration of Karoczkai and Aronow at 12.

²⁹ PCC-1 (Direct-Revised) at 34 in contrast to *TRO* at ¶ 451 ("As a result, competitive carriers neither incur the costs of hot cuts nor experience the quality degradation associated with the hot cut process to serve customer and loops with DS1 capacity and above.")

³⁰ This is documented by the fact that CLEC market penetration into the DS1 or higher market in Pennsylvania is less than 8%, is less than half of statewide average penetration as reported by the FCC, is significantly less than the residential market and stands in direct contrast to the FCC's national presumption in the *TRO* at § 451 that "Accordingly, competitive CLECs generally face the same opportunities and challenges as incumbents on connecting such facilities to their switches."

As to the evidence of economic impairment, the record is equally convincing that impairment exists.³¹ The un rebutted evidence reveals the FCC's finding for "most areas" does not include Pennsylvania under a granular approach.

While the number of CLEC switches actively serving CLEC customers is not included in this record through anything that resembles credible evidence, the evidence is un rebutted that relatively few CLEC switches have been installed and activated over the past three years. In fact, given the long trail of business failures and bankruptcies in the CLEC industry, there is a serious question as to whether the provision of service through self-provisioned switching can be sufficiently profitable in Pennsylvania to encourage new investment.³² Verizon has not refuted that current conditions in Pennsylvania have resulted in no new meaningful switch deployment over the last three years. This lack of deployment is clear evidence of the failure of existing market conditions to present sufficient economic return to encourage new infrastructure investment by competitors. These conditions will only be made worse if the Commission fails to petition for a statewide non-impairment waiver from the FCC.

In direct contrast to what Verizon will undoubtedly argue, this economic impairment for switch-based providers in Pennsylvania is due in large part to economic circumstances specific to Pennsylvania. First, Verizon's refusal or inability to provide a commercially viable DS1 Platform in Pennsylvania to serve the vast majority of Pennsylvania DS1 customers for the past

³¹ The FCC's two underlying factual findings on economic impairment are that ". . . in most areas, competitive LECs can overcome barriers to serving enterprise customers economically using their own switching facilities in combination with unbundled loops (or loop facilities) and that "Enterprise customers also generally offer increased revenue opportunities and are more willing to enter long-term contracts, allowing competitive LECs a greater ability to recover their nonrecurring costs associated with providing services using their own switches." *TRO* at 421.

³² PCC-1 (Direct-Revised) at 17.

four years has precluded CLECs, and specifically PCC members, from developing the economies necessary to support switch investment and deployment to serve DS1 Customers.³³ If the DS1 Platform is eliminated now, the negative effect on switch deployment will extend into the future and will be devastating to CLECs.

Those legacy CLEC switches that are currently serving DS1 customers are clustered in downtown Philadelphia and Pittsburgh.³⁴ These switches can only serve DS1 Customers, without the installation of CLEC-owned local loops, through combination with either collocation or EELs.³⁵ Both options impose distance sensitive costs on CLECs to backhaul traffic to the CLEC's switch.³⁶ Accordingly, it is unrebutted in this record that there are relatively few DS1 customers being served by CLEC switches as one moves away from the two big cities and into the rural areas.³⁷ This is due to Pennsylvania-specific economics, including Verizon's collocation and EEL rates, its refusal to provide EELs with concentration despite the *Global Order* and the requirements of its tariff, and its insistence on assessing an EEL entrance facility charge.³⁸ Accordingly, like in so many other areas, elimination of the DS1 Platform will

³³ PCC-1 (Direct-Revised) at 18-23.

³⁴ PCC-1.1 (Rebuttal) at 6.

³⁵ PCC-1.1 (Rebuttal) at 6-8.

³⁶ PCC-1 (Direct-Revised) at 23-28; FCC St. 1.1 (Rebuttal) at 6-8.

³⁷ PCC-1 (Direct-Revised) at 24-25; 35-37; Exhibit PCC-1.

³⁸ In fact, based on Verizon's tariff rates and based on a assumption of a customer who is located 37 miles from a CLEC switch, a CLEC would have to serve over 38 DS1 customers in each wire center before the CLEC could recover the wholesale costs of backhauling the traffic to a CLEC switch at Verizon's existing retail rates and over 50 DS1 customers to justify a CLEC rate below Verizon's rate which could conceivably attract customers. For customers beyond 37 miles, the backhaul costs would be substantially more, increasing the number of required DS1 customers for that wire center. As dismal as this economic picture is, it is important to understand that this analysis does

have a particularly devastating effect on potential DS1 competition outside of the Urban Centers, where there is little switch-based competition today.

For example, while ATX (in Philadelphia) and FSN (in Pittsburgh) own and operate local switches, the economics do not justify expansion of switch coverage outside of the two-big cities. While ATX uses EELs and collocation when they make economic sense, it generally remains economically unviable to extend its switch coverage to serve DS1 customers outside of the Philadelphia metropolitan area. Furthermore, it is not economically viable for ATX to consider dedicating the multi-million dollar investment to install new switches in these areas.³⁹ As to FSN, the Company simply has no economically viable way to extend its switch coverage to DS1 customers outside of Pittsburgh without the availability of a DS1 Platform to build up a customer base. In the area outside of the Urban Centers in Verizon's service territory, the low density of DS1 customers results in economies of scope and scale which simply do not support switched based service by a CLEC.⁴⁰ Accordingly, without a DS1 Platform, economic impairment will assure that DS1 customers outside of the Urban Centers are left without any competitive options. FSN President Schwencke testified, "Like so many other instances, it seems as if the rural part of Pennsylvania gets left behind."⁴¹

not include recovery of the CLEC's own retail costs, the recovery of the actual switch investment, usage based costs and overhead. Furthermore, the record reveals that any additional revenues that a CLEC may be able to recover through revenues from services other than voice services (e.g. data services) does nothing more than offset the CLEC costs incurred in addition to the wholesale costs. PCC-1 (Direct-Revised) at 36-37; Exhibit PCC-1, OTS Exhibit 1.

³⁹ PCC-1 (Direct-Revised) at 26-28.

⁴⁰ PCC-1 (Direct-Revised) at 34-36.

⁴¹ PCC-1 (Direct-Revised) at 36.

The record in this proceeding supports a finding, in unrebutted fashion, that as a result of circumstances unique to Pennsylvania, including the general unavailability of a DS1 Platform, the wholesale rates for collocation and EELs, the lack of local switches outside of urban areas, and the failure to comply with this Commission's requirements as to EELs with concentration, that CLEC penetration into the DS1 (or higher) markets in Verizon's service territory is a paltry market share of less than 8%.⁴² This CLEC penetration is less than half of the CLEC market penetration most recently reported by the FCC for the entire state of Pennsylvania and significantly less than the CLEC market penetration for residential customers in Verizon's service territory - a very noteworthy fact given the fact that FCC made a national finding of impairment for local circuit switching serving in the mass market.⁴³ Indeed, the evidence is clear that without the availability of a DS1 Platform, a wholesale service offering that was generally unavailable in Pennsylvania until two months ago, CLECs in Pennsylvania are and will continue to be operationally and economically impaired and competition in the DS1 markets in the Commonwealth will either remain completely stagnant or, more likely, dwindle away.

The continued availability of the DS1 Platform also has significant implications for the Commonwealth's network modernization objectives and the transition to next generation technology, commonly referred to as "soft switching," including the deployment of Voice over Internet Protocol ("VoIP") and other voice-over-packet transport technologies. Indeed, it is these next generation technologies which hold the key to future development of a robust broadband infrastructure throughout the Commonwealth. Furthermore, the availability of the so-called next-generation network ("NGN"), including VoIP, is quickly evolving into a technology which

⁴² PCC-1 (Direct-Revised) at 10.

⁴³ PCC-1 (Direct-Revised) at 10.

will eliminate the operational and economic impairment which currently exists in serving DS1 customers on a switch-based basis.⁴⁴ Once NGN is available, operational and can be interfaced transparently, and not before, it will be legally appropriate to eliminate DS1 Switching in Pennsylvania on an unbundled basis.

State law also supports the maintenance of unbundled DS1 Switching in Pennsylvania. As the Commission is fully aware, Section 3005(e) of the Public Utility Code includes its own unbundling requirement for basic service functions (including DS1 Switching) which are utilized by an ILEC, including Verizon, to provide "competitive" services. Currently, all of Verizon's retail services to customers over \$10,000 in TBR are classified as "competitive."

Since the adoption of the *TRO*, this Commission has conclusively determined that Verizon would not be released from state unbundling requirements by the *TRO* or other federal action for competitive services.⁴⁵ Furthermore, the Commission has also concluded that the

⁴⁴ PCC-1 (Direct-Revised) at 37-38.

⁴⁵ *Petition of Verizon Pennsylvania, Inc. for a Determination That its Provision of Business Telecommunications Services to Customers Generating Less Than \$10,000 in Annual Total Billed Revenue is a Competitive Service Under Chapter 30 of the Public Utility Code*, P-00021973 (August 12, 2003). As the Commission stated in its ruling on this matter:

Consistent with these parameters, we emphasize that for any telecommunications service for which Verizon PA obtains competitive designation under Chapter 30, Verizon PA is required, independent of other federal requirements, to unbundle BSFs used to provide that local service. If Verizon PA chooses to once again seek a Commission determination that a telecommunications service is a competitive service under Chapter 30, it bears the burden of proof. Specifically, Verizon PA is required to provide in support of its request detailed evidence indicating it has unbundled the BSF for any telecommunications service for which it seeks Commission competitive declaration.

Clearly, to avoid unbundling under any scenario, Verizon must voluntarily relinquish its competitive service designations.

market for customers at or below \$10,000 in TBR is not competitive, in large part because barriers to entry (or impairment) remains in those markets, justifying the continued availability of DS1 Switching on an unbundled basis.⁴⁶ While the record indicates that DS1 customers may fall on either side of the TBR benchmark,⁴⁷ it is clear that DS1 unbundling must be maintained as a UNE or basic service function given the application of state law and this Commission's recent granular review of the competitiveness of Verizon's business market.

Finally, while the PCC has focused its evidentiary presentation on the Verizon PA service territory, it is equally clear that impairment is present in the areas of the Commonwealth served by other ILECs. As to Verizon North, the record indicates that the operational and economic impairment is even more apparent than in Verizon PA's service territory.⁴⁸ Furthermore, as to non-Verizon companies, the record indicates that because those companies continue to be protected by rural exemption/suspensions, it is unrebutted that there is no switch-based provider serving DS1 Customers in these territories.⁴⁹ Accordingly, there is absolute impairment in these areas, demonstrating the absurdity of the application of the FCC's national non-impairment rule to these areas of the Commonwealth. At a minimum, the Commission must seek a waiver of the non-impairment finding in these areas as a matter of law.

Overall, the evidence is not only clear and convincing, but generally unrebutted, that CLECs and are and will continue to be operationally and economically impaired in serving DS1 customers on a switched-based basis. Based on this extensive evidence, the Commission should

⁴⁶ August 12, 2003 Order, P-00021973 at 22-23.

⁴⁷ PCC-1 (Direct-Revised) at 39-40.

⁴⁸ PCC-1 (Direct-Revised) at 28.

⁴⁹ PCC-1 (Direct-Revised) at 28.

find that CLECs are impaired without DS1 Switching and submit the appropriate waiver request to the FCC.

V. ARGUMENT

In its November 6, 2003 Secretarial Letter, the Commission required "mandatory sections" in the briefs in making arguments and in analyzing the evidentiary record in this proceeding. The mandatory sections follow the organization of Paragraphs 456-458 of the *TRO*. As directed by the Commission, the PCC will follow this required format in making its arguments pertaining to operational and economic impairment.

A. *Operational Criteria*

As explained above, the FCC based its national non-impairment rule for DS1 Switching on these factual findings as set forth in Paragraph 421 of the *TRO* -- none of which are true in Pennsylvania based on the record of this proceeding.⁵⁰ In Paragraph 456 of the *TRO*, the FCC discussed the manner in which the states could rebut the impairment standard and its factual findings. As the FCC stated, "In particular, state commissions must consider whether incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive LECs."

⁵⁰ *TRO* ¶ 421. The FCC's three factual findings upon which it based its national presumption are as follows: 1) ". . . in most areas, competitive LECs can overcome barriers to serving enterprise customers economically using their own switching facilities in combination with unbundled loops (or loop facilities);" 2) "The facilities used to provide DS1 capacity or above service to enterprise customers typically are not pre-wired to incumbent LEC switches, allowing competing carriers to avoid the costs and service disruptions associated with 'hot cuts' – the manual process by which customer lines are migrated to competitor's switches;" and 3) "Enterprise customers also generally offer increased revenue opportunities and are more willing to enter long-term contracts, allowing competitive LECs a greater ability to recover the nonrecurring costs associated with providing service using their own switches."

While the PCC has focused its evidentiary case on loop provisioning, it is clear from the un rebutted facts of record that operational impairment is alive and well and is raising barriers to entry for CLECs attempting to compete on a switch-based basis in Pennsylvania. Furthermore, the record is clear (and un rebutted) that the only way to overcome this impairment is to maintain unbundled DS1 Switching, a network element that has only been commercially available to CLECs to serve the vast majority of DS1 customers for less than two months.

1. ILEC's Performance in Provisioning Loops.

From the PCC's perspective, Verizon's performance in provisioning loops holds the key to operational impairment throughout Verizon's service territory. The panel testimony of David Schwencke, Scott Dulin and David Malfara, all of which have substantial, first-hand experience with Verizon's DS1 Customer migration processes as they occur in Pennsylvania,⁵¹ provided extensive evidence on the shortcomings of the loop provisioning process and the operational impairment that results. Indeed, loop provisioning is the primary focus of the PCC's evidentiary presentation in this matter.

As explained above, it is important to note that not only has the PCC provided extensive testimony and a myriad of facts on the loop provisioning process, that testimony and those facts are completely un rebutted on the record of this proceeding. As a result, in the Commission's evidentiary evaluation, there is no evidence against which to weigh the PCC's evidence on loop provisioning. Accordingly, the only way that the Commission can not find operational impairment in all markets in Verizon's service territory, and indeed, throughout Pennsylvania, is if the Commission finds that the myriad of facts presented by the PCC witnesses do not equal

⁵¹ PCC-1 (Direct-Revised) at 29-30.

operational impairment in the particular markets where the operational impairment occurs.

Clearly, given the extensive evidentiary record on this issue, this is an unsupportable result.

With this said, here are the unrebutted facts pertaining to Verizon's loop provisioning as pertains to processes and conditions found within the Commonwealth of Pennsylvania:

- 1) There is no process of any kind available in Pennsylvania to migrate a DS1 customer to a CLEC switch in instances where no pre-existing spare loop facilities are installed between the central office and the customer premises -- a situation which occurs frequently in Pennsylvania, and completely shuts out CLECs from serving these DS1 customers on a switch-based basis for local exchange services.⁵²
- 2) Directly contrary to the FCC's second national finding addressed above, all existing switched DS1 or above loops in Pennsylvania are pre-wired to the ILEC switch or switch distribution frame.⁵³
- 3) The parallel migration process relied on by the FCC to avoid manual hot cuts under which the CLEC's new service is activated before the ILEC's old service is disconnected is only available if the customer has enough excess capacity in the customer premises equipment to deploy the ILEC loop and the CLEC loop at the same time.⁵⁴
- 4) While the majority of DS1 customers in cities like New York, Chicago and Los Angeles may have the necessary capacity to handle the FCC's parallel migration process, there is likely no customer in Pennsylvania with the necessary excess capacity for a parallel migration.⁵⁵
- 5) Every DS1 migration in Pennsylvania involves a manual "hot cut" process under which the CLEC's new service or loop is not activated until after the ILEC's old service or loop is disconnected, resulting in a service interruption.⁵⁶

⁵² PCC-1 (Direct-Revised) at 30; PCC-1.1 (Rebuttal) at 13-14.

⁵³ PCC-1 (Direct-Revised) at 29.

⁵⁴ PCC-1 (Direct-Revised) at 29-30.

⁵⁵ PCC-1 (Direct-Revised) at 31-32; PCC-1.1 (Rebuttal) at 12-13.

⁵⁶ PCC-1 (Direct-Revised) at 30-32; PCC-1.1 (Rebuttal) at 11-15; Verizon St. 1.0 at 7.

- 6) Because Verizon has not developed a process of any kind in Pennsylvania to migrate a DS1 loop from its switch to a CLEC switch at the central office (like the processes used to migrate mass market customers), it has shifted the hot cut process to the customer premises.⁵⁷
- 7) Verizon's manual hot cut process for DS1 loops at the customer premises creates aggravated and more egregious problems than the hot cut process utilized for mass market customers at the central office because of the complexity of the process and the varying physical and environmental conditions in each customer premises (as compared to the relatively consistent conditions at the central office).⁵⁸
- 8) Verizon's manual hot cut process for DS1 loops at the customer premises involves a physical and logical facility replacement which must occur in a tightly coordinated process between Verizon, the CLEC, the interconnect company and the Number Plan Administration Center which must be perfect and, even then, the customer will be out of service for some period which may be for significant lengths of time. If the coordination is not perfect, the period of time the customer is out of service may easily span hours.⁵⁹
- 9) The steps in the DS1 hot cut process are as follows:
 - a. Verify and define individual case processes and required additional capacity with customer and customer's phone system vendor
 - b. Notify LEC of migration and obtain CSR
 - c. Order facilities through VZ (if available)
 - d. Arrange hot cut migration time with LEC, customer and phone system vendor
 - e. Design and arrange PBX routing and translations reconfiguration with phone system vendor
 - f. VZ provisions new facilities

⁵⁷ PCC-1 (Direct-Revised) at 30; PCC-1.1 (Rebuttal) at 13-14; Verizon St. 1.0 at 6-7.

⁵⁸ PCC-1 (Direct-Revised) at 32; PCC-1.1 (Rebuttal) at 13-14.

⁵⁹ PCC-1 (Direct-Revised) at 32; PCC-1.1 (Rebuttal)

- g. Phone system vendor installs/verifies in-house wiring for new facility
 - h. Level 1 and Level 2 testing of new facility with Verizon and phone system vendor
 - i. Provision LNP Trigger in both losing and gaining LEC Class 5 switches at least 24 hours in advance
 - j. Activate the numbers in the NPAC at the assigned time and test each.⁶⁰
- 10) Of these steps, the testing for proper link-level operation (step 8), the testing for proper routing and translation operation (step 5) and porting of the telephone numbers (step 10), can only be completed in Pennsylvania (where there is no parallel migration process) during the period when the customer is OUT OF SERVICE.⁶¹
- 11) In addition to the complexity of the DS1 manual hot cut process and the unavoidable service outage that results, the hot cut process utilized by Verizon in Pennsylvania is frequently affected by multiple human errors which cause service degradation. As a result of these problems, CLECs frequently miss service commitments to customers by a magnitude of days.⁶²
- 12) The service delays, service interruptions and service degradation that CLECs experience in the DS1 hot cut process in Pennsylvania are substantially the same or worse than for Verizon's manual hot cut process for mass market customers.⁶³
- 13) The service delays, service interruptions and service degradation experienced by CLECs in Verizon's DS1 hot cut process are always blamed on the CLEC as the new carrier and each of the PCC witnesses has lost customers as a result of this process.⁶⁴ In fact, it is likely that Verizon has never completed a DS1 migration that has not resulted in a costly requirement of redundant customer premise equipment or in an outage of significant length which

⁶⁰ PCC-1 (Direct-Revised) at 32-33.

⁶¹ PCC-1.1 (Rebuttal) at 15.

⁶² PCC-1 (Direct-Revised) at 33.

⁶³ PCC-1 (Direct-Revised) at 32-33; PCC-1.1 (Rebuttal) at 13-14.

⁶⁴ PCC-1 (Direct-Revised) at 34; PCC-1.1 (Rebuttal) at 13.

negatively impacts the relationship of the CLEC with its new customer.

- 14) Because of operational deficiencies in Verizon's DS1 hot cut process, CLECs incur very substantial costs in attempting to avoid lengthy service disruptions and service degradation. These costs are significant enough to affect the decision as to whether the CLEC can economically serve the customer.⁶⁵

These 14 unrebutted facts pertaining to Verizon loop provisioning in Pennsylvania provide the foundation for PCC's claim of operational impairment. In each case, the facts materially rebut the FCC's findings and observations pertaining to ILEC loop provisioning on a national basis.

First, there is clearly operational impairment for all of the DS1 customers where there are no spare loop facilities, and, because Verizon does not have a migration process at the central office for the existing loop, the CLEC is completely shut out from providing local service on a switch-based basis. As the PCC panel testified (and was unrebutted), this is an "intolerable result which occurs frequently in Pennsylvania,"⁶⁶ and certainly results in absolute operational impairment, since, without a DS1 Platform, the DS1 Customer is monopolized in that the customer is precluded from subscribing to any competitive local service.

As to the customers where there is a space facility available, all FCC findings and presumptions pertaining to loop provisioning have been effectively rebutted. A comparison of the FCC's findings and presumptions pertaining to loop provisioning as compared to the Pennsylvania specific granular analysis follows:

FCC Finding -- "The facilities used to provide DS1 capacity or above services to enterprise customers typically are not pre-wired to incumbent LEC switches, allowing competing carriers to avoid

⁶⁵ PCC-1 (Direct-Revised) at 34.

⁶⁶ PCC-1 (Direct-Revised) at 30.

the costs and service disruptions associated with 'hot cuts' -- the manual process by which customer lines are migrated to competition switches." *TRO* at ¶ 421 (emphasis added).

Pennsylvania Record -- All DS1 (or higher capacity) loops are pre-wired to Verizon's switch or switch distribution frame. A DS1 migration can not occur without a manual hot cut which causes CLECs to incur costs and experience service disruptions which are as bad, if not worse, than mass market migrations.

FCC Finding -- "Specifically, the conversion process for enterprise customers generally involves the initiation of service to the competitor's new digital loop while the incumbent's service remains in place." *TRO* at ¶ 451 (emphasis added).

Pennsylvania Record -- The un rebutted evidence reflects and Verizon's witness acknowledges that in the Verizon DS1 migration process, the initiation of service to the competitor's new digital loop is never activated while the incumbent's service remains in place, and, as a result, there is always an unavoidable service interruption.

FCC Finding -- "Thus, enterprise customers avoid potentially lengthy disruptions of service due to physical hot cuts, occasionally experiencing an outage of only 10 to 30 seconds for incoming calls as their numbers are updated in the industry databases used to route calls." *TRO* at ¶ 451 (emphasis added).

Pennsylvania Record -- The un rebutted evidence indicates that in Pennsylvania, Verizon's DS1 migration process involves physical hot cuts of the loop which normally cause service interruptions which are significant, exceed 30 seconds, can easily span hours and can cause customer commitments to be missed by days. Furthermore, in addition to the updating of numbers, testing of the new loop must occur during the period when the customer is out of service.

FCC Finding -- "As a result, competitive carriers neither incur the costs of hot cuts nor experience the quality degradation associated with the cut over process to serve customers with loops with DS1 capacity and above." *TRO* at ¶ 451 (emphasis added),

Pennsylvania Record -- The un rebutted evidence in Pennsylvania indicates that not only do competitive carriers incur the costs of hot cuts, but that Verizon's decision to force the hot cut process from the central office to the customer premise shifts the cost burden from the ILEC to the CLEC who is forced to incur costs so

significant that it can effect the economics of serving the customer. Furthermore, the record reflects that the potential for service degradation is as great as in the mass market migration process.

FCC Finding -- "Accordingly, competitive CLECs generally face the same opportunities and challenges as incumbents on converting such facilities to their switches." *TRO* at ¶ 451.

Pennsylvania Record -- Because the FCC's underlying presumptions are not applicable in Pennsylvania, neither can this resulting finding. In fact, Verizon's approximate 112,000 DS1 (or above) customers are already connected to Verizon's switch.⁶⁷

Overall, it is abundantly clear that the entire factual basis for the FCC's finding that operational impairment is not present has been rebutted by the Pennsylvania record. Furthermore, it is equally clear that Verizon's DS1 migration process and its manual hot cut process for loop deployment imposes the same level of operational impairment, or worse, as the FCC found for mass market customers. This operational impairment exists throughout Verizon's service territory and alone justifies a Commission waiver request to the FCC for each particular market in its service territory.

Verizon will undoubtedly argue that the Commission should disregard this evidence, because it believes its migration processes is the same as that used in other states. While this Verizon assertion is far from clear, in that the FCC's parallel delivery process may well be available for most customers in cities like New York, Los Angeles and Chicago, it is also not pertinent to the Commission's granular analysis in this proceeding. The FCC did not ask or require the states to do a comparative analysis between states. The FCC requested the states to conduct a granular analysis of local circumstances to determine if its findings regarding the national record were present or could be rebutted in that state. That is exactly what the PCC

⁶⁷ PCC-1.1 (Rebuttal) at 10.

testimony addresses, and the outright rebuttal of the FCC's findings on the critical issue of loop provisioning and the resulting operational impairment should end the inquiry.

Furthermore, Verizon will likely argue that the PCC evidence of operational impairment should be ignored because the PCC did not identify specific instances in which the operational problems encountered actually occurred. This likely defense by Verizon is rather curious since it is Verizon that is the first to complain when a CLEC presents specific instances of problems because Verizon views them as "anecdotal."

The fact of the matter is that nowhere in the record has Verizon denied that any of these operational problems occur or that they do not occur in the frequency or magnitude that is supported in the testimony. If it had, the PCC could and would have responded as necessary, with specific examples or other pertinent evidence.⁶⁸ Accordingly, any attempt by Verizon to criticize the PCC's case on the basis that it did not include the "anecdotal" type evidence it routinely objects to does nothing more than demonstrate the inadequacies of its own case in this matter.

Verizon will also undoubtedly argue that the PCC's testimony pertaining to loop provisioning should be given little weight because of certain statements that ATX made to the FCC, some of which are cited to in the *TRO*, in an attempt to assure that the FCC did not eliminate local circuit switching to serve the mass market. Placed in their proper context, those

⁶⁸ As the Commission is well aware, under longstanding evidentiary principles originating in the "Waldron Rule," once it is determined that a party has made a *prime facie* case, the burden of going forward shifts to the other party, while the burden of proof remains with the originating party. Only if the responding party presents evidence of co-equal or greater weight can the Commission reach a decision in favor of the responding party. See *Milkie v. Pennsylvania Public Utility Commission*, 768 A.2d 1217, 1220 (Pa. Cmwlth 2001). Here, once the burden of going forward switched to Verizon and Verizon did not even attempt to rebut the facts raised in the PCC case, the outcome of this proceeding was sealed in favor of the PCC.

statements do nothing more than indicate that ATX abandoned early attempts to migrate mass market customers to switch-based service because UNE-P provided a wholesale option for which operational impairment was not present. As is clear from the record of this case, ATX had no such option in serving DS1 Customers, because a DS1 Platform was generally unavailable and was rejected by ATX as a viable alternative.⁶⁹

This does not mean, as Verizon will likely assert, that ATX is not operationally impaired in serving DS1 customers from its switches. No evidence demonstrates this more conclusively than the fact that almost eight years since the passage of the Telecommunications Act, CLECs have only managed market penetration in the Verizon DS1 market of less than 8% -- a paltry figure compared to statewide market penetration and even market penetration in the mass market. As is unrebutted in this record, ATX faces the DS1 manual hot cut process and the service delays, service interruptions and service degradation that results on a daily basis. While ATX has survived, these factors, as reflected in the record of the proceedings, constitute operational impairment in the extreme.

Finally, Verizon will undoubtedly argue that the PCC evidence should be disregarded because its performance metrics which are relevant to DS1 loop performance demonstrates that the company provides good service to CLECs. Verizon will also argue that the *TRO* requires the states to defer to the performance metrics over all other evidence.

First, Verizon's reading of the *TRO* on the performance metric issue is self serving and distorted. What the FCC said on this issue is, "We therefore ask state commissions to consider

⁶⁹ PCC-1 (Direct-Revised) at 10. Now that recently Verizon may have made a commercially reasonable DS1 Platform available, ATX has reinitiated product development and design activity pending a favorable outcome in this case.

evidence, which **could** include metrics and standards . . ." not that the states must consider such evidence or must rely exclusively on that evidence as Verizon will likely argue.⁷⁰

Second, the record in this proceeding for Pennsylvania is conclusive that reliance on or even consideration of Verizon performance metrics is not supportable. The fact of the matter is that three performance metrics, OR-1-06, PR-4-01 and PR-6-01,⁷¹ simply do not measure Verizon's performance in loop provisioning in the areas which cause the operational impairment in the loop provisioning process. As the record indicates, these three performance metrics scrutinize Verizon's performance in the areas of order confirmation timelines (similar to the automated process by which you can determine if an e-mail has been read), missed appointments (which are like airline "on-time" records) and installation quality (which is not a direct indication of migration problems because it is not measured until after the migration is complete and all problems are resolved).⁷² These metrics were designed to address the standardized process which are used, for example, to migrate mass market UNE-P customers and simply do not address the measurement of performance relative to the ad hoc process for DS1 loop migration described by both PCC and Verizon witnesses.⁷³

More specifically, the metrics do not make any attempt to measure the length of service interruption or the out of service time which results from the manual hot cut process.

Furthermore, the performance standards do not measure the service delays which frequently

⁷⁰ (Emphasis added.) The statement not only does not preclude the state from relying on evidence other than performance metrics but does not require a state to consider evidence of performance metrics at all.

⁷¹ Verizon St. No. 1.0 at 8-9.

⁷² PCC-1.1 (Rebuttal) at 14.

⁷³ PCC-1.1 (Rebuttal) at 14-15.

result during the processes leading up to the actual migration of lines. Accordingly, as the PCC panel explained, "Therefore, the CLEC ultimately loses a hard-won customer because of an ad hoc process engaged in by Verizon in Pennsylvania, with no risk of violating and suffering the subsequent consequences of its actions."⁷⁴ Based on the record of this proceeding, Verizon's performance metrics statistics do not measure activities which are the cause of CLEC operational impairment and can not be relied on by the Commission in reaching a decision in this matter. The Commission should seek a non-impairment waiver from the FCC based on the operational impairment which results from loop provisioning alone for each particular market in Verizon's service territory.

2. Difficulties in Obtaining Collocation Space Or Delays in Process by the ILEC.

The PCC has not introduced any evidence demonstrating difficulties in obtaining collocation space or delays in provisioning collocation by Verizon or any other ILEC.

3. Difficulties in Obtaining Cross Connects in the ILEC's Wirecenter.

The PCC has not introduced any evidence demonstrating difficulties in obtaining cross connects in Verizon's wirecenter or that of other ILECs.

4. Any other Operational Criteria That Make Entry Uneconomic for CLECs.

As discussed throughout the PCC's testimony, there is a critical operational criteria pertaining specifically to Pennsylvania which has severely impaired the ability of CLECs to compete for DS1 customers on a switch-based basis. That is the complete availability of a commercially viable DS1 Platform to serve the vast majority of DS1 customers until mid-September of 2003.

⁷⁴ PCC-1.1 (Rebuttal) at 15.

The Commission itself fully understands the operational and economic significance of the failure by Verizon to comply with the *Global Order* and its own wholesale tariff. As the Commission discussed in its landmark *Global Order*, the importance of a CLEC to obtain UNEs as a "platform" cannot be overemphasized in that, "the platform permits CLECs to compete with BA-PA, with at least some of the advantages that BA-PA possesses as the incumbent local exchange provider, on a more level playing field."⁷⁵ Based on these findings, the Commission required Verizon to tariff and offer UNE-P to CLECs to serve all customers with TBR of less than \$80,000 per year, including the vast majority of the DS1 (or higher) customers at issue in this proceeding.⁷⁶

Nevertheless, the record of this proceeding reveals that Verizon did not offer an operational DS1 Platform wholesale product which could be used by CLECs to serve the vast majority of DS1 (or higher) customers until approximately two months ago in mid-September of 2003 -- shortly before this proceeding began.⁷⁷ In fact up until then, the DS1 Platform offered by Verizon in Pennsylvania was only commercially usable or operational for the relatively small number of DS1 customers with PRI capability in the customer premise equipment. This is problematic since to install PRI capability in a DS1 customer premise equipment costs the customer tens of thousands of dollars.⁷⁸

In fact, Remi was the first Pennsylvania CLEC to receive an operational DS1 Platform which could serve a non-PRI DS1 customer after fighting with Verizon for almost a year and one

⁷⁵ *Global Order* at 87.

⁷⁶ *Global Order* at 90.

⁷⁷ PCC-1 (Direct-Revised) at 22.

⁷⁸ PCC-1 (Direct-Revised) at 20-21.

half.⁷⁹ Remi is currently leasing the DS1 Platform under a "First Office Application" or trial arrangement and it is questionable whether any other CLEC can use the product, which was legally required almost four years ago, until Remi's trial is completed.⁸⁰

While the commercial unavailability of the Platform is technically an operational issue, it has far reaching economic repercussions. As the record reflects, the investment in a switch must result in a product which attracts enough customers and generates enough revenues to justify the original expenditure over a reasonable investment cycle and deploying a switch when a CLEC has no customers, including DS1 Customers can not be justified in today's business environment. The availability of a DS1 Platform, like any other platform arrangement, enables CLECs to build a DS1 Customer base creating economies that will justify switch investment over time and limits the costs involved in extending switch coverage through either EELs or collocation.⁸¹

As in the mass market, the unrestricted availability of the DS1 Platform is a critical necessary first step for widespread switch deployment by CLECs, in particular outside of major metropolitan areas.⁸² This is exactly why both this Commission and the FCC required Verizon to offer a DS1 Platform to enable CLECs to serve DS1 Customers in the first place.

The record reflects that the general unavailability of the DS1 Platform in Pennsylvania has negatively impacted CLEC installation of new switches and expansion of existing switches

⁷⁹ PCC-1 (Direct-Revised) at 20-21.

⁸⁰ PCC-1 (Direct-Revised) at 21-22.

⁸¹ PCC-1 (Direct-Revised) at 19.

⁸² PCC-1 (Direct-Revised) at 20.

to serve DS1 customers.⁸³ This is one of the factors which has lead to the paltry CLEC market penetration of less than 8% in Verizon's DS1 Customer market.

Verizon will undoubtedly argue that it has submitted evidence based on data from the Local Exchange Routing Guide ("LERG") that there are many CLECs serving DS1 customers through local switches in Pennsylvania even though (or in their terms, whether or not) a DS1 Platform was generally unavailable. However, the record reflects that the data on ILEC switch deployment is neither credible nor reliable. As the PCC panel explained:

While we all utilize the LERG for one purpose or another, the LERG does not contain either accurate or up-to-date information pertaining to CLEC switch deployment. For example, the LERG *includes multiple entries for single switches, switches which are no longer in operation, switches owned by carriers that are no longer in business, switches that do not serve any customers and switches that do not serve any DS1s.*⁴ Furthermore, there is no indication in the LERG whether the CLEC switches identified are used for voice traffic at all (and certainly many are not) in which case the switch would have no relevance to this case addressing local circuit switching. Finally, many of the CLEC switches listed in the LERG are operated by ILEC-affiliated CLECs within the service territory of the ILEC and are essentially ILEC switches operated by an affiliate to serve a customer when, for whatever reason, the ILEC wants to avoid the ILEC's tariff.

⁴ For example, the LERG indicates that ATX is operating 500% more local switches than are actually in operation by the company. If Verizon had wanted to accurately identify the number of switches in service, it could have identified the number of switches with which it exchanges traffic for reciprocal compensation purposes (even this figure would not identify the switches which do not serve DS1s).

Because Verizon summary data from the LERG is not corroborated in any way, it is not credible and should not be relied on by the Commission. What should be relied on is the un rebutted evidence that while certainly there are local switches in active operation in Pennsylvania, including by PCC members (and some of which are actively serving DS1

⁸³ PCC-1 (Direct-Revised) at 23.

customers), these switches were generally installed years ago and are located in the two Urban Centers. Furthermore, there has been very little switch deployment over the past three years over, the period of the Triennial Review, due to deteriorating conditions in Pennsylvania.⁸⁴ Again, the record reflects that one of the major factors in the lack of switch deployment in Pennsylvania to serve DS1 customers is the general unavailability of the DS1 Platform.

Verizon is wrong if it argues that the availability of legally required DS1 Platform is not relevant to whether switch-based service to DS1 customers is impaired. As the FCC recognized, "On the other hand, if the marketplace evidence shows that new entrants have not widely deployed a particular kind of facility, we will consider the facts as some evidence that barriers to entry in that market for that element are preventing the deployment."⁸⁵ Here the record reflects that while this Commission's unbundling policy was sound, Verizon's refusal or inability to comply with the policy clearly has discouraged the build-out of facilities and is an important consideration in the granular impairment analyses in Pennsylvania.

5. Discussion on Whether Operational Criteria Factors Identified in 1-4 Are Significant Enough to Constitute Impairment and How Unbundling Will Overcome the Alleged Impairment

The FCC has defined impairment as follows:

We find a requesting carrier to be impaired when lack of access to an incumbent LEC network element poses a barrier to entry, including operational and economic barriers that make entry into a market uneconomic.

TRO at 84.

However, it is not true, as Verizon will undoubtedly argue, that the fact that there are CLECs, including PCC members, serving DS1 customers through self-provisioned switching

⁸⁴ PCC-1 (Direct-Revised) at 17, 23-24; PCC-1.1 (Rebuttal) at 6.

⁸⁵ *TRO* at 96.

means there is no impairment or even a presumption of no impairment. Instead, the evidence of such deployment must be considered in the context of how extensively CLECs have been able to deploy alternatives, the extent of the market they serve and how stable the market is.⁸⁶

Furthermore, while the FCC has rejected an approach under which the level of retail competition would be dispositive of whether impairment exists, the level of retail competition is highly relevant to an impairment analysis.⁸⁷ As indicated above and below, the level of retail competition in Verizon's DS1 market is extremely low for a variety of reason directly relating to impairment. Therefore, any attempts by Verizon to argue that the level of retail competition should be completely discarded must be rejected.

With this said, the Pennsylvania record is clear and convincing that the operational criteria above causes operational impairment. Specifically, in the FCC's analysis of the DS1 market, it found operational impairment is not present, as it is in the mass market, because there is no manual hot cut process and no resulting service delays, interruptions and degradations. The record of this case rebuts the FCC's presumptions for Pennsylvania without exception. In fact, the evidence is conclusive that the operational problems encountered by CLECs in the switch-based DS1 market are equal to or greater than the operational problems encountered by CLECs in the switch-based mass market. Accordingly, the only rational conclusion is that these operational problems which cause service delays, interruptions and degradation and, which cause CLECs to incur significant costs, and, all too often result in lost customers, rises to the level of operational impairment in each of Verizon's markets.

⁸⁶ *TRO* at 94.

⁸⁷ *TRO* at ¶ 114

It is equally clear from the record, that requiring Verizon to offer and provision a DS1 Platform to serve all DS1 customers in its service territory will allow CLECs to overcome this impairment. From an operational perspective, as compared to an economic perspective, this is because the migration process to serve a DS1 customer through a DS1 Platform does not involve a hot cut of any kind and the associated service delays, interruptions and degradation do not occur. Accordingly, the entire foundation for operational impairment in the switch-based DS1 market has no applicability if the DS1 Platform were offered by Verizon beyond its trial stage with Remi to all CLECs to serve all DS1 customers. Accordingly, since it is the hot cut process that causes the operational impairment to switch-based CLECs in competing for DS1 Customers, it is the lack of a hot cut process which eliminates that operational impairment for CLECs serving DS1 Customers through a DS1 Platform.

B. Economic Criteria

As explained above, the FCC based its national non-impairment rule for DS1 Switching on three factual findings, two of which are relevant to the economic criteria discussed in this section. In paragraphs 457 and 458 of the *TRO*, the FCC discussed the manner in which states could rebut the non-impairment standard and underlying factual findings pertaining to economic criteria. The specific economic criteria discussed below are consistent with the Commission's November 6, 2003 Secretarial Letter governing briefs in this proceeding.

6. The "Particular Markets" in Which Entry Is Uneconomic in the Absence of Unbundling Local Circuit Switching.

The record of this proceeding supports a Commission determination that economic impairment is present in each of Pennsylvania's markets in the absence of unbundled DS1 local

circuit switching, but becomes overwhelming as one moves outside of the two Urban Centers.⁸⁸

While the applicable markets under the *TRO* will not be determined by the Commission until the conclusion of the nine month proceeding, consistent with the record, "particular markets" for this proceeding should be the previously defined "Urban Centers," the market consisting of the 12 wire centers within the top 50 MSAs⁸⁹ as one market and the rest of Verizon's service territory as the remaining market.

As reflected in the record, the switches serving customers in Pennsylvania, including DS1 Customers, are clustered in Pennsylvania's two Urban Centers.⁹⁰ Indeed, the economics of serving DS1 Customers on a switch-based basis varies dramatically between Philadelphia and Pittsburgh and the rest of the state.⁹¹ Furthermore, the less dense the exchange is the less dense the DS1 customer base will be making the economics even more difficult.⁹² For example, it is generally economically unviable for ATX, which is likely one of the most active switched-based DS1 providers in Pennsylvania, to extend its switch coverage outside of the Philadelphia metropolitan area.⁹³

⁸⁸ As indicated previously, the evidence in this case focuses on economic impairment in Verizon's markets, however, because of the continuing application of rural suspension/exemption, impairment should be found in non-Verizon markets as a matter of law.

⁸⁹ See Verizon Pa. P.U.C. - No. 216, Section 3, 1st Revised Sheet 5E and 5F.

⁹⁰ PCC-1 (Direct-Revised) at 23-24; PCC-1.1 (Rebuttal) at 6.

⁹¹ PCC-1 (Direct-Revised) at 35.

⁹² PCC-1 (Direct-Revised) at 35-36. The record could also support a market delineation based on Verizon's chemistry cells.

⁹³ PCC-1 (Direct-Revised) at 27-28.

Accordingly, based on the record of this proceeding, it is appropriate to define the markets as the already defined Philadelphia and Pittsburgh Urban Centers comprising one market and the rest of the Commonwealth as another market. As indicated above, the evidence supports a finding of economic impairment in both markets, but the impairment becomes overwhelming as one moves outside of the two defined Urban Centers market into the more rural areas of the Commonwealth.

7. CLEC's Potential Revenues From Serving Enterprise Customers in Each Particular Market Identified in Six Above Against the Cost of Entry into that Market (Not Necessarily any Carriers Individual Business Plan. (All Revenues Include Revenues Derived From Local Exchange and Data Services).

The business case submitted by PCC was prepared and sponsored by FSN and reflects the potential revenues and costs associated with providing service to DS1 Customers in competition with Verizon in Pennsylvania.⁹⁴ While the revenues in the business case are based on FSN's rates, the costs are generally common to all CLECs since they are based on Verizon's tariffed rates. The study, included as PCC Exhibit 1, reveals that FSN receives, on average, \$440 per month in potential revenues from a DS1 customer's voice services (excluding usage revenues and costs). As to wholesale costs, the study compares the wholesale costs on a per customer basis of serving a DS1 Customer from a CLEC switch through either a collocation or an EEL arrangement.⁹⁵

The study demonstrates that for a CLEC to recover just its wholesale costs to Verizon of extending its switch to serve DS1 Customers, it would have to serve 50 DS1 Customers in each

⁹⁴ PCC-1 (Direct-Revised) at 37.

⁹⁵ Collocation costs are marked on the PCC exhibit as collo costs. EEL costs are marked on the exhibit as "FSN POP Cost" or "FSN" costs since use of EELs would provide service directly to the customers from CLEC switch rather than from an intermediary collocation site.

wire center where it has customers.⁹⁶ The study further demonstrates that even if it sold its DS1 local service at Verizon's prevailing local rates, a rate which would not allow the CLEC to attract any customers, the CLEC would require 38 DS1 customers to recover its wholesale costs.⁹⁷

While the potential revenues in the study do not include potential revenues other than local service revenues, the record reflects that the study does not include the wholesale costs associated with any additional services, retail costs and other CLEC specific costs incurred by a CLEC in providing switch-based service, for example, recovery of original cost of the switch.⁹⁸ Furthermore, the record indicates that even if revenues are added in for other services, including data services, it will not help the economics, because the additional revenues will do no more than offset the additional CLEC specific costs.⁹⁹

⁹⁶ The first page of the study contains two presumptions which are reflected within the exhibit. The first is that the customers are located in wire centers approximately 37 miles from the CLEC switch and the second presumption is that the customers are located in Density Cell 4 -- although the exhibit includes the DC1 loop costs for all four density cells. Of course, because EELs and collocation are distance sensitive to backhaul traffic to the CLEC's switch, if the wire center where the DS1 Customers are located is more than 37 miles from the CLEC switch, the economics will be even worse -- and vice versa.

⁹⁷ PCC-Exhibit 1; OTS Exhibit 1. The Exhibit also indicates that the CLEC would have to serve 100 DS1 customers to reduce its wholesale costs on a per customer basis to that of a DS1 Platform in Density Cell 4.

⁹⁸ The study focused on the tariffed DS1 local revenues a specific CLEC, FSN, and the generic wholesale costs incurred by CLECs in expanding switch coverage either through collocation or EELs, since the other elements of a comprehensive cost/revenue analysis would vary greatly for CLECs and individual CLEC DS1 Customers. Under any reasonableness standard, the study and related record evidence fulfills applicable requirements to conduct a study which generally addresses the costs and revenues associated with serving DS1 Customers. Requiring a study which reflects the CLEC-specific potential revenues and costs of all CLECs would not only improperly invade the business plans of CLECs, but would take far longer to complete the duration of this 90 day proceeding in its entirety.

⁹⁹ PCC-1.1 (Rebuttal) at 7.

The study portrays an ugly economic picture and exemplifies why CLECs are and will be economically impaired, particularly outside of the Urban Center market, without a DS1 Platform. While it may be economically viable to raise the investment necessary to install a switch in areas dense with DS1 customers as may be the case in the Urban Center markets, the economics are marginal even in the Urban Centers and break down completely outside the Urban Centers where DS1 customers are not clustered together.

As Mr. Dulin explained the problem:

With that said, even with our switches, we are very restricted in our ability to serve this customer base by pure geography. Because of economies of scope and scale, at the time ATX was installing and purchasing its switches some time ago, ATX could only justify switch investment in the metropolitan Philadelphia area. As a result, without additional arrangements, ATX's switches are only capable of serving DS1 customers in the coverage area which covers the most urban area of the Commonwealth.

It is easy to say that if ATX wants to serve other DS1 customers it should merely go out and install more switches around the state. This simplistic view overlooks the fact that switches are a multi-million dollar investment. Furthermore, the economies simply can not support this notion and neither our lenders nor our investors would allow such a misguided business plan.

In the Philadelphia LATA (228) alone, for example, this presumption ultimately leads to the absurd outcome of CLECs installing more than 150 switches to optimally serve the Verizon territory in the same LATA. Verizon relied on its monopoly customer base, acquired prior to the Telecommunications Act of 1996, in order to deploy its more than 150 switches. To presume that a CLEC, bearing a proportionately trivial percent of the market share, can and should install enough switches to optimally serve this market rejects business reality in favor of regulatory imagination.

A company like ATX will only deploy a switch where it is profitable to do so. Its fiduciary duty to its shareholders mandates this. The removal of viable wholesale access will not yield the result of forced-deployment, but rather fundamental market exclusion. ATX will be excluded from offering service in markets incapable of economically justifying the deployment of multiple

switches, and customers in those markets will be denied competitive alternatives. Given the disparate population distribution of Pennsylvania, most geographic markets will be excluded on this basis.

Even as to operation of our own switches, to serve DS1 customers we must engage in a daily struggle to overcome the operational deficiencies and market power of a huge competitor, who unfortunately we are completely dependent on as a wholesale provider. The availability of a commercially usable DS1 Platform would significantly enhance our ability to expand our DS1 customer base, not only in the vast majority of Pennsylvania that we cannot reach with our switches, but also within our switch coverage area. From a businessman's perspective, to suggest that we have not been economically impaired without a useable DS1 Platform and that we will not continue to be economically impaired without the DS1 Platform is absurd.

PCC-1 (Direct-Revised) at 26-27.

In its October 30, 2003 Letter submitted at this docket, Verizon raised several legal challenges to the PCC study. Each of its challenges lack merit and attempt to impose unrealistic requirements on the Petitioners in this case.

First, as to inclusion of revenues other than local services which, of course, would vary greatly between carriers and customers, it is agreed that those revenues are not specifically included in the study, however, record evidence provides assurance that inclusion of those revenues and inclusion of other CLEC specific costs would not improve the economics of the analysis.¹⁰⁰ Furthermore, requiring such a study based on potential revenues which vary greatly between customers and CLECs would take far too long to compile to be prepared for this proceeding and the imposition of such a requirement in this proceeding would not be consistent with a meaningful opportunity to be heard under Pennsylvania law.

¹⁰⁰ PCC-1 (Direct-Revised) at 7.

Second, despite Verizon's contentions, the study does include the price that, as a typical CLEC, FSN, is able to charge for local service in competing with Verizon's prevailing local rate for DS1 customers. Again, to require some sort of blended average revenue based on some sort of a survey of CLECs would not be possible given the time constraints of this proceeding and would deny a meaningful opportunity to be heard.

Third, the study is not based on FSN's specific business plan, as Verizon will likely claim, but instead is generally based on Verizon's tariffed wholesale rates paid by all CLECs in serving DS1 customers. Taken together, the study is far from a comprehensive analytical study that could possibly be compiled at great cost over a period of many months. But it is a credible study which makes a simple yet valid point -- CLECs are and will be economically impaired without access to a DS1 Platform -- a point which explains why CLECs have managed only a paltry less than 8% penetration into Verizon's DS1 market.

8. Price Entrants Are Likely to be Able to Charge After Considering the Prevailing Retail Rates the ILEC Charges to Different Classes of Customers in Different Parts of Pennsylvania.

The PCC study only addresses what an entrant is likely to be able to charge for local service in consideration of Verizon's prevailing retail rates for an average DS1 customer. It does not address different classes of customers, like, for example, a DS3 customer. Certainly, for a DS3 customer, wholesale rates would be much higher than reflected in PCC Exhibit 1, as would Verizon's potential prevailing rates and an entrants likely rates.

As reflected in PCC Exhibit 1, FSN, as an average entrant, charges DS1 customers a rate of \$440 per month for local service regardless of whether a DS1 Customer is served by its switch

or a DS1 Platform arrangement (for a PRI customer).¹⁰¹ It also charges the same rate regardless of which density cell the DS1 Customer is located in even though the loop rates for DS1 Customers vary between density cells.¹⁰² This makes business sense and, if sustainable from an economic perspective, provides potential for attracting customers, since, based on knowledge and belief, and as is reflected in the Exhibit, it appears that Verizon's prevailing local rate for a DS1 customer is approximately \$533.83 -- a rate which does not vary greatly between areas of its service territory.¹⁰³

While entrants faced with a similar situation are likely to adopt very different responsive pricing strategies -- one thing is clear -- given the risks and problems inherent in the DS1 migration process, an entrant must provide a deep discount to a potential DS1 customer to have any hopes of attracting or maintaining the customer. Such a scenario does not represent unimpaired competition and without unimpaired options, like the DS1 Platform, the ability of CLECs to serve enterprise customers will be threatened.

¹⁰¹ As reflected in the highly confidential version of PCC's Petition to Initiate Proceedings, because of the general unavailability for the DS1 Platform, FSN serves a small number of DS1 customers through a PRI-configured DS1 Platform.

¹⁰² The cost of a DS1 Platform unbundled local switching PRI port (minus the variable usage rate) remains consistent at \$128.53/month per port, however, as reflected in the exhibit, the monthly loop rates for DS1 customers are as follows:

DC1	\$117.90
DC2	\$120.62
DC3	\$146.42
DC4	\$191.17

Because there is an approximate \$75 per month spread between DC1 loop rates and DC4 loop rates, a CLEC could price its DS1 local services differently for the different density cells.

¹⁰³ Obviously, this is not based on a special study, but only upon Verizon's retail tariff and general observations upon conducting business in Pennsylvania.

9. CLECs Costs of Entry Into Each Particular Market Identified in the Number 6 Above, Including Costs Imposed by Both Operational and Economic Barriers to Entry.

The evidence pertaining to this issue has been addressed and briefed in Sections 6 through 8, which are incorporated herein by reference. Pertaining to economic barriers, in addition to this evidence, Verizon's own anti-competitive actions in Pennsylvania have hindered the usefulness of the limited CLEC switches which are in service to serve DS1 Customers. This is because Verizon has refused to comply with this Commission's requirements and the requirements of its own tariff to provide EELs with concentration.¹⁰⁴ EELs are critical to CLEC network expansion for the simple reason that they permit the CLECs to spread the recovery of its switch investment over a greater number of customers, central offices and remote terminals without incurring collocations costs which would otherwise be necessary -- collocations costs which are themselves prohibitive without the availability of a DS1 Platform to build up a customer base in a certain area. EELs have the potential to substantially reduce the CLECs average switching cost per customer and allows efficiencies that Verizon already enjoys as the owner of a network that was built and engineered (with guaranteed ratepayer funding) to accommodate 100% of the network. However, EELs are of very limited use without concentration, since otherwise the CLEC will incur exorbitant transport costs on a per customer basis in backhauling traffic to the CLEC's switch.¹⁰⁵

¹⁰⁴ *Global Order* at 91-92. An EEL is the combination of an unbundled loop, the potential for multiplexing and unbundled interoffice transport. Concentration is the function of increasing the ratio between loops and transport, thereby reducing both transport costs and wasted transport capacity by 75% to 90%. PCC-1 (Direct-Revised) at 24.

¹⁰⁵ PCC-1 (Direct-Revised) at 24.

Like the DS1 Platform, DS1 EELs with concentration were specifically ordered by the Commission to be offered by Verizon¹⁰⁶ and are included in Verizon's wholesale tariff. However, they simply were never provided. In fact, recently, Administrative Law Judge Gesoff expressly recognized that this four year old requirement remained unfulfilled by Verizon.¹⁰⁷

Instead, when a CLEC attempts to order a DS1 EEL with concentration, the CLEC will be informed that it is the CLEC which must provide the concentration.¹⁰⁸ This requirement by Verizon, in violation of Commission and tariff requirements, significantly limits the usefulness of EELs to extend out the CLECs network.¹⁰⁹

Even aside from the lack of concentration, the pricing of EELs needed to expand switch coverage without incurring collocation costs is exorbitant. In order to provision an EEL to extend a CLEC's switch coverage outward into other exchanges, the CLEC must pay a substantial entrance facility charge which, particularly in combination with concentration costs, makes use of EELs prohibitively expensive for areas where an EEL is the only efficient means to serve DS1 Customers from the CLEC's switch.¹¹⁰

¹⁰⁶ *Global Order* at 91-92.

¹⁰⁷ *Verizon Pennsylvania, Inc.; Petition and Plan for Alternative Regulation Under Chapter 30; 2000 Biennial Update to Network Modernization Plan*; R-00930715F002. (March 24, 2003. Rec. Dec.) at 83 ("Verizon is required to provide concentrated EELs in Pennsylvania and includes such an offering in Verizon Pa. P.U.C. - No. 216, Section 3.")

¹⁰⁸ This is despite the fact that the Commission, in the *Global Order* could not have been clearer as to who had to provide the concentration. "BA-PA will provide all necessary multiplying as well as any necessary concentration to provide these combinations as part of the interoffice transport function." *Global Order* at 92.

¹⁰⁹ PCC-1 (Direct-Revised) at 24-25.

¹¹⁰ PCC-1 (Direct-Revised) at 25.

As to the second subject of this section, the costs associated with operational impairment, as indicated in the record and as addressed previously, because Verizon has chosen not to develop a migration process at the central office for DS1 (or higher) Customer migrations, significant costs are foisted on the CLEC. However, these costs, while significant, do not even start to measure the harm to CLECs which can not be measured by costs -- in the form of loss of goodwill in the relationship with the customer and ultimately the loss of the customer back to incumbent.¹¹¹ As the PCC panel explains:

No matter who is at fault in the hot cut process, it is the new carrier, the CLEC, which the customer blames for any resulting problems. While in some circumstances sophisticated enterprise customers may be more tolerant of minor service interruptions than residential customers, each of our companies has lost customers we could have acquired as a result of the hot cut process.

PCC-1 (Direct-Revised) at 34.

And again, in the panel's rebuttal testimony:

Under the **normal** steps of that process, the affected customer is OUT OF SERVICE from the time the old service is disconnected from the customer premise equipment; the new service is connected; the new service is tested for proper link-level operation; the new service is tested for proper routing and translations operation and the numbers are ultimately ported. Furthermore, as explained in our testimony, if the porting process is not perfectly executed the customer is OUT OF SERVICE for periods which may easily span hours in the event that a technician is required to be dispatched in order to reconnect the customer premise equipment to the old facility. In our experience, if events escalate to this point, the customer will hardly ever risk the process again (and will subsequently decide to remain with the incumbent). Therefore, the CLEC ultimately loses a hard-won customer because of an ad hoc process engaged in by Verizon in Pennsylvania, with no risk of violating a performance metric and suffering the subsequent consequences of its actions.

¹¹¹ It also certainly can not measure the harm pertaining to a DS1 Customer which cannot be served by a CLEC because a spare loop facility is not available to accommodate Verizon's DS1 migration process in Pennsylvania.

Verizon may argue that a finding of impairment can not be reached unless both operational and economic impairment are present -- or unless the operational impairment can be measured in dollars and cents and incorporated into an income statement-like analysis. Such an interpretation is illogical, irrational and unsupportable under the *TRO*. As the FCC expressly concluded in addressing operational issues alone, "We believe based on the large record in this proceeding, that these [operational] factors can raise barriers to entry."¹¹² Furthermore, in its regulations at 47 CFR § 51.319(d)(3)(i), it expressly provides that state commissions can petition the commission "if it finds that operational or economic barriers to entry exist." (Emphasis added.) Certainly if a CLEC can not serve a customer or if the CLEC runs the risk of losing customers through operational problems caused by its largest competitor, operational impairment exists and should be recognized by this Commission. The fact that CLECs may be able to survive, at least for the moment, in the face of such impairment does not excuse the impairment, as provided for in this record, and the *TRO*.

10. Any Other Economic Criteria That Makes Entry Uneconomic for CLECs.

The record reflects that an additional economic criterion requires consideration pertaining to future deployment issues. In evaluating the impairment issue, the Commission should not overlook the importance of the availability of DS1 unbundled local circuit switching as a critical facilitator in the transition to next generation switching technology, commonly referred to as "soft switching," as well as in deployment of VoIP and other voice-over-packet transport technologies that will use and, in fact, drive the development of a robust broadband infrastructure throughout the Commonwealth. Properly understood, maintenance of the unbundled DS1 local circuit switching will substantially accelerate the transition to facilities-

¹¹² *TRO* at ¶ 456.

based competition, not deter it as Verizon frequently argues to regulators. Equally as important, the resulting accelerated demand for a more robust broadband infrastructure in order to support VoIP transport could help fuel its very deployment in areas of the Commonwealth where demand for data services alone may be insufficient to justify build-out.

As a result of the immature status of these technologies and in the absence of DS1 Platform, CLECs will be faced with an unsolvable dilemma -- a dilemma which Verizon is determined to make a reality: In order to participate in a market, CLECs will be required to either commit to spending hard-won capital resources on inferior legacy equipment, like Class 5 switches, in an attempt to replicate the ILEC's network or forego or competitive entry or freeze its business plans until such time as NGN technology has sufficiently matured to support the full features and functions necessary for commercial roll-out.¹¹³

The investment decision is not one made by the CLEC's management team alone. It is also made by capital markets who, themselves, will evaluate the prudence of such a decision and make funding commitments accordingly. In the wake of the poor financial performance of switch-based CLECs who have attempted to replicate the networks of the ILEC and have experienced countless economic and operational impairments in doing so, the chance of securing funding for additional legacy switch deployment is virtually nil -- explaining why, as the record reflects, new switch deployment in Pennsylvania over the past three years has been virtually non-existent.¹¹⁴

DS1 Platform provides access to the unbundled network elements that allow CLECs to expand competitive options to customers, enabling CLECs to offer the broadest spectrum of

¹¹³ PCC-1 (Direct-Revised) at 37-38.

¹¹⁴ PCC-1 (Direct-Revised) at 37-38.

services to the most customers – much the way the Verizon was allowed to build its network. Further, the DS1 Platform will facilitate CLEC future deployment of NGN technologies by providing an interface with which logical migration of customer facilities can occur avoiding the significant impairment issues involved with analog hot cuts for customers using both analog and digital facilities. To the extent the DS1 Platform is no longer available at the time NGN technologies are sufficiently mature to support the full features and functions necessary for CLECs to provide the service, consumers and the industry will have lost a vital and facilitating tool for accomplishing this migration.¹¹⁵ To the extent DS1 Platform remains available throughout the Commonwealth, there is no doubt that the arrangement will serve as an important catalyst to robust competitive carrier NGN deployment from city-centers, deep into the rural areas of Pennsylvania, and the PCC members enthusiastically wait for the day when they can participate in tomorrow's competitive environment.

C. State Law Issues

State law also supports the continued availability of DS1 switching on an unbundled basis throughout Pennsylvania. The state law issue which is critical to this proceeding pertains to the impact of 66 Pa. C.S. §3005(e), which provides as follows in relevant part:

(e) Additional determinations.--The commission shall determine whether local exchange telecommunications companies are complying with the following provisions:

(1) The local exchange telecommunications company shall unbundle each basic service function on which the competitive service depends and shall make the basic service functions separately available to any customer under nondiscriminatory tariffed terms and conditions, including price, that are identical to

¹¹⁵ PCC-1 (Direct-Revised) at 38.

those used by the local exchange telecommunications company and its affiliates in providing its competitive service.

This provision establishes an unbundling requirement under state law for services which have been designated as "competitive" by the Commission. While the Pennsylvania defined term for network components is "basic service functions" rather than "unbundled network elements," it is clear from the definition in 66 Pa. C.S. § 3002 that DS1 switching is a basic service function which requires unbundling under Section 3005(e) for all competitive services.¹¹⁶

Of particular relevance is the fact that the Commission has already interpreted Section 3005 within the context of the *TRO*. On August 13, 2003, the Commission entered an Order denying Verizon's Petition to designate as "competitive" all of its business telecommunications services for customers generating less than \$10,000 in TBR per year.¹¹⁷ In this critical decision,

¹¹⁶ Under 66 Pa. C.S. § 3002, a "basic service functions" is defined as follows:

"Basic service functions." Those basic components of the local exchange carrier network which are necessary to provide a telecommunications service and which represent the smallest feasible level of unbundling capable of being tariffed and offered as a service.

¹¹⁷ *Petition of Verizon Pennsylvania, Inc. for a Determination That its Provision of Business Telecommunications Services to Customers Generating Less Than \$10,000 in Annual Total Billed Revenue is a Competitive Service Under Chapter 30 of the Public Utility Code*, P-00021973 (August 12, 2003). As indicated previously, under the *Global Order's* scheme, Verizon's business services for customers generating over \$10,000 in TBR have already been designated by the Commission as "competitive." It is noteworthy that the Commission determined that the record in that proceeding only justified competitive designation for customers above an \$80,000 TBR benchmark, but that, based on mere projection and a structural separation requirement which never occurred, the Commission develop a sliding scale over time under which the TBR benchmark was directed to automatically drop first to \$40,000 and then subsequently to \$10,000. However, this sliding scale was not base on a granular analysis or any other factual analysis, but instead was based on speculation as to how the Commission thought competition might develop in business markets. Certainly this speculative sliding scale has no relationship to whether or not there is impairment for any customer, geographic or product market in Pennsylvania, since even the Commission's speculative analysis presumed the continued availability of UNE-P **and** other forms of both facilities based and non-facilities based

the Commission first rejected Verizon's attempt at "competitive" classification of these services concluding that Verizon had failed to meet its burden of demonstrating the presence and continued viability of competitors (of any kind -- facilities based or non-facilities based), and that to the extent there was competition, ". . . Verizon PA's claim that competition will continue to thrive despite economic and financial difficulties by CLECs in Pennsylvania are equally unpersuasive."¹¹⁸

Second, and even more directly related to this proceeding, the Commission outright rejected Verizon's argument that the requirements of Section 3005(e)(1) would be avoided (and that Verizon could discontinue offering unbundled network elements) if the FCC rules abolish the federal requirements to provide UNEs to competitors, because the unbundling requirements of Section 3005 were independent state law requirements.¹¹⁹ As the Commission stated in its ruling on this matter:¹²⁰

competition. Indeed, as the record in this proceeding will reflect, if the DS1 Platform is eliminated in Pennsylvania, Verizon's retail service to customers with over \$10,000 in TBR should immediately be reclassified to noncompetitive service.

¹¹⁸ August 12, 2003 Order, P-00021973 at 22-23.

¹¹⁹ On September 5, 2003, Verizon filed a Petition for Reconsideration of this Commission determination. The Commission is presently considering the merits of that petition.

¹²⁰ In reaching its decision the Commission relied on the following passage from the *Global Order*:

Chapter 30 provides another source of state law for requiring the unbundling of network elements. BA-PA has obtained competitive classification of several of its local services in accordance with Chapter 30 requirements. Chapter 30 also requires BA-PA to "unbundle each basic service function on which those competitive services depend ..." Thus, to the extent that BA-PA receives and accepts competitive classification of its business services as part of this proceeding, it must unbundle the "basic service functions" on which the "competitive" local service depends. Chapter 30 defines "basic service functions" as "those basic components of the local

"Consistent with these parameters, we emphasize that for any telecommunications service for which Verizon PA obtains competitive designation under Chapter 30, Verizon PA is required, independent of other federal requirements, to unbundle BSFs used to provide that local service."

Verizon will undoubtedly argue that state law is irrelevant to this proceeding because of the preemptive effect of the *TRO*. However, Verizon is clearly wrong if it claims that the FCC has preempted all types of state rules regarding matters covered by the *TRO*. In fact, the *TRO* states that

[w]e do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. ...[the Telecommunications Act]. section 251(d)(3) preserves states' authority to impose unbundling obligations but only if their action is consistent with the Act and does not substantially prevent the implementation our federal regime.¹²¹

Consistent with these general guidelines, the FCC found that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations."¹²² But the state law obligation that continues to require Verizon to offer unbundled switching is a voluntary obligation, willingly entered into by Verizon and not a mandatory order creat[ing] [or]

exchange carrier network which are necessary to provide a telecommunications service and which represent the smallest feasible level of unbundling capable of being tariffed and offered as a service." Currently, BA-PA's Centrex, Paging, Repeat Dialing, Speed Dialing and High Capacity Special Access services have been declared competitive in Pennsylvania. Therefore, any "basic service functions" used to provide these services must be unbundled. Clearly, loops, switching and transport are part of any Centrex offering. Repeat Dialing and Speed Dialing are features built upon the switching basic service function. Also, loops and transport are part of special access offering.

¹²¹ *TRO* at ¶¶ 192, 193 (emphasis added).

¹²² *TRO* at ¶ 187.

modify[ing] an unbundling obligation. Verizon's state-based unbundling obligations can be traced to the Company's own voluntary decision to subject itself to the unbundling requirements of Chapter 30. It did this by voluntarily accepting the Alternative Regulation Plan offered by the PUC in 1994, in response to the Company's initial Petition and, as part of that filing and in subsequent filings, requesting – and obtaining – competitive designation for certain retail services.¹²³ Such voluntary acceptance of state unbundling requirements is perfectly consistent with the FCC's standards and requirements in the *TRO*.¹²⁴ Moreover, since this unbundling obligation is in furtherance of a competitive pricing and ratemaking scheme voluntarily adopted by Verizon, it is impossible to characterize this unbundling requirement as “substantially preventing the implementation of the federal regime.” Nowhere does the *TRO* indicate that an ILEC is prohibited from voluntarily agreeing to exceed the national standard if the ILEC voluntarily does so for competitive or other reasons. This is exactly what occurred when Verizon made a voluntary choice to accept its alternative regulation plan. In addition, the terms of the individual interconnect agreements which make use of this unbundling may then prohibit Verizon from unilaterally discontinuing the provision of service on the ground there is a change of [federal] law.¹²⁵ To decide otherwise would be to allow Verizon to continue to reap the

¹²³ 66 Pa.C.S. § 3004(b). Under Section 3004(b), Verizon is provided an opportunity to accept or reject the alternative regulation plan adopted by the Commission. By accepting its alternative regulation plan, Verizon voluntarily accepted the unbundling requirements of 66 Pa. C.S. § 3005.

¹²⁴ *TRO* ¶¶ 187, 194.

¹²⁵ In addition, the terms of the individual interconnect agreements which make use of this unbundling may prohibit Verizon from immediately discontinuing the provision of service on the ground there is a change of [federal] law. *Petition of MCI for Emergency Declaratory Ruling and Enforcement of Interconnect Agreement with Bell Atlantic-Pennsylvania, Inc.*, Docket No. A-310236F0002, (December 11, 2001).

benefits of competitive service designation without the corresponding requirements agreed to by Verizon and applicable to such a designation – in essence the “quid” without the “quo.”

It is for this reason that the Commission just recently reaffirmed its view that these state obligations will continue notwithstanding any FCC determination regarding federal requirements to the contrary. Based on the foregoing, and given the Commission's recent determinations, state law requires continued unbundling of all local circuit switching, including when the element or function is used to serve DS1 Customers.

VI. CONCLUSION

It can not be overstated that the debate which starts with this 90 Day Proceeding is critical to the survival of local competition. As the Consumer Federation of America ("CFA") recently concluded in a report issued just last week in a section entitled "Debunking the ILECs Claims:"

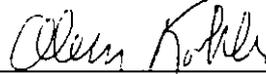
The recent progress toward more open and competitive local telecom markets is important but fragile. Although competition has made significant gains, the Bells are working hard to undermine UNE-based competition and force weakened competitive local exchange carriers (CLECs) to build redundant telecommunications networks. A successful result for the RBOCs on this would put a swift end to local competition.

This paper examines three arguments that have been advanced by the Bell companies in support of these anti-competitive aims. In the past RBOCs have employed these arguments to delay opening their local markets to competition. They are reviving them now in an attempt to reduce the availability of UNEs, or to raise UNE pricing to such exorbitant rates that competitors would be forced from the marketplace. This paper examines the current state of competition in 39 of the largest states where public data is available regarding residential competition. Our research shows that, in each case, the Bell's arguments are both misleading and unfounded.

Competition at the Crossroads: Can Public Utility Commissions Save Local Phone Competition? Consumer Federation of America, October, 2003 at 2.

In this 90 Day Proceeding, the PCC has effectively rebutted the FCC's national presumption that there is no impairment for CLECs in the absence of local circuit switching to serve DS1 (or higher) enterprise market. Accordingly, the Commission should petition the FCC to show that requesting telecommunications carriers are impaired without access to local circuit switching to serve end use customers using DS1 capacity and above loops in the geographic markets in Pennsylvania in accordance with 47 CFR 51.319(d)(3)(i).

Respectfully submitted,



Daniel Clearfield

Alan Kohler

WOLF, BLOCK, SCHORR AND
SOLIS-COHEN LLP

212 Locust Street, Suite 300

Harrisburg, PA 17101

(717) 237-7172

akohler@wolfblock.com

Attorneys for Pennsylvania Carriers'
Coalition

Date: November 17, 2003

RECEIVED

NOV 17 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participants, listed below, in accordance with the requirements of § 1.54 (relating to service by a participant).

VIA EMAIL AND FIRST CLASS MAIL

Julia A. Conover, Esq.
William Peterson, Esq.
Verizon Pennsylvania Inc.
1717 Arch Street, 32N
Philadelphia, PA 19103

Ross A. Buntrock
Kelley, Drye & Warren, LLP
1200 Nineteenth Street, NW, Suite 500
Washington, DC 20036

Norman Kennard
Hawke McKeon Sniscak & Kennard LLP
Harrisburg Energy Center
100 North Tenth Street P. O. Box 1778
Harrisburg, PA 17108

Russell M. Blau
Philip Macres
Tamar E. Finn
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Patricia Armstrong
Thomas, Thomas, Armstrong & Niesen
212 Locust St., Suite 500
PO Box 9500
Harrisburg, PA 17108-9500

Kandace F. Melillo
Office of Trial Staff
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Maryanne R. Martin
PA Public Utility Commission
400 North Street
Harrisburg, PA 17101

Angela Jones, Esq.
Office of Small Business Advocate
Commerce Building, Suite 1102
300 North 2nd Street
Harrisburg, PA 17101

Barrett Sheridan, Esq.
Office of Consumer Advocate
5th Floor, Forum Place Bldg.
555 Walnut Street
Harrisburg, PA 17101-1921

Date: November 17, 2003



Alan Kohler, Esq.

RECEIVED

NOV 17 2003

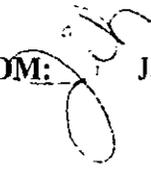
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

COMMONWEALTH OF PENNSYLVANIA

DATE: November 18, 2003

SUBJECT: I-00030099

TO: Office of Administrative Law Judge

FROM:  James J. McNulty, Secretary

DOCKETED

NOV 24 2003

DOCUMENT

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements

Attached are copies of Petitions to Intervene filed in connection with the above docketed proceeding by the following:

Choice One Communications of Pennsylvania, Inc.

Focal Communications Corporation of Pennsylvania

SNiP LiNK LLC

This matter is assigned to your Office for appropriate action.

Attachment

cc: FUS
LAW

jih

ORIGINAL

MCI

November 20, 2003

DOCUMENT

RECEIVED

NOV 20 2003

Via Overnight Delivery

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: Investigation into the Obligations of Incumbent Local Exchange
Carriers to Unbundle Network Elements, Docket No. I-00030099

Development of an Efficient Loop Migration Process,
Docket No. M00031754

Investigation into the Obligation of Incumbent Local Exchange
Carriers to Unbundle Local Circuit Switching for the Enterprise
Market, Docket No. I-00030100

Dear Mr. McNulty:

Please find enclosed four (4) copies of each Confidentiality Agreement signed on behalf
of MCI WorldCom Network Services, Inc. in the above-referenced cases.

Please contact me if you have any questions or concerns with this matter.

Very truly yours,


Michelle Painter

cc: Certificates of Service
Honorable Michael C. Schnierle

Enclosures

APPENDIX A-1
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

DOCKETED
JAN 07 2004

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for the
Enterprise Market

Docket No. I-00030100

RECEIVED

NOV 20 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

The undersigned is the employee of
MCI (retaining party) and is not, or has no knowledge or basis
for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other
than stock of any competitor of _____ (producing party) or an
employee of any competitor of the producing party who is primarily involved in the pricing,
development, and/or marketing of products or services that are offered in competition with those
of the producing party; or (2) an officer, board member, stockholder, partner, or owner than
stock of any affiliate of a competitor of the producing party. (See ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this
Confidentiality Agreement deal with the treatment of Proprietary Information and Highly
Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply
with, the terms and conditions of said Protective Order as a condition of access to the Proprietary
Information and Highly Confidential Proprietary Information. Further, the undersigned, if an
independent expert, represents that he/she has complied with the provisions of ordering
paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality
Agreement.

DATE: _____



Signature

CARL D GIESY

Print Name

Regional Director

Status relative to Retaining Party

MCI

Employer

1133 19th Street

Address Washington, DC 20036

DOCUMENT

APPENDIX A-1
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for the
Enterprise Market

Docket No. I-00030100

DOCKETED
JAN 07 2004

CONFIDENTIALITY AGREEMENT

DOCUMENT

TO WHOM IT MAY CONCERN:

The undersigned is the SENIOR ATTORNEY of MCI (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of VERIZON (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (See ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: 11/3/03

KAWILD
Signature

KAWILD
Print Name

SENIOR ATTORNEY
Status relative to Retaining Party

WORLD COM/MCI
Employer

1133 19TH ST., WASH. DC 20036
Address

APPENDIX A-1
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for the
Enterprise Market

Docket No. I-00030100

DOCKETED
JAN 07 2004
DOCUMENT

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

The undersigned is the employee of
MCI (retaining party) and is not, or has no knowledge or basis
for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other
than stock of any competitor of _____ (producing party) or an
employee of any competitor of the producing party who is primarily involved in the pricing,
development, and/or marketing of products or services that are offered in competition with those
of the producing party; or (2) an officer, board member, stockholder, partner, or owner than
stock of any affiliate of a competitor of the producing party. (See ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this
Confidentiality Agreement deal with the treatment of Proprietary Information and Highly
Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply
with, the terms and conditions of said Protective Order as a condition of access to the Proprietary
Information and Highly Confidential Proprietary Information. Further, the undersigned, if an
independent expert, represents that he/she has complied with the provisions of ordering
paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality
Agreement.

DATE: 10-31-03

Sherry L. Lichtenberg
Signature

SHERRY LICHTENBERG
Print Name

employee
Status relative to Retaining Party

MCI

Employer
1133 19th ST. N.W.
Address

WASHINGTON, DC 20036

APPENDIX A-1
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for the
Enterprise Market

Docket No. I-00030100

DOCKETED
JAN 07 2004

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

DOCUMENT

The undersigned is the Consultant of MCI (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of _____ (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (See ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: 10/31/03

Earle Jenkins
Signature
Earle Jenkins
Print Name
CONSULTANT
Status relative to Retaining Party
SHS CONSULTING
Employer
POB 192
Address
HOLDENESS, NH
03245

APPENDIX A-1
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for the
Enterprise Market

Docket No. I-00030100

DOCKETED
JAN 07 2004

CONFIDENTIALITY AGREEMENT

DOCUMENT

TO WHOM IT MAY CONCERN:

The undersigned is the Independent expert of MCI (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of _____ (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (See ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: Nov 10 2003

Michael D Pelcovits
Signature
Michael D. Pelcovits
Print Name
expert
Status relative to Retaining Party
MICRA
Employer
1155 Connecticut Ave NW
Address Wash, DC.

APPENDIX A-1
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for the
Enterprise Market

Docket No. I-00030100

DOCKETED
JAN 07 2004
DOCUMENT

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

The undersigned is the employee of MEI (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of _____ (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (See ¶15 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(11) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: 11/19/03

Mindy Chapman
Signature
Mindy E. Chapman
Print Name

Status relative to Retaining Party
MEI
Employer
707 17th St Suite 4200
Address
Denver CO 80202

ORIGINAL

1110 N. Mountain Road
Harrisburg, PA 17112
Telephone: 717-541-1194

ANDERSON, GULOTTA & HICKS, P.C.

fax: 717-541-5434

200 North Fifth Street
Camden, NJ 08102
Telephone: 1-800-330-1458

November 21, 2003

James J. McNulty, Secretary
Commonwealth of Pennsylvania
Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

DOCUMENT

RECEIVED
03 NOV 24 AM 9:43
PA.P.U.C.
SECRETARY'S BUREAU

RE: Confidentiality Agreements
Docket No. ~~I-00030099~~

I-60030100

Dear Mr. McNulty:

Pursuant to the Protective Order in the above-captioned matter, enclosed please find for filing a copy of executed Confidentiality Agreements identifying Penn Telecom as the "retaining party" and Verizon Pennsylvania, Inc. as the "producing party."

Should you have any questions, please do not hesitate to contact me at (717) 541-1194.

Renardo L. Hicks

FOR: Penn Telecom
Renardo L. Hicks, Esquire
Anderson, Gulotta & Hicks, PC
1110 N. Mountain Road
Harrisburg, PA 17112
Tel.: (717) 541-1194
Fax: (717) 541-5434
rhicks@aghweb.com

84

APPENDIX A-1
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for the
Enterprise Market

Docket No. I-00030100

DOCKETED
JAN 07 2004

CONFIDENTIALITY AGREEMENT

DOCUMENT

TO WHOM IT MAY CONCERN:

The undersigned is the ATTORNEY of
PEWEE TELECOM (retaining party) and is not, or has no knowledge or basis
for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other
than stock of any competitor of VERIZON PA, INC. (producing party) or an
employee of any competitor of the producing party who is primarily involved in the pricing,
development, and/or marketing of products or services that are offered in competition with those
of the producing party; or (2) an officer, board member, stockholder, partner, or owner than
stock of any affiliate of a competitor of the producing party. (See ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this
Confidentiality Agreement deal with the treatment of Proprietary Information and Highly
Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply
with, the terms and conditions of said Protective Order as a condition of access to the Proprietary
Information and Highly Confidential Proprietary Information. Further, the undersigned, if an
independent expert, represents that he/she has complied with the provisions of ordering
paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality
Agreement.

DATE: 11/21/2003

Renardo C Hicks

Signature

RENARDO C. HICKS

Print Name

ATTORNEY

Status relative to Retaining Party

ANDERSON, GILLOTTA + HICKS, P.C.

Employer

1110 N. MOUNTAIN RD

Address

HBG. PA 17112

SECRETARY'S BUREAU

NOV 24 AM 9:43

11/21/03

ORIGINAL

Michelle Painter, Senior Attorney
Law and Public Policy
1333 19th Street, NW
Washington, DC 20036
Telephone 202 736 6204

MCI

November 24, 2003

Via Overnight Delivery

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

DOCUMENT

RECEIVED

NOV 24 2003

PUBLIC UTILITY COMMISSION
SECRETARIES BUREAU

Re: Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements, Docket No. I-00030099

Development of an Efficient Loop Migration Process,
Docket No. M00031754

Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market, Docket No. I-00030100

Dear Mr. McNulty:

Please find enclosed four (4) copies of each Confidentiality Agreement signed on behalf of MCI WorldCom Network Services, Inc. in the above-referenced cases.

Please contact me if you have any questions or concerns with this matter.

Very truly yours,

Michelle Painter

cc: Certificates of Service
Administrative Law Judge Michael C. Schnierle
Administrative Law Judge Susan Colwell

Enclosures

196

DOCKETED
JAN 07 2004

APPENDIX A-1
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

DOCKETED
JAN 07 2004

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for the
Enterprise Market

Docket No. I-00030100

DOCUMENT

RECEIVED
NOV 24 2003

CONFIDENTIALITY AGREEMENT

PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

TO WHOM IT MAY CONCERN:

The undersigned is the research assistant to an independent expert of
MCI (retaining party) and is not, or has no knowledge or basis
for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other
than stock of any competitor of _____ (producing party) or an
employee of any competitor of the producing party who is primarily involved in the pricing,
development, and/or marketing of products or services that are offered in competition with those
of the producing party; or (2) an officer, board member, stockholder, partner, or owner than
stock of any affiliate of a competitor of the producing party. (See ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this
Confidentiality Agreement deal with the treatment of Proprietary Information and Highly
Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply
with, the terms and conditions of said Protective Order as a condition of access to the Proprietary
Information and Highly Confidential Proprietary Information. Further, the undersigned, if an
independent expert, represents that he/she has complied with the provisions of ordering
paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality
Agreement.

DATE: 11/21/03

[Signature]
Signature
Anthony Giunta
Print Name
Research Assistant to independent expert
Status relative to Retaining Party
MICRA, Inc.
Employer
1155 Connecticut Ave., Suite 900
Address Washington, DC 20036

APPENDIX A-1
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

RECEIVED

NOV 24 2005

PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Docket No. I-00030100

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for the
Enterprise Market

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

The undersigned is the research assistant to an independent expert of
MC I (retaining party) and is not, or has no knowledge or basis
for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other
than stock of any competitor of _____ (producing party) or an
employee of any competitor of the producing party who is primarily involved in the pricing,
development, and/or marketing of products or services that are offered in competition with those
of the producing party; or (2) an officer, board member, stockholder, partner, or owner than
stock of any affiliate of a competitor of the producing party. (See ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this
Confidentiality Agreement deal with the treatment of Proprietary Information and Highly
Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply
with, the terms and conditions of said Protective Order as a condition of access to the Proprietary
Information and Highly Confidential Proprietary Information. Further, the undersigned, if an
independent expert, represents that he/she has complied with the provisions of ordering
paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality
Agreement.

DATE: 11/21/03

[Signature]
Signature

Anthony Giunta
Print Name

Research Assistant to independent expert
Status relative to Retaining Party

MICRA, Inc.
Employer

1155 Connecticut Ave., Suite 900
Address Washington, DC 20036

APPENDIX A-1
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for the
Enterprise Market

Docket No. I-00030100

NOV 24 2003

CONFIDENTIALITY AGREEMENT

PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

TO WHOM IT MAY CONCERN:

The undersigned is the research assistant to an independent expert of MC I (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of _____ (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (See ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: 11/21/03

[Signature]
Signature
Anthony Giunta
Print Name
Research Assistant to independent expert
Status relative to Retaining Party
MICRA, Inc.
Employer
1155 Connecticut Ave., Suite 900
Address Washington, DC 20036

ORIGINAL

SERVICE LIST

I hereby certify that I have this day caused a true copy of MCI's Confidentiality Agreements to be served upon the parties of record in Docket Nos. I-00030099, I-00030100, M-00031754 in accordance with the requirements of 52 Pa. Code Sections 1.52 and 1.54 in the manner and upon the parties listed below.

Dated in Washington, DC on November 24, 2003

VIA OVERNIGHT DELIVERY

NOV 24 2003
PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Patricia Armstrong
Thomas, Thomas, Armstrong & Niesen
212 Locust Street, Suite 500
Harrisburg, PA 17108
Phone – 717-255-7600

Julia Conover
Verizon
1717 Arch Street, 32N
Philadelphia, PA 19103
Phone – 717-963-6001

Kandace F. Melillo
Pennsylvania Public Utility Commission
Office of Trial Staff – 2nd Floor
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
Phone – 717-783-6155

Angela Jones
Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101
Phone – 717-783-2525

Alan Kohler
Wolf Block Schorr and Solis-Cohen
212 Locust Street, Suite 300
Harrisburg, PA 17108
Phone – 717-237-7172

Robert C. Barber
AT&T
3033 Chain Bridge Road
Oakton, VA 22185
Phone – 703-691-6061

Phil McClelland
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101
Phone – 717-783-5048

John F. Povilaitis
Ryan, Russell, Ogden & Seltzer
800 North Third Street, Suite 101
Harrisburg, PA 17102
Phone – 717-236-7714

Linda Smith
Dilworth Paxson LLP
305 North Front St, Suite 403
Harrisburg, PA 17101
Phone – 717-236-6248

Philip Macres
Swidler Berlin Shereff Friedmann
3000 K Street, NW
Washington, DC 20007
202-945-6915

Richard U. Stubbs
Cavalier Telephone Mid-Atlantic, LLC
965 Thomas Drive
Warminster, PA 18974
(267)803-4002

Charis Burak
McNees, Wallace & Nurick
100 Pine Street
Harrisburg, PA 17108
Phone – 717 237 5437

Norman Kennard
Hawke McKeon Sniscak & Kennard
100 North Tenth St
Harrisburg, PA 17101

Sue Benedek
Sprint/United
204 North Third St, Suite 201
Harrisburg, PA 17101
Phone – 717-236-1385

Ross Buntrock
Kelley Drye & Warren
1200 19th Street, NW, Suite 500
Washington, DC 20036
202-887-1248

Rick Hicks
Anderson Gulotta & Hicks, PC
1110 N. Mountain Rd
Harrisburg, PA 17112
717-541-1194


Michelle Painter
Michelle Painter

November 25, 2003

Via Hand Delivery

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

DOCUMENT

RECEIVED
2003 NOV 25 AM 11:54
PA PUC
SECRETARY'S BUREAU

Re: Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Network Elements, Docket No. I-00030099

Development of an Efficient Loop Migration Process,
Docket No. M00031754

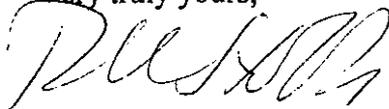
Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market, Docket No. I-00030100

Dear Mr. McNulty:

Enclosed for filing are an original and three (3) copies of each Confidentiality Agreement executed on behalf of Cavalier Telephone Mid-Atlantic, LLC in the referenced matters.

Please do not hesitate to contact me if you have any questions.

Very truly yours,



Richard U. Stubbs
267.803.4002
rstubbs@cavtel.com

cc: The Honorable Michael C. Schnierle
The Honorable Susan Colwell
Service List

Enclosure

APPENDIX A-1
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

DOCKETED
JAN 07 2004

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for the
Enterprise Market

Docket No. I-00030100

RECEIVED
2003 NOV 25 AM 11:54
PA PUC
SECRETARY'S BUREAU

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

The undersigned is the employee of
Cavalier Telephone Mid-Atlantic (retaining party) and is not, or has no knowledge or basis
for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other
than stock of any competitor of _____ (producing party) or an
employee of any competitor of the producing party who is primarily involved in the pricing,
development, and/or marketing of products or services that are offered in competition with those
of the producing party; or (2) an officer, board member, stockholder, partner, or owner than
stock of any affiliate of a competitor of the producing party. (See ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this
Confidentiality Agreement deal with the treatment of Proprietary Information and Highly
Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply
with, the terms and conditions of said Protective Order as a condition of access to the Proprietary
Information and Highly Confidential Proprietary Information. Further, the undersigned, if an
independent expert, represents that he/she has complied with the provisions of ordering
paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality
Agreement.

DATE: 11/24/03

Richard U. Stubbs Jr.
Signature
Richard U. Stubbs Jr.
Print Name
General Counsel
Status relative to Retaining Party
Cavalier Telephone Mid-Atlantic, LLC
Employer
965 Thomas Dr.
Address
Warminster, PA 18974

CONFIDENT

APPENDIX A-1
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

RECEIVED
2003 NOV 25 AM 11:54
PENNSYLVANIA
SECRETARY'S BUREAU

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for the
Enterprise Market

Docket No. I-00030100

CONFIDENTIALITY AGREEMENT

DOCKETED
JAN 07 2004

TO WHOM IT MAY CONCERN:

The undersigned is the Senior Counsel of Cavalier Telephone Mid-Atlantic, LLC (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of _____ (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (See ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: November 24, 2003



Stephen T. Perkins
Senior Counsel
Cavalier Telephone Mid-Atlantic, LLC
2134 West Laburnum Avenue
Richmond, Virginia 23227-4342

DOCUMENT

APPENDIX A-1
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

RECEIVED
2003 NOV 25 AM 11:54
PENNSYLVANIA
SECRETARY'S BUREAU

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for the
Enterprise Market

Docket No. I-00030100

CONFIDENTIALITY AGREEMENT

DOCKETED
JAN 07 2004

TO WHOM IT MAY CONCERN:

The undersigned is the employee of
Cavalier Telephone (retaining party) and is not, or has no knowledge or basis
for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other
than stock of any competitor of _____ (producing party) or an
employee of any competitor of the producing party who is primarily involved in the pricing,
development, and/or marketing of products or services that are offered in competition with those
of the producing party; or (2) an officer, board member, stockholder, partner, or owner than
stock of any affiliate of a competitor of the producing party. (See ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this
Confidentiality Agreement deal with the treatment of Proprietary Information and Highly
Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply
with, the terms and conditions of said Protective Order as a condition of access to the Proprietary
Information and Highly Confidential Proprietary Information. Further, the undersigned, if an
independent expert, represents that he/she has complied with the provisions of ordering
paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality
Agreement.

Martin W. Clift, Jr.

DATE: 11/24/03

Signature
Martin W. Clift, Jr.
Print Name
VP-Regulatory
Status relative to Retaining Party
Cavalier Telephone, LLC
Employer
2134 W. Laburnum Ave.
Address
Richmond, VA 23227-4342

DOCUMENT

SERVICE LIST

I hereby certify that I have this day served a true copy of this document by hand or by first class U.S. mail upon the participants listed below in accordance with 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated in Warminster, Pennsylvania on November 25, 2003.

Julia A. Conover, Esq.
Verizon Pennsylvania Inc.
1717 Arch Street, 32N
Philadelphia, PA 19103

Barrett Sheridan, Esq.
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101

Sue Benedek, Esq.
Sprint Communications Co. LP
204 North Third St, Suite 201
Harrisburg, PA 17101

Alan Kohler, Esq.
Wolf Block et al.
212 Locust Street, Suite 300
Harrisburg, PA 17108

Robert C. Barber
AT&T & TCG
3033 Chain Bridge Road
Oakton, VA 22185

Michelle Painter, Esq.
MCI Worldcom Communication
1133 19th Street, NW
Washington, D.C. 20036

Kandace F. Melillo, Esq.
PA Public Utility Commission
Office of Trial Staff – 2nd Floor
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Angela Jones, Esq.
Office of Small Bus. Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

PECO Hyperion Telecomm.
712 North Main Street
Coudersport, PA 16915

Focal Comm. Corp. of PA
200 North LaSalle St.
Suite 1100
Chicago, IL 60601

Comcast Phone of PA
188 Inverness Drive West
Englewood, OC 80112

RCN Telecom Services, Inc.
RCN of Philadelphia
105 Carnegie Center
Princeton, NJ 08540

Z-Tel Communications
601 S. Harbor Island Drive
Suite 220
Tampa, FL 33602

Christopher Hanifin
Choice One Commun. of PA, Inc.
2 Pine West Plaza, Suite 205
Washington Ave. Extension
Albany, NY 12205

Michael Romano, Esq.
Level 3 Communications LLC
8270 Greensboro Dr., Suite 900
McLean, VA 22102

Talk America Inc.
6805 Route 202
Hew Hope, PA 18938

Allegiance Telecom of PA Inc.
9201 North Central Expressway
Dallas, TX 75231

Adelphi Bus. Solution of PA Inc.
712 North Main Street
Coudersport, PA 16915

Intermedia Communications Inc.
6 Concourse Parkway
Suite 600
Atlanta, GA 30328

XO Pennsylvania Inc.
2690 Commerce Drive
Harrisburg, PA 17110

Penn Telecom Inc.
2710 Rochester Road
Cranberry Township, PA 16066

CTC Communications Corp.
115 Second Avenue
Waltham, MA 02154

CEI Networks
441 Science Park Road
State College, PA 16803-2217

CTSI
3950 Chambers Hill Road
Harrisburg, PA 17111

Metro Teleconnect
2150 Herr Street
Harrisburg, PA 17103


Richard U. Stubbs

RECEIVED
2003 NOV 25 AM 11:54
SECRETARY'S BUREAU