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February 17, 2004

VIA UPS OVERNIGHT DELIVERY

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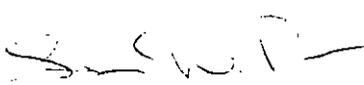
Re: *Investigation into the Obligation of Incumbent Local Exchange Carriers to
Unbundle Network Elements, Docket No. 1-00030099*

Dear Secretary McNulty:

Enclosed please find the original and nine copies of the Main Brief of Verizon Pennsylvania Inc. and Verizon North Inc. in reference to the above captioned matter. Please note that the Brief contains proprietary information, and that an Expurgated copy of the Brief also is enclosed.

Please do not hesitate to contact me if you have any questions.

Very truly yours,


Suzan D. Paiva

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Investigation into the :
Obligation of Incumbent : Docket No.
Local Exchange Carriers : I-00030099
to Unbundle Network Elements :

**DOCUMENT
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**MAIN BRIEF OF VERIZON PENNSYLVANIA INC.
AND VERIZON NORTH INC.**

EXPURGATED VERSION

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I. INTRODUCTION

The record developed here irrefutably proves that competitors are “not impaired” without unbundled access to mass market switching, dedicated transport and high capacity loops in particular Pennsylvania locations. This conclusion must follow from the proper application of the FCC’s binding rules established in the *Triennial Review Order* (“TRO”)¹ regarding the scope of network elements that incumbent local exchange carriers (“ILECs”) must provide on an unbundled basis under section 251(c)(3) of the Telecommunications Act of 1996, which limits unbundling to those elements without which competitors would be “impaired” in their ability to provide service.

While the FCC made a binding national finding on impairment for some network elements, for certain others it determined that a “more targeted, granular” factual analysis undertaken by the state commissions applying mandatory FCC decision rules was necessary to reach an ultimate conclusion on impairment. (*TRO* ¶ 187-190). Specifically, the FCC directed that within 9 months of the *TRO*’s effective date (or by July 2, 2004) state commissions should review the state-specific facts and identify where carriers are “not impaired” without access to mass market switching, dedicated transport and high capacity loops. Verizon Pennsylvania Inc.’s and Verizon North Inc.’s (“Verizon”) Petition, based on the FCC’s mandatory “triggers” analysis, requests that this Commission find that CLECs are not impaired without access to unbundled mass market switching, dedicated transport and high capacity loops in particular locations in Pennsylvania.

The over twenty competitive carriers that have intervened in this proceeding for the most part do not dispute as a factual matter – and in many cases confirm – the extensive presence of

¹ *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147 (Released August 21, 2003) (“TRO”).

competitive alternatives in Pennsylvania and the wide-spread deployment of CLEC network facilities. This evidence requires the Commission to find that the FCC’s mandatory “triggers” are met for mass market switching, dedicated transport and high capacity loops in various areas.

For example, Verizon’s line count study (based on its own unbundled loop records and residential E911 data) shows that competitors are serving nearly 350,000 mass market lines (residential and small business customers) using their own switching in the eight Pennsylvania Metropolitan Statistical Areas (“MSAs”) at issue here (in addition to mass market customers in other parts of the state, as well as large numbers of enterprise business lines, neither of which is at issue here).

Similarly, the record (from Verizon inspections and competitor admissions) shows many undisputed operational collocation arrangements fed with non-Verizon fiber, and hundreds of dedicated transport routes on which competitors self provision or provide at wholesale their own fiber optic facilities at varying speeds. Likewise, the intervenors’ own discovery responses reveal customer locations at which competitors self provision or wholesale high-capacity loops.

The *TRO* established a two-step process for demonstrating “no impairment.” As a threshold matter, the Commission *must* find no impairment if certain objective evidentiary “triggers” are satisfied. (*TRO* ¶ 494). If the triggers are met, then the Commission *is required to find no impairment without further analysis*. The largely undisputed record compels a finding under the FCC’s mandatory “trigger” standards that competitors are “not impaired” without unbundled access to mass market switching, dedicated transport and high capacity loops in designated areas, and requires elimination of unbundling requirements in these areas. This is not a close case. For example, while the FCC’s rules mandate an automatic finding of “no impairment” where three or more competitors are serving mass market customers with their own

switching in a relevant market, the undisputed facts show that nearly every MSA for which Verizon seeks relief on switching has more than the minimum of three – indeed the Philadelphia MSA has *fourteen separate competitors* providing mass market service and the Pittsburgh MSA has *nine separate competitors*.

In a bid to prolong their access to forced unbundling and TELRIC pricing wherever possible, the intervening competitors attempt to create non-existent “exceptions” to the FCC’s straightforward triggers to argue that the Commission should ignore the undisputed facts and should conclude that many of the known competitors and facilities should not “count” in the analysis. These “exceptions” are prohibited by the *TRO*, and this Commission cannot alter or add to the FCC’s mandatory trigger standards. The Commission must apply the triggers as written, not as the intervenors would rewrite them. The intervenors also rely on policy arguments that the FCC already considered in formulating its trigger standards and that this Commission is not permitted to use to modify or override the FCC’s objective triggers. The Commission cannot be distracted by these arguments and must properly apply the triggers and conclude that there is no impairment for the elements and locations depicted in Verizon’s testimony.

II. THE SCOPE OF THE PROCEEDINGS

A. The Commission Must Confine Itself To Determinations Relevant To The Triggers

In the *TRO*, the FCC set objective “triggers” that state commissions must use as the “principal mechanism . . . in evaluating whether requesting carriers are in fact not impaired in a particular market.” (*TRO* ¶ 498). These mandatory triggers are based solely on evidence of “actual competitive deployment,” which the FCC has concluded is the “best indicator that requesting carriers are not impaired.” (*TRO* ¶ 506). The FCC requires state commissions to apply these

triggers *first*, and only if these triggers are not satisfied should a state commission go further and undertake the more complex “potential deployment” review provided by the FCC as a second, alternative means of evaluating impairment.² As the FCC recently told the United States Court of Appeals for the District of Columbia Circuit, “for switching for mass market customers, the [Triennial Review] Order required *automatic elimination* of unbundling in any market where three competitors have deployed switching, either through traditional circuit switches or intermodal alternatives such as cable or packet switches.”³ The triggers for dedicated transport and high capacity loops are automatic as well.

Verizon has indicated from the outset that it is not bringing a “potential deployment” case, but is instead relying *solely* on the FCC’s triggers to demonstrate non-impairment. Such a “triggers only” proceeding “avoid[s] delays caused by protracted proceedings and can minimize administrative burdens,” but only if the Commission follows the FCC’s direction and limits the scope of this 9-month proceeding to these triggers. (*TRO* ¶ 403). The Presiding Officers have already recognized that information regarding “potential deployment” is not relevant to this triggers case and that the *TRO* does not “permit opposing parties to force an ILEC to put on a ‘potential deployment’ case over the ILEC’s objection.”⁴

While the intervenors ostensibly concede that this case is limited to the FCC’s triggers, some nevertheless present testimony that has nothing to do with these triggers and cannot properly

² See *TRO* ¶ 425, n. 1300 (“states must first employ triggers that examine actual deployment; only if the triggers are not met must states apply criteria to assess whether entry is uneconomic); *id.* ¶ 494 (“If the [switching] triggers are not satisfied, the state commission shall proceed to the second step of the analysis, in which it must evaluate certain operational and economic criteria to determine whether conditions in the market are actually conducive to competitive entry . . .”).

³ Opposition of Respondents to Petitions for a Writ of Mandamus at 2, *United States Telecom Association v. FCC*, Nos. 00-1012, 00-1015 *et al.* (D.C. Cir.) (Filed with the Court on October 9, 2003) (emphasis added).

⁴ *Order Concerning MCI WorldCom Network Services, Inc.’s Motion To Compel Responses From Verizon Pennsylvania, Inc.* (December 30, 2003) (“*MCI Discovery Order*”) at 5.

be considered in this proceeding. While the Presiding Officers determined not to strike this testimony from the record, in the interest of presenting the full record to the Commission,⁵ it is nonetheless clear from the FCC's directions in the *TRO* that this spurious "evidence" cannot form the basis for any conclusions this Commission reaches regarding the satisfaction of the FCC's "bright-line" and "objective" triggers.

The predominant theme of this irrelevant testimony is an attempt to justify, praise and defend the UNE platform – for example, by claiming that the availability of the UNE platform in Pennsylvania provides "meaningful competitive alternatives," and that its elimination would "spell the end of local phone competition."⁶ Other witnesses go to great lengths attempting to defend the UNE platform from the obvious truth that it reduces investment incentives.⁷ But these extravagant claims and dire predictions are irrelevant; the only relevant inquiry here is whether the FCC's *mandatory, objective, and exhaustive* triggers are satisfied. (*TRO* ¶¶ 428 n.1315, 498-500, 510). The FCC has neither asked nor authorized this Commission to conduct a referendum on the UNE platform.

Certain CLECs have also presented testimony that discusses what they claim are operational and economic "barriers" to competitive entry into the mass market. While this testimony might have had some relevance in a "potential competition" case, it is plainly irrelevant to this "triggers" case. The entire purpose of the FCC's triggers is to render moot the consideration of this type of operational and economic argument, since the triggers presume that actual commercial deployment demonstrates that these "barriers" do not exist because they have

⁵ Tr. at 37.

⁶ See, e.g., AT&T St. 1.0 (Nurse-Kirchberger Dir.) at 58.

⁷ E.g., AT&T St. 2.0 (Mayo Dir.) at 39-51. Dr. Mayo virtually acknowledges that this testimony is not really rebutting anything that Verizon has actually asserted in this case. See *id.* at 39.

not prevented the actual deployment of competing facilities.⁸ If there were any confusion on this point, it was clarified by the FCC's September 17, 2003 *Errata*, in which the FCC made clear that subjective factors such as whether a provider is "operationally ready," "willing to provide service to all customers in the designated market," and "capable of economically serving the entire market," are *not* part of a trigger consideration.⁹ *Errata* at 21.

While the *TRO* does permit a state *to petition the FCC* for waiver of the mandatory triggers where there are "exceptional circumstances," as the Presiding Officers recognized in the discovery order discussed above, the CLEC testimony does not present the type of specific facts the Presiding Officers found might be relevant to "exceptional circumstances."¹⁰ These exceptional circumstances require proof of a unique, specific factual situation that renders competitive entry "*impossible, irrespective of other economic or operational circumstances*" – such as the absence of collocation space available in a relevant market. (*TRO* ¶ 503). None of the witnesses claimed that the generalized and economic complaints that they discussed were "exceptional" sources of impairment under this standard, and no witness claims to put forward such evidence.¹¹ Rather, the claims of operational and economic problems are the same type of arguments that the CLECs made to the FCC in the *TRO* proceeding, and which the FCC

⁸ See, e.g., *TRO* ¶ 501 ("the existence of three self-provisioners of switching demonstrates adequately the technical and economic feasibility of an entrant serving the mass market with its own switch, and indicates that existing barriers to entry are not insurmountable."); *Id.* ¶ 494 ("if the [switching] triggers are satisfied, the states need not undertake any further inquiry, because no impairment should exist in the market. If the triggers are not satisfied, the state commission shall proceed to the second step of the analysis, in which it must evaluate certain operational and economic criteria to determine whether conditions in the market are actually conducive to competitive entry . . .").

⁹ Tellingly, MCI's contention that such operational issues have any relevance to the triggers case was based upon an erroneous quotation from paragraph 499 of the *TRO*, which the testimony originally quoted as requiring switching trigger candidates to be "capable of economically serving the entire market." At the hearing, MCI's Mr. Jenkins acknowledged that the FCC's *Errata* had removed this phrase from the *TRO*, and he accordingly removed the quote from his testimony. Tr. at 380; VZ Cr. Ex. 1 (*TRO* ¶ 499, as modified by FCC's *Errata*).

¹⁰ See *MCI Discovery Order* at 6, 23 (also recognizing that exceptional circumstances must be based on "situation as it exists today, not on how it might exist in the future.")

¹¹ See, e.g., MCI St. 1.0 (Pelcovits Dir.) at 83 (witness has not conducted an "exceptional circumstances" analysis).

considered in the *TRO* when it established the triggers in the first place.¹² As the FCC clearly indicated, “we believe the existence of three self-provisioners of switching demonstrates adequately the technical and economic feasibility of an entrant serving the mass market with its own switch, and indicates that existing barriers to entry are not insurmountable.” (*TRO* ¶ 316).

B. The Commission Cannot Allow CLECs To Evade Their Burden Of Coming Forward With Evidence Uniquely Within Their Control

This proceeding requires the Commission to make specific factual findings about the CLECs’ Pennsylvania networks – their deployment of equipment and actual service to customers. Verizon, as the party petitioning the Commission to find the FCC’s triggers satisfied in certain areas, has come forward with substantial evidence of trigger satisfaction from its own internal records, from public sources and from CLEC discovery responses. Taken alone, Verizon’s evidence is sufficient to demonstrate that the triggers have been satisfied. Nonetheless, ultimately the CLECs have possession of the most precise information regarding their own networks and customers.

A number of these companies – while styling themselves as “participants” in this proceeding – have challenged Verizon’s evidence as insufficiently specific to prove the case, while withholding from the Commission the very details about their own networks that would conclusively answer the questions presented here. This Commission should not countenance such manipulation of the process. Rather, in accordance with the *TRO* and longstanding Pennsylvania law, it should find that if the CLEC has failed to muster the evidence to rebut or admit Verizon’s *prima facie* case regarding satisfaction of the triggers, then Verizon’s *prima facie* case prevails.

¹² For example, MCI made the same argument to the FCC about unbundling of loops served by IDLC systems that Mr. Jenkins made in his testimony here. MCI St. 2.0 (Jenkins Dir.) at 27-42. *See also* AT&T St. 1.0 (Kirchberger/Nurse Dir.) at 80. The FCC recognized that hybrid copper/fiber loops served by IDLC systems would be unbundled “in most cases . . . either through a spare copper facility or through the availability of

For example, if Verizon’s substantial evidence shows that a CLEC is providing wholesale transport on a particular route, and the CLEC has failed to come forward with evidence to rebut or admit that fact, then the Commission should find that the CLEC provides wholesale transport.

Contrary to these parties’ assertions, under the *TRO* Verizon does not by itself bear either the burden of production *or* the burden of persuasion with respect to the trigger analysis. As the *TRO* makes clear, it is the obligation of each state commission to determine whether the triggers are satisfied and to gather the factual evidence to make this determination.¹³ The FCC gave the states this role based on its expectation that states were better suited to conduct the “highly granular” impairment analysis that the FCC claims the D.C. Circuit has required.¹⁴ Indeed, the FCC specifically held that in conducting its own unbundling analysis for specific UNEs in the *TRO*, “[w]e do not adopt a ‘burden of proof’ approach that places the onus on either the incumbent LECs or competitors.” (*TRO* ¶ 92).

Even if this were a traditional state law case in which the petitioner bears the ultimate burden of proof – which it is not – the CLECs would still have the burden of coming forward with evidence and would not be permitted to sit back and challenge Verizon’s case as insufficiently specific without divulging the evidence in their own unique possession and control. As this Commission has explained, “while the burden of proof never shift[s]” from the proponent of a claim, “the burden of going forward with the evidence, sometimes called the burden of persuasion,

Universal DLC systems.” *TRO* ¶ 297. The FCC nonetheless did not require any additional showing with regard to IDLC loops as part of the triggers analysis.

¹³ See, e.g., *TRO* ¶ 384 (“[W]e delegate to the states the authority to collect and analyze more specific evidence of transport deployment”).

¹⁴ *TRO* ¶¶ 360, 398 (finding that the nature of transport facilities requires a “highly granular impairment analysis” and concluding that the record was “insufficiently detailed to make more precise findings regarding impairment”).

can properly shift to that party . . . best able to meet the burden after Complainants establish a prima facie case.”¹⁵

On the burden of proof, Pennsylvania has long made a distinction between the burden of proof and the burden of persuasion or coming forward with evidence. However, “burden of proof” and the “weight of the evidence” are not one and the same; the former remains on the party upon whom is imposed the duty of producing a certain amount of evidence in order that he may not lose summarily while the latter involves the credibility of persuasive quality of the evidence produced and, during a trial, may shift from side to side as the trial proceeds. . . . The secondary burden, or the weight of the evidence burden, is a burden requiring a party to present evidence sufficient to establish a prima facie case. In Pennsylvania, an established prima facie case “shifts” the secondary burden to the opponent.¹⁶

Even were this an ordinary state law case, therefore, once Verizon presented the detailed evidence in its possession, the burden of coming forward shifted to the CLEC parties to produce evidence demonstrating that the trigger is not satisfied in a particular market or on a particular route or customer location identified by Verizon. If the CLECs have not come forward with the necessary evidence to rebut Verizon’s showing, then the Commission must find the trigger to be satisfied.

III. MASS MARKET SWITCHING

The FCC’s self-provisioning trigger for mass market switching requires a finding of “no impairment” if three or more competitors serve mass market customers using their own switching in the relevant market. The record demonstrates that the self-provisioning trigger is met for 8 Metropolitan Statistical Areas (“MSAs”) in Pennsylvania. Verizon seeks a “no impairment”

¹⁵ *Shaffer v. Commonwealth Telephone Company*, No. C-00924648, 1995 Pa. PUC LEXIS 14 (Opinion and Order entered January 24, 1995) (also noting “the importance of properly placing the burden of persuasion on the party best able to prove the existence or nonexistence of a fact under Pennsylvania law.”)

¹⁶ *Shaffer* at *21-22 (citations omitted). See also *Henes v. McGovern*, 317 Pa. 302, 305 176 A. 503 (1935); *Pfordt v. Educators Beneficial Association*, 140 Pa. Superior Ct. 170, 14 A.2d 170, 174 (1940); *Morrissey v. Commonwealth Dept. of Highways*, 424 Pa. 87, 225 A.2d 895, 898 (1967).

finding for the Density Cell 1, 2 and 3 areas of each of these MSAs (leaving the Density Cell 4 areas eligible for continued provision of the UNE platform).

The intervenors largely do not dispute as a factual matter that each of these MSAs has at least three (usually many more) competitors serving mass market customers with their own switching – for a total of nearly 350,000 mass market lines. Instead, these parties manufacture a laundry list of non-existent “exceptions” to the trigger in an attempt to eliminate most of this substantial competition from triggers consideration. For example, they argue that, in order to count, a competitor must serve both residential *and* small business customers. However, the *TRO* makes clear that the trigger *only* requires a showing that competitors are serving “mass market” customers with their own switches. Mass market customers include *both* residential and small business customers, and thus a qualifying CLEC that serves only mass market business customers qualifies as serving the mass market. There is no requirement that a carrier serve *both* the residential and business segments of the mass market (the record, however, also shows that a substantial number of residential lines are being served by CLEC switches). Similarly, the other parties ask this Commission to ignore the substantial number of mass market (including residential) customers served by cable companies and CLECs affiliated with independent ILECs, but the *TRO* clearly requires that such competition must be considered.

The FCC’s triggers are specific, objective and mandatory, and this Commission does not have the discretion to alter their requirements in the manner argued by the CLECs. Therefore, it must find that the trigger for mass market switching has been met in these eight MSAs.

A. Description Of The Mass Market Switching Triggers

Under the “self-provisioning trigger,” a state “*must* find ‘no impairment’ when three or more unaffiliated competing carriers are serving mass market customers in a particular market

with the use of their own switches.” (*TRO* ¶ 501) (emphasis added). Under the “competitive wholesale trigger,” states *must* find no impairment where there are two or more unaffiliated CLECs that offer wholesale switching service to other carriers in a particular market using their own switches. (*TRO* ¶ 504). Verizon is not attempting at this time to make a showing under the competitive wholesale facilities trigger for switching, but has relied instead on the self-provisioning trigger.

The self-provisioning trigger is deliberately objective. It is assessed entirely through the application of data, rather than by the consideration of more subjective experiences, theories, estimates, opinions, and predictions. This objectivity allows trigger determinations to be made quickly and accurately, and avoids the need for “protracted proceedings.” (*TRO* ¶ 498). In fact, other than the objective count of CLECs using their own switching to serve mass market customers, “states *shall not* evaluate any other factors, such as the financial stability or well-being of the competitive switch providers.” (*TRO* ¶ 500) (emphasis added). Where, as here, the trigger has been met – indicating that a number of real world CLECs are already operating their own switches in a market – there is no need to prove in theory that those CLECs potentially might operate in that market.

B. The Relevant Geographic Market Is The Metropolitan Statistical Area

As part of evaluating whether the triggers for mass market switching have been satisfied, this Commission must undertake a “granular” analysis to define the relevant markets in which it will apply the triggers. While the FCC has delegated this task to the states, it has provided “significant guidance.” (*TRO* ¶ 495, note 1536). The *TRO* directs that “state commissions cannot define a market as encompassing an entire state” and that “they should not define the market so narrowly that a competitor serving that market alone would not be able to take advantage of

available scale and scope economies from serving a wider market.” (*Id.*) In defining a market between these two extremes, the Commission must consider factors such as “the locations of mass market customers actually being served (if any) by competitors, the variation in factors affecting competitors’ ability to serve each group of customers, and competitors’ ability to target and serve specific markets profitably and efficiently using currently available technologies.” (*TRO* ¶ 495. *See also* 47 C.F.R. § 51.319(d)(2)(i)).

Verizon has proposed a definition of the relevant markets for Pennsylvania that best meets the FCC’s *TRO* requirements. Specifically, Verizon defines the market as the Metropolitan Statistical Area (“MSA”), and seeks relief for the top three Density Cells (Cells 1, 2 and 3) in each of the MSA’s designated in its testimony. These MSAs are (1) Philadelphia-Camden-Wilmington, (2) Allentown-Bethlehem-Easton, (3) Reading, (4) Lancaster, (5) Scranton-Wilkes-Barre, (6) Pittsburgh, (7) Harrisburg-Carlisle, and (8) Lebanon.¹⁷ With Verizon’s market definition, all Density Cell 4 areas in Verizon’s territory, and all areas outside the 8 designated MSAs, would continue to have unbundled switching and the UNE platform for mass market customers.¹⁸

Verizon’s Dr. Taylor explained why these individual MSAs are the appropriate market definition under the *TRO*. An MSA is a socially and economically integrated geographic area generally covered by the same by newspapers and local radio, television and cable media.¹⁹ The

¹⁷ Verizon’s direct testimony initially sought relief for 7 MSAs. However, as explained in Verizon’s supplemental direct testimony, the Office of Management and Budget redefined what was originally the Harrisburg-Carlisle-Lebanon MSA into a Combined Statistical Area comprised of two separate MSAs: Harrisburg-Carlisle and Lebanon. Therefore, although the geographic scope of Verizon’s request for relief did not change, the number of MSAs increased from 7 to 8. *See* VZ St. 1.1 (West/Peduto Supp. Dir) at 6, n.1.

¹⁸ *See* Verizon Hearing Ex. 1 (map).

¹⁹ VZ St. 2.0 (Taylor Reb.) at 19. In fact, in its discussion of the metropolitan area to be used in the Bell Atlantic/NYNEX merger, the FCC observed that television and radio advertising markets generally encompassed the geographic area it had designated. *Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, *Memorandum Opinion and Order*, 12 FCC Rcd 199985 (1997) (“*Bell Atlantic-NYNEX Order*”) at ¶ 55-56.

federal Office of Management and Budget (“OMB”) designates the MSAs based on specific factors, including a large clustered population of at least 50,000, with adjacent areas having a high degree of community of interest with the core population center, to recognize “economic linkages between urban cores and outlying, integrated areas.”²⁰ Because the MSA approximates how mass-market services are sold (through mass-market advertising) and how services are provided (with a switch that serves a large geographic area), the MSA is the best available designation of the geographic areas in which CLEC and ILEC services likely to compete.²¹

As Dr. Taylor explained, the empirical evidence of where CLECs have actually deployed their switches and are serving customers, combined with the economic reality that mass-media advertising necessarily covers an entire MSA and that CLECs have the incentive to maximize their switching investment by serving as large a geographic area as possible, compels a finding that the MSAs are the relevant markets in which the triggers have been satisfied. The record shows that CLECs have deployed their own switches and are actually serving customers in all of these MSAs. Carriers would be expected to serve the entire MSA because, if a carrier advertised throughout the MSA, but did not serve the entire area, that would raise its costs and potentially harm its reputation. Service offerings, including offerings of discounted bundled services, are frequently rolled out by individual MSA since that is the geographic area covered by newspapers and local radio, television and cable media. Thus, all potential customers in the MSA are exposed to the same mass-market advertising messages.²²

²⁰ VZ St. 2.0 (Taylor Reb.) at 17-18 (citing 65 Fed. Reg. 82228 (2000)).

²¹ *Id.* at 18-19.

²² *Id.* at 16-19.

Defining the market as the MSA is consistent with the FCC's discussions of the issue in this and other proceedings.²³ The FCC has previously determined that MSAs are the correct geographic scope of local exchange markets in at least three contexts. First, the FCC implemented its recent order that allows customers to port their wireline telephone numbers to wireless carriers on an MSA basis.²⁴ This order is especially germane to this proceeding, because, as four of the five FCC Commissioners explicitly observed in their separate statements, one of the major implications of the order is to substantially increase the intermodal competition between wireline services (including ILEC offerings) and wireless services. Second, in its assessment of how the merger of formerly independent incumbent local exchange carriers would affect local exchange competition in the merged territories, the FCC identified specific metropolitan areas as the markets subject to a competitive assessment.²⁵ The FCC identified the metropolitan scope of advertising markets as a relevant factor in defining the market.²⁶ Third, the FCC granted ILECs price flexibility for certain interstate services on an MSA basis, concluding that "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition."²⁷ The FCC's "market definition" rule in the *TRO* is entirely consistent with its prior emphasis on the "scope of competitive entry" used to define geographic markets in its price flexibility order, and with these other orders.²⁸

²³ *Id.* at 20 (citing *Brief for Respondents*, On Petition for Review of an Order of the Federal Communications Commission, *United States Telecom Ass'n v. FCC*, No. 00-1012 (D.C. Cir.) (filed December 31, 2003) ("*Brief for Respondents*").

²⁴ *Id.* at 21 (citing *In the Matter of Telephone Number Portability and CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, (CC Docket No. 95-116) (FCC 03-284) (rel. November 10, 2003) at ¶ 29-30)).

²⁵ *Id.* at 22 (citing *Bell Atlantic-NYNEX Order* at ¶ 43).

²⁶ *Id.* (citing *Bell Atlantic-NYNEX Order* at ¶ 55).

²⁷ *Id.* (citing *Pricing Flexibility Order* at ¶ 72).

²⁸ In addition to defining geographic markets for local competition, the FCC has used MSAs in numerous other proceedings, such as in its Biennial Review of spectrum aggregation limits for wireless carriers (*In re 1998*

Notably, some of the intervenors agree with Verizon that the MSA – or the top three Density Cells within the MSA – constitutes the appropriate market for application of the *TRO* triggers.²⁹ For example, the OCA’s Dr. Loube and Mr. Curry advise that “[t]he PUC should define the markets as the density cells within the MSAs.”³⁰ They go on to explain that Density Cells 1, 2 and 3 should be considered the relevant markets, because CLEC should be able to have a switch somewhere in either Density Cells 1, 2 or 3 and build efficient backhaul facilities to bring everything back to that one switch.³¹ While the OCA witnesses do not agree that Density Cell 4 areas should be included, Verizon is not seeking relief for the Density Cell 4 areas, and thus OCA’s witnesses recognized that “[i]n practice” they “support the same market definition” as Verizon.³²

Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, 15 FCC Rcd. 22072 at ¶16 (October 17, 2000)); in defining the geographic markets for programming distributors (*In re Implementation of Section 304 of the Telecommunications Act of 1996*, 13 FCC Rcd. 14775 at ¶ 108 (June 11, 1998)); and in conducting lotteries and granting the right to acquire cellular telephone licenses. (*See In the Matter of CVS Corporation*, File No. 971-0060, Analysis to Proposed Consent Order to Aid Public Comment (June 1997)). It also used the MSA as the geographic basis for its switching exemption in the *UNE Remand Order* for CLECs serving enterprise (4-plus line) customers. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3699, (“*UNE Remand Order*”), ¶¶ 276-298. Specifically, ILECs are exempted from having to provide unbundled switching to CLECs serving customers with four or more lines in density zone one of the top 50 MSAs. *See* VZ St. 2.0 (Taylor Reb.) at 22-23.

²⁹ *See, e.g.*, OCA St. 1 (Loube/Curry Dir.) at 15; AT&T St. 2.0 (Mayo Dir.) at 19; CLEC Coalition St. 1.0 (Gillan Dir.) at 29 (LATAs are reasonable proxies for MSAs).

³⁰ OCA St. 1 (Loube/Curry Dir.) at 15

³¹ Tr. at 372. *See also* OCA St. 1 (Loube/Curry Dir.) at 15 (“Due to the relatively small size and compactness of density cells 1, 2 and 3, it appears that a CLEC should be able to build a reasonably efficient backhaul network to bring the traffic back from the incumbent’s wire centers to the CLEC switch.”)

³² OCA St. 1 (Loube/Curry Dir.) at 18. The OCA witnesses assert one exception to their agreement that all Density Cell 1, 2 and 3 areas in the relevant MSAs should be considered part of the market. They contend that the Hazleton wirecenter in the Scranton-Wilkes Barre MSA should not be included even though it is Density Cell 3, because it is “not contiguous” with other relief areas and “difficulties . . . might be incurred in building an efficient backhaul network.” OCA St. 1 (Loube/Curry Dir.) at 16. However, the OCA’s speculation is unsupported because the record shows that the same 2 or 3 CLECs are serving Hazleton and the other areas in the MSA, so they must have devised some reasonably efficient way to serve that area from their switches. *See* VZ. St. 1.2 (West/Peduto Reb.) Attach.5; Tr. at 373-374.

However, while a number of intervenor witnesses recognize that a relatively broad geographic market area is warranted under the FCC’s market definition guidelines – rather than artificially small areas such as wire centers – they go on to attempt to alter the FCC’s mandatory trigger standards to try to thwart relief from unbundling obligations anywhere within that market. For example, they argue that the entire market must fail the trigger test unless CLECs, or a particular CLEC, serves the whole market “ubiquitously.”³³ As described in Section III.E.2, below, the FCC has already addressed this question and concluded that its choice of a level of competition in its trigger analysis (three self-providing CLECs – not four, or two) accounts for the possibility that CLECs may not actually be providing service to mass-market customers using their own switches in all wire centers in the relevant geographic market. In fact, in its September 17, 2003 *Errata*, the FCC explicitly eliminated the previous requirements that a trigger carrier be “willing to provide service to all customers in the designated market” or “capable of economically serving the entire market.” *Errata* at 21. Therefore, defining the relevant market as the MSA, or the top three Density Cells within the MSA, does *not* mean that each triggering CLEC – or *any* CLEC – must be serving customers throughout the geographic market for the FCC’s self-provisioning trigger to be satisfied.

Other intervenors, notably MCI and the Pennsylvania Carriers’ Coalition (“PCC”), take the opposite position and contend that the market should be defined very narrowly, at the wire center level. Defining the relevant market as the wire center, however, runs afoul of the FCC’s admonition not to “define the market so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider

³³ See, e.g., CLEC Coalition St. 1.0 (Gillan Dir.) at 27; AT&T St. 2.0 (Mayo Dir.) at 28-29.

market.”³⁴ As Dr. Taylor explained, “no CLEC holds itself out as providing service in individual ILEC wire centers; indeed, from the end user’s perspective, ILEC wire centers are features of the ILEC’s legacy network that have no relevance for the CLEC’s marketing of its services.”³⁵ The OCA’s witnesses Dr. Loube and Mr. Curry agree, stating that wire centers “should not be used to define the market because the factors that affect an impairment analysis generally affect a geographic area that is larger than the wire center,” such as ILEC retail and UNE pricing, the design of an efficient backhaul network, and marketing of services.³⁶ AT&T’s Dr. Mayo similarly recognizes that “[d]ue to economies of scale associated with local exchange switches, the relevant geographic market is likely to be broader than single wire centers.”³⁷

In a recent decision, the Ohio Commission rejected the use of the wire center as the geographic market for the purpose of the impairment analysis, finding that the wire center was too small to exhaust economies of scale and scope. The Ohio Commission found that “there is no evidence in the record that any switch-based competitive carrier has entered a market and provided services in only a single wire center in the state of Ohio.”³⁸ Instead, the Ohio Commission constructed geographic markets by combining contiguous wire centers within each UNE pricing zone in each MSA, in a manner similar to the geographic markets proposed in the current proceeding by Verizon.³⁹

³⁴ *Id.*

³⁵ VZ St. 2.0 (Taylor Reb.) at 28.

³⁶ OCA St. 1 (Loube/Curry Dir.) at 19-20.

³⁷ AT&T St. 2.0 (Mayo Dir.) at 19, n. 3.

³⁸ VZ St. 1.2 (West/Peduto Reb.) Attachment 2 (*In the Matter of the Implementation of the Federal Communications Commission’s Triennial Review Regarding Local Circuit Switching in the [SBC Ohio and Cincinnati Bell Telephone Company] Mass Market*, The Public Utilities Commission of Ohio, *Opinion and Order*, Case Nos. 03-2040-TP-COI, 04-34-TP-COI and 04-35-TP-COI, January 14, 2004 (“Ohio Order”) at 30).

³⁹ In Ohio, each MSA would be divided into separate areas according to UNE-loop rates and those areas would be further divided into clusters of contiguous wire centers for each UNE-loop rate. *Ohio Order* at 24.

In sum, the Commission should define the relevant geographic markets as the 8 MSAs identified in Verizon's testimony, and should grant Verizon the relief it seeks for Density Cells 1, 2 and 3 in these MSAs.

C. The Commission Should Define "Mass Market Customers" As Those Customers Who Are Served By One Or More Voice Grade DS0 Circuits.

In order to apply the self-deployment trigger and determine how many carriers are serving "mass market" customers, the Commission must first determine how to distinguish between mass market customers on the one hand, and DS1 enterprise customers on the other. According to the FCC, "DS1 enterprise customers are characterized by relatively intense, often data-centric, demand for telecommunications service sufficient to justify service via high-capacity loops at the DS1 capacity and above." (*TRO* ¶ 451). Therefore, for the purposes of its impairment analysis, DS1 enterprise customers are "those customers for which it is economically feasible for a competing carrier to provide voice service with its own switch using a DS1 or above loop." (*TRO* ¶ 451 n. 1376).

Mass market customers, on the other hand, "are analog voice customers that purchase only a limited number of POTS lines, and can only be economically served via DS0 loops." (*TRO* ¶ 497). "Mass market" refers not only to residential customers, but also to business customers that do not use DS1 capacity facilities. The FCC recognized that, "[a]t some point, customers taking a sufficient number of multiple DS0 loops could be served in a manner similar to that described above for enterprise customers – that is, voice services provided over one or several DS1s, including the same variety and quality of services and customer care that enterprise customers receive." (*TRO* ¶ 497). However, the FCC left it to the states to determine where the cutoff point should be between mass market and enterprise customers, which "may be the point where it makes economic sense for a multi-line customer to be served via a DS1 loop." (*Id.*)

As set forth in the testimony of the Verizon Panel (West and Peduto), the Commission should establish that mass market customers are those customers that are actually being served with one or more voice grade DS0 circuits, while enterprise customers should be those customers actually being served by DS1 or higher capacity loops.⁴⁰ It is the objective behavior of the CLEC in the marketplace that should drive the determination of whether or not it “makes economic sense” for that CLEC to serve particular customers over DS1 loops, rather than multiple voice grade DS0 lines. This objective test better reflects actual marketplace evidence than an arbitrary “cutoff” at a particular number of lines regardless of whether the customer is actually being served as a DS1 enterprise customer or an analog mass market customer.⁴¹

The complicated alternatives proposed by some of the CLECs do not comport with the *TRO* and are unworkable from a practical perspective. For example, Sprint proposed a cost model using weighted average UNE prices across the state and a calculation of its own equipment costs for installing a channel bank at a customer premises, amortized over nine years, to establish a proposed a crossover point at 15 DS0s at a single customer premises.⁴² The PCC witnesses Schwenke, Malfara, and Dulin, argue that the determination of whether a customer is mass market or enterprise must be made on a “customer by customer” basis, but do not draw the line at the number of analog lines that serve the customer.⁴³ Rather, they propose to define mass market customers as those with \$10,000 or less in annual “TBR” (total billed local and intraLATA toll revenue) for customers that do not require CPE upgrades to utilize a DS1 facility, and \$25,000 or less in annual TBR for those customers that do.⁴⁴ MCI, on the other hand, appears to opt for the

⁴⁰ VZ St. 1.0 (West/Peduto Dir.) at 16-18; VZ St. 1.2 (West/Peduto Reb.) at 13.

⁴¹ *Id.*

⁴² Sprint St. 2.0 (Dunbar Dir.) at 24.

⁴³ PCC St. 1.0 (Schwenke, Malfara, and Dulin Dir.) at 36.

⁴⁴ *Id.* at 36-38.

FCC's 4-line cutover, although it provides no evidence whatsoever to support it.⁴⁵ All of the other parties – including AT&T⁴⁶ -- have either agreed with Verizon's approach, have offered no opinion or have made a proposal with no supporting evidence. The Rube Goldberg alternatives to Verizon's proposal should be rejected. The Commission should look at how the CLECs are actually serving their customers to determine which customers are DS0 mass market customers for the purposes of applying the mass market switching trigger.

D. The Evidence Demonstrates Significant Deployment Of Mass Market Switching In Pennsylvania And Shows That The TRO's Triggers Are Satisfied In Eight MSAs

In order to show the presence of multiple CLECs serving DS0 mass market customers with their own switching, Verizon collected and analyzed data, at the wire center level, using two sources of data maintained by Verizon. First, Verizon used its internal billing databases to determine where, and to whom, Verizon leases 2-wire and 4-wire stand-alone UNE loops (including EELs) in Pennsylvania (the "Line Count Study").⁴⁷ The purpose of this Line Count Study was to identify DS0 voice grade lines that CLECs lease from Verizon to provide local exchange service to customers *without* using Verizon's local switching under a UNE-P arrangement. As Verizon's Mr. West explained, any carrier leasing such loops from Verizon is, necessarily, providing service to customers over DS0 voice grade lines.⁴⁸ Second, in response to the Commission's Information requests, Verizon used the E911 database to determine the number of *residential* customers served by carriers that bypass Verizon's network altogether to serve mass market customers over their own loop facilities (and thus would not show up in Verizon's Line

⁴⁵ MCI St. 1.0 (Pelcovits Dir.) at 52.

⁴⁶ AT&T St. 1.0 (Kirchberger/Nurse Dir.) at 67 (Verizon's cross-over point proposal is "warranted by the facts.")

⁴⁷ VZ St. 1.0 (West/Peduto Dir.) at 21-22.

⁴⁸ VZ St. 1.0 (West/Peduto Dir.) at 21.

Count Study).⁴⁹ Verizon provided the results of this combined analysis in Attachment 2 to Verizon Statement 1.0. That evidence is sufficient on its own to demonstrate satisfaction of the FCC's mass market switching trigger in Density Cells 1, 2 and 3 within the 8 MSAs in which Verizon is seeking relief. In particular, Verizon's internal data show that 14 unaffiliated CLECs are serving mass market customers in the Philadelphia-Camden-Wilmington MSA; 8 are serving mass market customers in the Pittsburgh MSA; 6 are serving mass market customers in the Harrisburg-Carlisle MSA; 3 serving mass market customers in the Lebanon MSA; 4 are serving mass market customers in the Reading MSA; 8 are serving mass market customers in the Allentown-Bethlehem-Easton MSA; 5 are serving mass market customers in the Scranton-Wilkes-Barre MSA; and 4 are serving mass market customers in the Lancaster MSA – all using their own switching.

In addition, Verizon compared this evidence with information submitted by CLECs in response to the Commission's Preliminary Discovery Requests in Appendix A of the October 3, 2003 Procedural Order. In that Order, the Commission submitted a standardized set of discovery requests to certain "footnote 14" CLECs, asking a series of questions to assist the Commission in identifying CLECs that satisfy that FCC's mass market switching triggers. In addition to asking CLECs to identify the switches they use to serve customers in Pennsylvania, the capacity of those switches, and the ILEC wire center areas they serve, the Commission asked the CLECs to identify the total number of DS0 voice grade equivalent lines that they provide from their switches in each ILEC wire center (Switching Question #3). The Commission also asked the CLECs to break these line counts out into the total number of lines that are provided to mass market customers on the

⁴⁹ *Id.* at 25-26. As Verizon explained, in order to eliminate any overlap, Verizon only used E911 data for cable companies that provide telecommunications services. This understates the data because it excludes CLECs that are not cable companies that use their own facilities to serve mass market business customers. *Id.* at 31-32; VZ St. 1.2 (West/Peduto Reb.) at 16-17 n. 1.

one hand (*i.e.*, “residential customers” and “business customers to whom you provide only voice-grade or DS0 lines”) and enterprise customers (*i.e.*, “business customers to whom you provide DS1, ISDN-PRI, or other high capacity lines”) (Switching Question #5).⁵⁰ It is the CLEC responses to Question #5 that most precisely isolate the number of loops provided to mass market customers.⁵¹

Most (but not all) of the CLECs identified by Verizon as trigger candidates responded in whole or in part to these requests. Verizon then compared this data with the results of the Line Count Study and residential E911 analysis, both at the MSA and Density Cell level, and at the wire center level.⁵² An updated version of this comparison is attached hereto as Exhibit 1 to this Brief.⁵³

The results of this comparison demonstrate that, to the extent that the trigger CLECs provided meaningful responses to the Commission’s discovery,⁵⁴ the data confirms that the mass market trigger is satisfied in the markets in which Verizon is seeking relief (and, indeed, increases the number of triggering CLECs in the Pittsburgh MSA from eight to nine, as set forth on Exhibit 1 to this Main Brief). Although the “CLEC Counts” do not precisely match in every circumstance (nor would they be expected to match, due to a number of factors, including timing differences

⁵⁰ October 3, 2003 Procedural Order, Appendix A, Switching Questions.

⁵¹ Tr. at 170-73, 350-51.

⁵² VZ St. 1.1 (West/Peduto Suppl. Dir.), Exhibit 1. Verizon subsequently revised this document in VZ St. 1.2 (Panel Rebuttal), Attachment 5.

⁵³ As set forth in Verizon’s February 11, 2004 letter to ALJs Schnierle and Colwell, Verizon indicated that it would submit a revised version of this exhibit, with changes based on the record evidence. The specific changes made are highlighted on Exhibit 1, with the record support indicated in the notes thereto.

⁵⁴ As explained more fully below, one CLEC identified by Verizon in its Line Count Study – D&E Systems – did not respond to discovery (although its affiliate, CEI Networks, did). Another CLEC – PECO TelCove (identified as “Adelphia” in the Line Count Study) – provided a response that made a line-by-line count comparison impossible, as explained in more detail below.

and the different ways in which the CLECs responded to the Commission discovery),⁵⁵ the “CLEC Counts,” when viewed together with Verizon’s evidence from its Line Count Study and residential E911 analysis, confirm that the CLECs are, in fact, serving mass market customers in the areas identified by Verizon.⁵⁶

E. The CLECs’ Attempts To “Disqualify” Trigger Candidates Are Not Supported By The *TRO* Should Be Rejected

1. A CLEC that Serves Mass Market Customers Using its Own Switching Counts Toward the Trigger Regardless of Whether it Serves *Both* Residential and Business Mass Market Customers.

Several parties claim that the Commission should split the mass market into separate sub-markets of residential and small business customers, and require that CLECs serve *both* segments of the mass market to count toward the self-deployment trigger for mass market switching. The *TRO* precludes this sort of subdivision, and this Commission is not empowered to create such an additional standard for the FCC’s trigger.

As Verizon’s Dr. Taylor and Mr. West explained, customers are either part of the mass market or they are not, and if they are, they count toward the self-deployment trigger and relieve Verizon of its obligation to provide unbundled switching to serve *all* mass market customers, whether business or otherwise. The FCC specifically clarified this point in the *TRO* in response to criticism from one of the dissenting Commissioners:

If . . . a state finds based on the record that a cut-off of more than four lines is appropriate, more multi-line customers will be treated as mass market customers. . . . [A]s Commissioner Abernathy points out, “dozens of CLECs serve *business* customers of such size using their own switches.” *Commissioner Abernathy Statement* at 8, n. 27. Such

⁵⁵ For example, Choice One identified the number of mass market business *customers* served, not the number of lines used to serve those customers, and thus the numbers they provided in response to Switching Question #5 are smaller than the Verizon Counts of the total number of DS0 voice grade loops that it leases from Verizon. Tr. at 621-22; Choice One Ex. 1. However, when one compares the total DS0 voice grade lines that Choice One claims that it provides in each wire center in response to Switching Question #3, the numbers are closer to those in the Verizon Line Count Study.

⁵⁶ Tr. at 170-73.

widespread deployment of competitive switches would be considered under our mass market triggers. In such markets, then, it is more likely that there will be a finding of no impairment for the *entire market*, leading to significantly less unbundled switching than was available under the previous four-line carve-out.

(*TRO* ¶ 497 n. 1546) (emphasis added). In other words, CLECs that serve multi-line business customers using their own switches – as long as those customers are part of the mass market – count toward the self-deployment trigger and demonstrate non-impairment in the “entire market,” including residential customers.

Moreover, as discussed above, the FCC, in its Errata, specifically *eliminated* any requirement that CLECs offer service to all segments of the mass market to count toward the self-deployment trigger. The following shows the redlined changes to *TRO* ¶ 499 made by the FCC in the Errata:

Moreover, the identified competitive switch providers should be actively providing voice service to mass market customers in the market. ~~They must also~~ Identified carriers providing wholesale service should be actively providing voice service used to serve the mass market and be operationally ready and willing to provide service to all customers in the designated market. ~~They should be capable of economically serving the entire market, as that market is defined by the state commission. This prevents counting switch providers that provide services that are desirable only to a particular segment of the market.~~

(*TRO* ¶ 499). By eliminating the limitation that triggering carriers may not “provide services that are desirable only to a particular segment of the market,” the FCC clarified that CLECs serving one segment of the mass market – small business customers – count toward the trigger even if they do not serve the residential segment of the mass market.

Finally, the Ohio Public Utilities Commission recently rejected the same argument asserted by MCI in its nine-month proceeding:

The Commission disagrees with the request to separately analyze markets distinguishing services provided to residential subscribers and small business customers. The Commission notes that in the *Triennial Review Order*, the FCC defines mass market customers to include residential and small business voice grade customers that “purchase only a limited number of POTS lines and can be

economically served via DS0 loops.” The Commission stresses that the purpose of the impairment analysis is to assess whether or not CLECs are impaired in providing service to mass market customers if the unbundled local switching element is no longer available to them at TELRIC rates. Therefore, it is the Commission’s opinion that once an unaffiliated CLEC is determined by the Commission to be providing service to mass market customers (customers with a limited number of POTS lines regardless of whether they are residential or small business) in a particular geographic market using its own switching equipment, the CLEC will be considered as one of the “three self-provisioners of switching” for the purpose of the trigger analysis.⁵⁷

This Commission likewise should reject the CLECs’ attempts to rewrite the FCC’s trigger to require that a CLEC serve both residential and mass market business customers to count as a triggering carrier.

2. There Is No Requirement that a CLEC Serve 100% of the Defined Market in Order to Qualify Under the Trigger Analysis

The CLECs also attempt to read into the FCC’s self-deployment trigger a requirement that a triggering CLEC serve the mass market “ubiquitously” – that is, in every (or virtually every) wire center in the relevant market. For example, the PCC has gone so far as to claim that the FCC’s self-deployment trigger is not satisfied where there are multiple CLECs providing service to mass market customers using their own switches throughout the market, but the same three CLECs are not in *every* wire center in the market.⁵⁸ This reading is not only logically absurd, but it is wholly unsupported by the language of the *TRO*. In fact, the FCC deliberately eliminated any such requirement from the self-deployment trigger in its correction to ¶ 499 of the *TRO*, thus making it clear that geographic ubiquity is *not* required for a CLEC to count as a self-provider of switching services for the application of the retail trigger analysis.

⁵⁷ VZ St. 1.2 (West/Peduto Reb.) Attachment 2 (Opinion and Order, *In the Matter of the Implementation of the Federal Communications Commission’s Triennial Review Regarding Local Circuit Switching in the Mass Market*, Case No. 03-2040-TP-COI et al., issued January 14, 2004 (“Ohio Order”), at 33-34).

⁵⁸ Tr. at 692.

In particular, the FCC eliminated any requirement that self providing CLECs “be operationally ready and willing to provide service to all customers in the designated market.” Instead, the FCC clarified that this requirement applies only to *wholesale* providers of switching. Furthermore, the FCC eliminated any requirement that triggering CLECs “be capable of economically serving the entire market, as that market is defined by the state commission.” Thus, there is no “market share” requirement for the self-deployment trigger (as OCA witnesses Loube and Curry (at 37) erroneously contend)⁵⁹ or “de minimus” qualification in the *TRO* trigger analysis, nor is there any requirement that a CLEC currently serve, or be capable of serving, customers throughout the market in order to count toward the triggers, as Verizon’s Dr. Taylor explains in his testimony.⁶⁰ In fact, the FCC’s *Errata* makes it clear that the FCC did not impose any requirement that a carrier must currently be serving customers throughout the market to qualify as a triggering CLEC. In its October 9, 2003 filing in the D.C. Circuit Court opposing the USTA Writ of Mandamus, the FCC explained that

The corrected paragraph [¶ 499] does *not* require that, for purposes of the switching triggers, self-provisioning competitors must be ready and willing to serve all retail customers in the market. The Commission made similar corrections in the *Order*’s discussion of how states should analyze impairment in areas where the triggers are not met... These deletions eliminate any suggestion in the *Order* that a state’s finding of no impairment is contingent on a determination that a facilities-based competitor could economically serve all customers in the market.⁶¹

⁵⁹ OCA witnesses Loube and Curry contend that the Commission should require that *each* qualifying CLEC serve fully 3% of the market before it can be counted toward the triggers. In other words, OCA would have the Commission decline to apply the FCC’s mandatory triggers unless CLECs were serving at least 9% of mass market customers in the given market. Obviously, this is not the test established by the FCC. If the FCC had intended that there be a 9% market share requirement in the trigger, it could easily have included this requirement in Rule 319(d)(2)(iii); it did not, and the Commission cannot add such a requirement.

⁶⁰ VZ St. 2.0 (Taylor Reb.) at 5-6.

⁶¹ See VZ. St. 1.2 (West/Peduto Reb.), Attachment 3 (*Opposition of Respondents to Petitions for a Writ of Mandamus, United States Telecom Ass’n v. FCC*, No. 00-1012 (D.C. Cir.) (filed October 9, 2003), at 23).

Therefore, there is no requirement in the Order that a CLEC serve mass market customers “ubiquitously” throughout a particular market for the CLEC to count toward the self-deployment trigger for mass market switching.

3. The CLECs Have Misinterpreted the Requirement that a CLEC Be “Currently Offering and Able To Provide Service” to Improperly Eliminate Trigger Candidates

Several of the CLECs also argue that the requirement that a CLEC be “currently offering and able to provide service” and “likely to continue to do so” gives the Commission discretion to examine each CLEC’s business plan to determine, for example, whether the CLEC is somehow growing its UNE-L business,⁶² or is financially able to continue to provide service using its own switches,⁶³ or is moving toward a greater reliance on UNE-P⁶⁴ or some other alternative to Verizon’s switching, such as “Voice Over Internet Protocol” (“VoIP”).⁶⁵ However, nothing in the *TRO* gives state commissions the discretion to consider such subjective criteria. To the contrary, the FCC found that states could *not* look at issues such as the “financial stability or well-being of the competitive switching providers” in applying the triggers. (*TRO* ¶ 500). The FCC was clear that, in examining whether a CLEC is “likely to continue” to “offer[] and [be] able to provide service,” the Commission may look only at evidence that shows that a CLEC has affirmatively indicated that it is exiting the market and will no longer serve customers – such as by filing a notice to terminate service – not at evidence that the carrier may be having financial difficulties, or losing customers to its competitors, or increasing its reliance on a UNE-P strategy as a preferred business strategy. (*Id.* and note 1556). Indeed, as the Ohio Commission recently ruled, “the

⁶² MCI St. 1.0 (Pelcovits Dir.) at 60; CLEC Coalition St.1.0 (Gillan Dir.) at 48-49; Sprint St. 1.0 (Sywenki Dir.) at 21.

⁶³ PCC St. 1.0 (Schwencke, Malfara and Dulin Dir.) at 46-47; CLEC Coalition St. 1.0 (Gillan Dir.) at 38.

⁶⁴ PCC St. 1.0 (Schwencke, Malfara and Dulin Dir.) at 45-47; CLEC Coalition St. 1.0 (Gillan Dir.) at 52; AT&T St. 1.0 (Nurse-Kirchberger Dir.) at 46.

market entry of competitors using UNE-P to serve customers, and their business plans that are focused on using the highest profitability entry method, are irrelevant to the determination whether the competitive provider is impaired without access to the unbundled local switching.”⁶⁶ In other words, the fact that a carrier has found it more profitable to rely on UNE-P for the majority of its mass market customers has no bearing on the trigger analysis, which looks at whether a carrier serves any mass market customers using its own switching.

4. Cable Telephony Is a Clear and Unambiguous Substitute to Verizon Local Exchange Service

Another purported “exclusion” advocated by the CLECs is that cable telephony providers cannot count toward the self-deployment trigger. The CLECs’ arguments are primarily based on a claim that, because cable telephony providers do not use the incumbent’s loop facilities, their presence in the market does not provide evidence of non-impairment. However, the FCC found that precisely the opposite is true. By setting the trigger at three self-provisioning CLECs, the FCC expressly took into account that some of those triggering carriers would be using their own loops:

We recognize that when one or more of the three competitive providers is also self-deploying its own local loops, this evidence may bear less heavily on the ability to use a self-deployed switch as a means of accessing the incumbent’s loops. Nevertheless, the presence of three competitors in a market using self-provisioned switching and loops shows the feasibility of an entrant serving the mass market with its own facilities. [*TRO ¶ 501, n. 1560*]

In other words, the FCC found that the trigger is met even if *all* of the triggering carriers are using their own loop facilities to serve the mass market. This Commission does not have the discretion to alter the FCC’s decision on this point. The fact that cable companies are “bypass” carriers is *not* grounds for excluding them from the trigger. Quite to the contrary, the FCC held that “states

⁶⁵ CLEC Coalition St. 1.0 (Gillan Dir.) at 51; AT&T St. 1.0 (Nurse-Kirchberger Dir.) at 44.

⁶⁶ VZ St. 1.2. Attachment 2 (Ohio Order at 33).

also *shall* consider carriers that provide intermodal voice service using their own switch facilities” for the purposes of the triggers. (*TRO* ¶ 499 n. 1549) (emphasis added). Therefore, the Commission must include cable telephony in the trigger analysis as long as it is comparable in quality to the ILEC’s phone service. (47 C.F.R. § 51.319(d)(2)(iii)(A)).

There can be no serious claim, based on the evidence in the record, that cable telephony is not “comparable” in quality to traditional telephone service. As Verizon’s Dr. Taylor explained, cable telephony is an unambiguous substitute for ILEC local exchange service, based on service characteristics, quality and price.⁶⁷ Moreover, the quality of circuit switched cable telephony – like Verizon’s service – is regulated by this Commission.⁶⁸ Although several CLECs have argued that cable telephony does not meet the “comparable in quality” standard,⁶⁹ their arguments are nothing more than claims that cable telephony is not *identical* to traditional telephone service offered by ILECs. For example, AT&T’s witnesses Kirchberger and Nurse and MCI’s witness Pelcovits argue that cable telephony is not comparable in quality because it does not provide remote back-up power in the case of a power outage.⁷⁰ However, this is no different than with cordless phones, which do not work in the event of a power outage – yet, as Mr. Kirchberger admitted, millions of customers of traditional telephony choose to rely on them exclusively, and no longer have hard-wired phones.⁷¹ Clearly, these customers have determined that the other benefits of such devices outweigh any disadvantages they may have in other respects, and treat

⁶⁷ VZ St. 2.0 (Taylor Reb.) at 25-26.

⁶⁸ Tr. at 512.

⁶⁹ See, e.g., MCI St. 1.0 (Pelcovits Dir.) at 63-64.

⁷⁰ MCI St. 1.0 (Pelcovits Dir.) at 63-64; Tr. at 510-11.

⁷¹ Tr. at 511.

them as substitutes for traditional phones. The same applies for cable telephony.⁷² In any event, the article upon which MCI witness Pelcovits relies to claim that cable telephony lacks power back-up in fact indicates that leading cable telephony providers, such as Comcast, do provide back-up power for their circuit-switched cable telephony customers.⁷³

Moreover, it is certainly disingenuous for AT&T to claim that the same AT&T Broadband service that it sold to Comcast less than 18 months ago is not comparable in quality to Verizon's service.⁷⁴ In its 2001 Annual Report to its shareholders, AT&T represented that "AT&T Broadband Digital Phone service combines digital clarity, functionality, reliability and affordability."⁷⁵ It further quoted one of its Pennsylvania service technicians as follows:

"The customers I talk to really like our AT&T Digital Phone service," says Jack Follmer, an AT&T Broadband service technician in Pittsburgh. "It gives them the same quality as a regular phone call at a price that's better than the competition."⁷⁶

Clearly, AT&T was sufficiently satisfied with the quality of its product to make these representations to its investors in its annual report.

Finally, there is no more telling evidence that consumers view cable telephony as comparable in quality to Verizon service than the sheer number of residential customers in Pennsylvania – almost **[BEGIN CLEC PROPRIETARY]** **[END CLEC**

⁷² Mr. Kirchberger's comparison to wireless telephony – which the FCC found is not comparable in quality – is inapposite. There is no evidence in the record of this proceeding that wireless customers are abandoning their landline phones in large numbers in the Commonwealth. There is such evidence for cable telephony customers.

⁷³ MCI St. 1.0 (Pelcovits Dir.), Exhibit MDP-6 ("such leading cable phone players as Comcast and Cox Communications now provide 'network powering' of customer premises telephony devices for their older circuit-switched services").

⁷⁴ Tr. at 508. Indeed, AT&T still provides many of the underlying services to Comcast to support its provision of circuit switched cable telephony, pursuant to a contract that, according to AT&T, "replaces an AT&T intercompany agreement" under which AT&T's affiliates operated the AT&T Broadband assets in Pennsylvania prior to the sale to Comcast. VZ Cross Ex. 6, response to Switching Question 7. As set forth in TRO ¶ 499 n. 1551, Comcast's use of AT&T's switches under this type of arrangement to serve more than **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** mass market customers in Pennsylvania qualifies Comcast as a self-provider of switching under the FCC's rules.

⁷⁵ VZ Cross Ex. 1.

PROPRIETARY] – that currently subscribe to cable telephony service.⁷⁷ Given that consumers substitute cable telephony for traditional voice service, they have voted with their feet with respect to whether that service is “comparable” in quality.

5. CLECs with ILEC Affiliates Are Trigger Candidates

The CLECs further claim that the Commission may not count CLEC affiliates of ILECs operating out-of-franchise as triggering CLECs. Again, there is no basis in the FCC’s rules for this limitation.

To the contrary, the FCC affirmatively states that affiliates of incumbent LECs serving the mass market outside of the incumbent’s territory can count toward the self-deployment trigger, if they otherwise meet the requirements of the trigger. In particular, although the FCC found that “competitive deployment” by “large, independent incumbent LECs expanding into adjacent areas” was not enough by itself to establish non-impairment on a national basis, (*TRO* ¶ 440), it nevertheless held that such deployment “could be considered by states in determining whether the triggers . . . have been satisfied in specific markets.” (*TRO* ¶ 440 & n. 1352). Therefore, to the extent that Verizon demonstrates – as it clearly has – that CLEC affiliates of other ILECs are actively serving mass market customers out-of-franchise in Verizon’s territory, those CLECs are triggering CLECs, just like any other CLEC. There is no legal basis in the FCC’s regulations or the FCC’s Order to exclude them. Indeed, each of the CLEC affiliates of ILECs identified in Verizon’s Line Count Study – CEI Networks, D&E Systems, CTSI (Commonwealth) and Penn Telecom – are all actively competing with Verizon in the mass market using standalone voice

⁷⁶ VZ Cross Ex. 7.

⁷⁷ See ALJ Ex. 10 (RCN Responses to Appendix A Discovery); ALJ Ex. 12 (Comcast Responses to Appendix A Discovery).

grade UNE loops leased from Verizon.⁷⁸ Moreover, their CLEC territories are often larger than the franchise territories of their incumbent affiliates.⁷⁹ Thus, their presence in the market clearly demonstrates that they have overcome the supposed operational impairments identified by the FCC.

Nevertheless, AT&T's witnesses Kirchberger and Nurse claim that the FCC's requirement that qualifying CLECs must be using "separate switches" means that a CLEC using the switch of its ILEC affiliate is not a qualifying CLEC. This is a gross misreading of the FCC's order. The purpose of the "separate switch" requirement is to "avoid[] counting as a true alternative a provider that uses the switching facilities of the incumbent LEC or another alternative provider *that has already been counted.*" (*TRO* ¶ 499) (emphasis added). In other words, of the three triggering CLECs, each must be using a different switch. However, it does not mean that a triggering CLEC that uses the switch of its parent company or affiliate does not count. To the contrary, the FCC expressly stated that "[a]ffiliated companies will be counted together, in order to prevent gaming." (*TRO* ¶ 499 n. 1550). Therefore, for the purposes of the triggers, all affiliated companies are considered to be the same company. Just as Verizon cannot count two affiliated companies – CEI Networks and D&E, for example – as separate qualifying CLECs for the purposes of the triggers, neither can D&E Systems and CEI Networks claim that they are separate companies from their parents and affiliates from which they obtain local circuit switching. Otherwise, CLECs could disqualify themselves as trigger candidates merely by transferring

⁷⁸ Exhibit 1 to this Brief.

⁷⁹ VZ Cross Ex. 13 (showing the reach of Penn Telecom's CLEC territory, which dwarfs the territory of its incumbent affiliate).

technical ownership of the switch to an affiliate. The FCC's rules do not permit this type of gaming.⁸⁰

6. Adelphia Should Count as a "Trigger" Provider

At the hearing, there was considerable discussion concerning the numbers identified by Verizon in the "Verizon Counts" and the "CLEC Counts" columns of Rebuttal Attachment 5 for the carrier identified as "Adelphia," and whether Adelphia should be considered a "trigger" carrier. Verizon offers the following clarification, based on the record evidence:

First, as Verizon's witness Mr. West explained, the "Adelphia" in Rebuttal Attachment 5 for whom Verizon identified lines in the "Verizon Counts" column refers to two different entities. The first is the cable company, Adelphia Communications, hereinafter referred to as "Adelphia Cable."⁸¹ The lines attributable to Adelphia Cable were obtained from the residential E911 database and represent residential customers only.

The second entity identified in the "Verizon Counts" column is PECO TelCove, formerly known as PECO Hyperion.⁸² The lines attributable to PECO TelCove are standalone voice grade UNE loops identified in Verizon's Line Count Study. At one time, PECO TelCove and Adelphia Cable were affiliates, and thus they are counted together in Verizon's Line Count Study. However, as indicated in Verizon's Rebuttal Testimony at 22 n. 5, Verizon recently learned that Adelphia Cable and PECO TelCove may no longer be affiliates, and thus it may be appropriate to count them as two separate triggering CLECs. Therefore, for the convenience of the Commission,

⁸⁰ AT&T also claims that VoIP providers should not be included in a "triggers" analysis. Verizon has not directly relied on providers of VoIP as triggering CLECs for the purposes of the mass market trigger, since to date, Verizon has not been able to discern the physical locations of actual customers of such carriers (such as Vonage) based on available data. Nevertheless, the *TRO* clearly contemplates that they are properly considered as trigger candidates. *TRO* 499 n. 1549 (noting that packet switched service to the mass market counts toward the triggers).

⁸¹ VZ St. 1.2 (West/Peduto Reb.) at 22 n. 5.

⁸² Tr. at 333.

Verizon has revised Exhibit 1 to separately identify the two different entities, based on the record evidence.

Second, with respect to the “CLEC Counts” column, Adelphia Cable was not a footnote 14 CLEC, and did not respond to the Commission’s discovery requests or otherwise participate in this proceeding. Thus, Adelphia Cable has neither confirmed nor refuted the evidence provided by Verizon from residential E911 listings.

The “TelCove” entities, including PECO TelCove, on the other hand, did respond to the Commission’s discovery requests and to a subsequent Verizon subpoena seeking clarification of those responses. Unfortunately, the response for “TelCove” included line counts not only for PECO TelCove (the entity that currently leases mass market loops from Verizon) but also lines provided by four other entities, including Adelphia Business Solutions Operations, Inc. (“Adelphia Operations”). Adelphia Operations is the entity that “provides services pursuant to the Commonwealth Telecommunication contracts.”⁸³ PECO TelCove and its affiliates (collectively “TelCove”) did not clarify this point until late on the Friday before the hearings in this matter, and thus Verizon was not aware of it until after hearings had commenced.⁸⁴

To be clear, Verizon does *not* intend to rely on lines provided to the Commonwealth in support of its triggers case. Verizon, however, has no means to separate out the Commonwealth contract lines from the mass market lines provided by PECO TelCove, despite its repeated attempts to obtain clarifying information from TelCove to permit it to do so.⁸⁵ Therefore, to

⁸³ ALJ Ex. 1 at 1.

⁸⁴ Tr. at 161; ALJ Ex. 1 at 1.

⁸⁵ As ALJ Ex. 1 shows, Verizon not only issued a subpoena to TelCove in an attempt to obtain information concerning its service to mass market customers in Pennsylvania, but it also sought clarification through follow-up questions to TelCove’s counsel. In the end, however, those clarifications were only marginally helpful.

prevent any further confusion concerning the import of the TelCove discovery responses, Verizon has eliminated all line counts for TelCove in the “CLEC Counts” in Exhibit 1.

This does not mean, however, that the information in the “Verizon Counts” column should be disregarded. To the contrary, Verizon’s Line Count Study is solid evidence that PECO TelCove is currently leasing standalone voice grade UNE loops to serve mass market business customers in the areas identified by Verizon and should therefore be recognized as a “triggers” carrier. Moreover, *none* of those lines are attributable to the Commonwealth contract, since – according to TelCove -- PECO TelCove is not the entity that provides service to the Commonwealth.⁸⁶ Instead, TelCove identifies PECO TelCove as the entity that “provides service to general business customers in the Philadelphia/Allentown market.”⁸⁷ Therefore, the unrebutted evidence demonstrates that PECO TelCove is a triggering CLEC in the Allentown, Harrisburg, Philadelphia, and Scranton MSAs based on the results of Verizon’s Line Count Study.

In sum, there are indisputably three or more CLECs providing voice service to mass market customers using their own switching in each of these relevant markets. This Commission therefore must find the FCC’s objective self-provisioning trigger for mass market switching to be satisfied for the Density Cells 1, 2 and 3 areas in the 8 MSAs identified in Verizon’s testimony.

IV. DEDICATED TRANSPORT

For dedicated transport – fiber optics dedicated to a particular customer or competitive carrier used for transmission directly or indirectly between two or more Verizon central or tandem offices – the record shows widespread deployment by competitors of their own facilities, both as dark fiber and “lit” with optronics to support varying transport capacities or speeds. Therefore, the

⁸⁶ ALJ Ex. 1 at 1.

⁸⁷ *Id.*

FCC’s “self-provisioning” and “wholesale” triggers are satisfied for hundreds of dedicated transport routes in Pennsylvania. The CLECs largely do not dispute the existence of their numerous operational collocation arrangements fed with non-Verizon fiber, which was revealed by Verizon’s thorough inspection process and confirmed by discovery. They also do not deny the existence of extensive CLEC fiber networks and SONET fiber rings in Pennsylvania.

The primary dispute – as with switching – surrounds some CLECs’ attempts to create generalized, non-existent “exceptions” to the transport triggers based on erroneous interpretations of the FCC’s rules to argue that *none* of their robust, extensive fiber networks “count” as dedicated transport routes for purposes of the triggers. Again, it is beyond this Commission’s authority to alter the FCC’s mandatory triggers in the manner argued by the intervenors, and the evidence requires a conclusion that the transport triggers have been met for the identified routes.

A. Description Of The Triggers For Dedicated Interoffice Transport

The FCC authorized the state commissions to determine the specific transport routes that meet one or both of two objective triggers – which show that competing carriers are already providing non-ILEC transport facilities, either to themselves (self-provisioning trigger) or to other carriers (wholesale trigger). To count toward the triggers, the transmission facility must be capable of providing transport between Verizon wire centers. This condition is satisfied if a carrier has operational collocation arrangements in a pair of Verizon wire centers and has fiber that physically connects those arrangements.⁸⁸

The self-provisioning trigger is met if *three or more* unaffiliated competing carriers have deployed along a particular route their own dark fiber or DS3 transport facilities. *TRO* ¶¶ 405-411. Leased “dark fiber” is considered to be that carrier’s own fiber for purpose of applying the

⁸⁸ The FCC made clear in its *TRO* that “[c]ollocation may be in a more traditional collocation space or fiber can be terminated on a fiber distribution frame.” *TRO* ¶ 406 n.1257.

self-provisioning trigger. If the carrier has attached its own electronics to activate the leased dark fiber at a DS3 level, the activated fiber is also considered the carrier's own DS3 transport. (*TRO* ¶ 408).

The wholesale trigger is met for dark fiber, DS1, and DS3 interoffice transport facilities if there are "two or more alternative transport providers, not affiliated with each other or the incumbent LEC, immediately capable and willing to provide transport at a specific capacity of transport on a route." (*TRO* ¶ 400). Dark fiber obtained as an unbundled network element from Verizon counts as the buying carrier's own fiber if that carrier attaches its own electronics and offers the activated fiber at wholesale. (*TRO* ¶ 416).

If this Commission finds that either trigger is met for a route, it "must make a finding of non-impairment," and "the incumbent LEC will no longer be required to unbundle that transport along that route[.]" (*TRO* ¶¶ 400, 411; *see also TRO* ¶ 405).

B. Verizon's Transport Claims Are Largely Undisputed.

Verizon's transport triggers case is based on facts that are largely undisputed, including the results of Verizon's thorough visual inspection of operational fiber-fed collocation arrangements, as well as CLECs' admissions in discovery regarding their transport facilities and reasonable conclusions regarding the configuration of the CLECs' networks. In some cases the CLECs have ignored these facts completely, in the hopes that the Commission will agree with their flawed "burden of proof" argument (discussed above), while in other cases the CLECs have either expressly or implicitly conceded these facts, but argued that they should not be interpreted as required by the *TRO*. These uncontested facts are the critical building blocks that demonstrate that the transport triggers are met on the routes identified by Verizon in its updated "pairing report."⁸⁹

⁸⁹ Attached as Exhibit 2 to this Brief is Verizon's updated pairing report, based on evidentiary developments at the hearings.

Verizon conducted physical inspections of all collocation arrangements included in its original triggers case, and determined where CLECs had powered equipment in place and non-Verizon fiber optic cable that both terminated in the collocation facility and left the Verizon wire center.⁹⁰ There is no factual dispute about the results of this inspection. No carrier has identified *even a single instance* in which Verizon's internal information misidentified a collocation arrangement. In fact, the one carrier to dispute Verizon's visual inspections – Cavalier – withdrew those portions of its testimony at the hearing, acknowledging that they were erroneous, and that Verizon's evidence is correct.⁹¹ Verizon's identification of operational collocations fed by non-Verizon fiber is based on this inspection evidence and on the carriers' discovery responses.

There is also no real dispute over many of the operational assumptions regarding CLEC network configurations – supported by the expert testimony of Verizon's experienced network witness, Mr. Peduto – that would demonstrate the existence of transport routes between these operational CLEC collocations and the capacities of such transport.

First, as Verizon explained in its initial testimony, CLECs that self-provision transport deploy fiber optic cable, activate those facilities at an OCn level (typically OC12 or OC48), and then attach the optronics required to provide the lower speed services sought by their end user customers, including DS1s and DS3s.⁹² These basic facts are consistent with the FCC's factual determinations in the *TRO*⁹³ were not disputed by any CLEC.

⁹⁰ VZ St. 1.0 (West/Peduto Dir.) at 45-47.

⁹¹ VZ St. 1.2 (West/Peduto Reb.) at 52-54 (noting that Verizon's visual inspection process did not locate non-Verizon fiber at a handful of Cavalier collocations, but that Cavalier itself had said in discovery responses that it did not use UNEs at those collocations); ALJ 17A; Tr. at 701-10, 736-37.

⁹² VZ St. 1.0 (West/Peduto Dir.) at 39-40, 48-51.

⁹³ *E.g.*, TRO ¶¶ 370-372.

Second, CLECs typically deploy fiber optic rings that physically connect their switching locations or points of presence in the LATA and various customer premises, in addition to connecting to various Verizon wire centers.⁹⁴ This, too, is completely consistent with the FCC’s factual findings in the *TRO* about how CLECs deploy dedicated transport facilities.⁹⁵ Because competitive facilities are deployed *in rings*, if the same carrier has fiber facilities in two Verizon wire centers in a LATA, the Commission can reasonably find that those fiber rings are part of a CLEC-operated fiber network that is capable of carrying traffic to and from all Verizon wire centers physically connected to the network. No carrier in this proceeding has claimed to have done anything other than deploy SONET facilities configured in fiber rings ultimately connected to the rest of their network, and no CLEC has claimed that its fiber networks are not *physically connected* to the Verizon wire centers identified by Verizon.⁹⁶

Many CLECs, including [BEGIN PROPRIETARY] ⁹⁷ [END PROPRIETARY] have deployed more than one fiber ring in Pennsylvania. If a carrier has deployed more than one fiber ring in a LATA, there will be fiber facilities that physically connect those rings.⁹⁸ No carrier is going to deploy a fiber ring that is incapable of transmitting traffic to another of its fiber rings. While the CLECs have tried to obfuscate this point by arguing

⁹⁴ VZ St. 1.0 (West/Peduto Dir.) at 48.

⁹⁵ VZ St. 1.0 (West/Peduto Dir.) at 39-40, 48-51.

⁹⁶ AT&T claimed that it “could” be operationally impaired from carrying traffic between the Verizon wire centers that are admittedly physically connected. AT&T St. 1.0 (Kirchberger/Nurse Dir.) at 105. However, as discussed in Section E.4 below, AT&T’s operational impairment argument boils down to its suggestion that transporting traffic between Verizon wire centers “could” require AT&T to make investment in *unspecified* “product management; engineering; equipment EF&I; and augmentation applications.”

⁹⁷ [BEGIN PROPRIETARY] PROPRIETARY] Tr. at 479.

[END

⁹⁸ VZ St. 1.0 (West/Peduto Dir.) at 47-48; VZ St. 1.1 (West/Peduto Supp. Dir.), at 15.

hypothetically that their own networks or CLEC networks generally *might* not be interconnected,⁹⁹ no carrier has identified which of its fiber rings are not connected to its other fiber rings, let alone how any such purported lack of interconnection affects the transport routes that meet the FCC’s triggers.¹⁰⁰ And these CLECs know, of course, where and how their fiber rings are deployed and connected.¹⁰¹

Third, no carrier – including AT&T -- claims that it does not have the digital cross connect equipment at its switching hub that would allow it to provide a dedicated circuit among Verizon wire centers physically connected to the carrier’s fiber ring. Indeed, *AT&T admitted that it has digital cross connect equipment at its switching hub.*¹⁰² Therefore, even though the FCC did not define “dedicated transport” to require a dedicated circuit, even if it did, there is no real factual dispute that AT&T and the other CLECs have the digital cross connect equipment already in place in their switching locations to provide just that.

C. The Record Evidence Demonstrates That The Dedicated Transport Routes Identified By Verizon Meet One Or Both Of The FCC’s Triggers

Based on these largely undisputed facts about the CLECs’ transport networks, Verizon has shown that it meets the FCC’s transport triggers for hundreds of separate routes in Pennsylvania. In a number of cases, described below, Verizon adjusted the information presented in its initial and supplemental testimony to conform to new or different evidence presented at the hearings. This combined and adjusted evidence is summarized in a new “pairing report” in Exhibit 2, subparts A-D to this brief, in which Verizon summarizes the record evidence for each trigger, by

⁹⁹ See, e.g., MCI St. 1.0 (Pelovits Dir.) at 88-90;.

¹⁰⁰ Tr. at 480 (Verizon: “Has AT&T deployed facilities that allows or permits traffic to go from one AT&T ring to another AT&T ring?” AT&T: “On some parts of the network, yes. “)

¹⁰¹ See, e.g., Tr. at 412 (Pelcovits cross examination).

¹⁰² Tr. at 438 [BEGIN PROPRIETARY]
PROPRIETARY]

[END

carrier, type of capacity (*i.e.*, DS1, DS3, and dark fiber), and LATA. Verizon asks the Commission to grant it relief on each of the transport routes identified in Exhibit 2, subparts A-D.

1. The Self-Provisioning Trigger for DS3-Level Transport

The record evidence shows that there are 363 transport routes meeting the FCC's trigger for self-provisioned DS3-level services. There are three transport routes meeting this trigger in the Harrisburg LATA (LATA 226), 253 in the Philadelphia LATA (LATA 228), one in the North East LATA (LATA 232), and 106 in the Pittsburgh LATA (LATA 234). *See* Exhibit 2(A).

The FCC's self-provisioning trigger is met if there are at least *three* carriers that are operationally ready to self-provision transport between two Verizon wire centers. The record evidence on the transport routes meeting the FCC's self-provisioning trigger for DS-3 level transport is presented, by LATA, Verizon wire center, and competing carrier, in Exhibit 2(A).¹⁰³

Verizon made the following adjustments to its analysis to reflect evidence presented at the hearings:

- Verizon removed the collocation arrangements that Allegiance mistakenly identified in response to the Commission's transport discovery requests.¹⁰⁴

¹⁰³ For example, in the Harrisburg LATA (LATA 226), the first Verizon wire center in the pair – Camp Hill (CPHLPACH) – is shown in the second and third columns of Exhibit 2(A). The fourth and fifth columns in Exhibit 2(A) then show that two other Verizon wire centers in LATA 226 – Harrisburg (HRBGPAHA) and Lancaster (LNCSPALA) – have three or more competing carries in common with the Camp Hill wire center. There are four competing carriers with DS-3 level transport in common at the Camp Hill and Harrisburg wire centers [BEGIN PROPRIETARY] [END PROPRIETARY], and three competing carriers [BEGIN PROPRIETARY] [END PROPRIETARY] with DS-3 level routes between the Harrisburg and Lancaster wire centers. The proprietary version of this attachment filed with the Commission identifies the competing carriers on a route-by-route basis. Carriers' names have been removed from the public version of Exhibit 2(A).

¹⁰⁴ Specifically, in responding to the Commission's discovery requests, Allegiance reported having operational collocation arrangements fed with non-Verizon fiber at scores of Verizon wire centers. VZ St. 1.2 (West/Peduto Reb.) at 60-61; ALJ Ex. 5 (Allegiance's response to Commission's Appendix A Discovery Requests, Transport Table A). In its testimony, however, Allegiance indicated that it had misunderstood the Commission's requests, and, therefore, had mistakenly reported that it used non-Verizon fiber at dozens of Verizon wire centers where it in fact uses UNE transport. Allegiance St. 1.0 (Anderson Dir.) at 7; VZ St. 1.2 (West/Peduto Reb.) at 60-61. Verizon's new pairing report reflects Allegiance's corrections.

- Verizon also changed a small number of Verizon wire centers at which Cavalier has operational collocation agreements fed with non-Verizon fiber. Cavalier’s witness, Mr. Vermuelen, testified that, in responding to the Commission’s transport discovery requests, Cavalier misreported where it has operational collocation arrangements fed with non-Verizon fiber.¹⁰⁵ Verizon modified its information on Cavalier’s collocation arrangements to reflect the corrections made by Cavalier, removing the wire centers where Cavalier now says it uses Verizon fiber, and adding wire centers where Cavalier says it uses non-Verizon fiber.

As a result of these adjustments, Verizon is now seeking relief for 135 fewer self-provisioned DS3 transport routes (*i.e.*, 363 routes, as opposed to the 498 routes presented in Verizon’s supplemental testimony). For most if not all of these 363 transport routes the *sole issue* is whether, as AT&T, Allegiance, XO, and others mistakenly argue, the FCC’s rules should be interpreted to exclude *all* competitive transport facilities in Pennsylvania (and elsewhere).¹⁰⁶ As a factual matter, however, there is no real dispute that the carriers identified by Verizon in Exhibit 2(A), including **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** self-provision DS3-level transport precisely where Verizon claims they do. DS3-level transport is the essential building block of modern telecommunications networks, and as the record shows, is provided by all self-provisioning carriers.

For the more significant carriers, the record shows:

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¹⁰⁵ VZ St 1.2 (West/Peduto Rebuttal) at 52-54; Cavalier (Direct) Ex. 1, at 4-5, and 6; ALJ Ex. 17A; Tr. at 701-10, 736-37.

¹⁰⁶ See Section IV.E of this Brief.

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¹⁰⁸ 47 C.F.R. § 51.318(e)((2)(i)(A)(1).

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¹⁰⁹ See Section IV.E of this Brief.

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¹¹² See *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067, 1070, 63 Pa. Commw. 238 (Pa. Commw. 1981) (citing *Behrend v. Bell Telephone Co.*, 363 A.2d 1152 (Pa. Commw. 1980)); see also *Kossman v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Commw. 1997).

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¹¹⁴ 47 C.F.R. 51.319(e)(2)(i)(A)(1).

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¹¹⁶ 47 C.F.R. 51.319(e)(2)(i)(A)(1).

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¹¹⁹ ALJ Ex. (responding to the Commission’s transport question 3 that the “transport technology” used by [BEGIN PROPRIETARY] is [END PROPRIETARY] VZ. St. 1.2 (West/Peduto Rebuttal) at 72.

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123 PTI Ex. 1; Penn Telcom St. 1.0 (Myers Dir.) at 28 **[BEGIN PROPRIETARY]**
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128 47 C.F.R. § 51.318(e)(2)(i)(A)(1).

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In summary, the record evidence overwhelmingly confirms that the carriers identified on Verizon's Exhibit 2(A) self-provision DS3-level transport. The Commission should therefore find that the 363 transport routes identified in Verizon's Exhibit 2(A) meet the FCC's trigger for self-provisioned DS3-level transport.

2. The Self-Provisioning Trigger for Dark Fiber Transport

The record evidence proves that 359 transport routes meet the FCC's trigger for self-provisioned dark fiber. *See* Exhibit 2(B). There are three transport routes meeting the dark fiber trigger in the Harrisburg LATA (LATA 226), 263 transport routes in the Philadelphia LATA (LATA 228), one route in the North East LATA (LATA 232), and 92 routes in the Pittsburgh LATA (LATA 234). The increase in the number of routes meeting the self-provisioned dark fiber trigger – *i.e.*, from 245 routes in Verizon's supplemental testimony to the 359 routes requested here -- is due to the additional information provided by Telcove in its supplemental response to the Commission's discovery.¹³¹

The Commission should accept Verizon's un rebutted evidence that all carriers with self-provisioned fiber transport facilities meet the FCC's self-provisioning trigger for dark fiber. The CLECs have not put forward *any* evidence challenging Verizon's conclusion that all self-provisioned fiber transport facilities have unlit fibers, and, therefore, meet the FCC's self-provisioning trigger for dark fiber. As MCI admitted: "it is true that no carrier would place only enough fiber capacity to serve its existing demand."¹³² As a matter of basic network engineering,

¹³¹ ALJ Ex.1.

¹³² MCI St. 1.0 (Pelcovits Dir.) at 99.

the vast majority of self-provisioned fiber transport facilities have spare fiber. Carriers do not incur the large fixed and sunk costs required to self-provision fiber transport facilities without allowing for ample unlit fiber as spares, let alone without leaving even a single strand of dark fiber. *No* carrier that self-provisions its own transport facilities has challenged this common sense conclusion by claiming that its own transport facilities, or the transport facilities of any other carrier, do not contain unlit fibers.¹³³ *None* of the carriers that Verizon identified in its supplemental testimony as self-provisioning dark fiber, and that filed testimony in this proceeding, has challenged Verizon on this point. To be sure, Penn Telecom and Sprint testified that Verizon's conclusion *might* not be correct, but neither offered any facts – *even about their own transport facilities* – to rebut Verizon's conclusion. Penn Telecom complains about difficulties Penn Telecom purportedly has experienced obtaining dark fiber UNEs from Verizon, but never says that it has no unlit fibers in its own transport facilities.¹³⁴ And Sprint witness Mr. Dunbar merely offers a laundry list of hypothetical reasons why CLEC facilities might not have unlit fibers in their transport facilities, without identifying even a single carrier – including Sprint – that has deployed facilities in a manner consistent with those hypotheticals.¹³⁵

Verizon's evidence that all self-provisioned fiber transport routes have unlit fiber stands un rebutted. Based on the record evidence, the Commission should therefore find that the 359 transport routes identified in Verizon's Exhibit 2(B) meet the FCC's trigger for self-provisioned dark fiber.

¹³³ The arguments made by AT&T and other CLECs that their transport facilities are not operationally ready because they do not presently carry traffic are inapplicable to self-provisioned dark fiber: No optronics or equipment is required for self-provisioned dark fiber because the fiber is not lit, nor is traffic carried over dark fibers. The retail customers of self-provisioning carriers do not use dark fiber.

¹³⁴ Penn Telcom St. 1.0 (Myers Dir.) at 28-30.

¹³⁵ Sprint St. 2.0 (Dunbar Dir.) at 14, 18-20.

3. The Wholesale Trigger for DS1s and DS3s

Verizon seeks relief on 772 transport routes meeting the FCC's wholesale triggers for both DS1-level and DS3-level transport. There are 15 routes meeting the FCC's wholesale triggers for DS1-level and DS3-level transport in Harrisburg (LATA 226), 451 routes meeting each of those triggers in Philadelphia (LATA 228), 6 routes meeting the triggers in North East LATA (LATA 232), and 300 routes meeting the triggers in the Pittsburgh LATA (LATA 234). *See* Exhibit 2(C).

The FCC's wholesale trigger is met if there are at least *two* carriers that offer dedicated interoffice transport facilities to other carriers. The record evidence on the routes meeting the FCC's wholesale trigger for DS-1 and DS-3 level transport is show, by LATA, Verizon wire center, and wholesale provider, in Exhibit 2(C). Verizon made the following adjustment to Exhibit 2(C) to reflect the evidence at the hearings:

- Verizon is treating AboveNet as a wholesale provider of dark fiber only, and not as a wholesale provider of DS1s and DS3s. It is undisputed that AboveNet is a wholesale provider;¹³⁶ the only dispute has been whether AboveNet offers to provide "lit" transport services, such as DS1s and DS3, in addition to dark fiber transport. Verizon has decided to remove AboveNet from the list of carriers offering DS1s and DS3s at wholesale because, on balance, the evidence to date *in Pennsylvania* indicates that AboveNet provides only wholesale dark fiber.¹³⁷

As a result of this adjustment, the number of wholesale DS1 and DS3 transport routes on which Verizon seeks relief has dropped from the 899 routes identified in Verizon's supplemental testimony to the 772 routes identified here (a reduction of 127 routes).

¹³⁶ Snip Link St. 1.0 (Abate Dir.) at 42; VZ St. 1.2 (Peduto/West Reb.) at 67.

¹³⁷ For example, although a number of carriers have reported leasing AboveNet's dark fiber (*e.g.*, Allegiance leases dark fiber from AboveNet), no Pennsylvania carrier has thus far reported leasing "lit" transport facilities from AboveNet. AboveNet's responses to Snip Link's discovery subpoena are almost completely unusable because AboveNet applied a patently incorrect definition of transport route. Rather than disclosing all of its transport routes that are capable of directly or indirectly connecting Verizon wire centers, which is what the FCC's rules require, *see* 47 C.F.R. §§ 51.319(e), TRO ¶ 402 n.1246, ¶ 405 n.1247, AboveNet provided information only the handful of direct "links" between Verizon wire centers. For those "links," however, AboveNet reports offering only wholesale dark fiber, which supported Verizon's decision here to identify AboveNet as providing only wholesale dark fiber. SNIP Link Ex. 1.

The CLECs challenged only a very few of the carriers identified by Verizon in its supplemental testimony as meeting the wholesale trigger for DS1 and DS3-level transport: Allegiance, AT&T, Telcove, and XO. As shown below, however, the record evidence strongly supports Verizon’s conclusion that each of these carriers offers DS1 and DS3 transport services to other carriers:

Allegiance. Under the FCC’s Order, it is not necessary that a carrier actually have wholesale arrangements presently in place to “count” as a wholesale provider, as long as the carrier is ready and willing to provide wholesale transport.¹³⁸ The Commission should conclude that Allegiance is a wholesale provider under the FCC’s rules for at least three reasons. First, Allegiance presently holds itself as being willing to provide DS1 and DS3 wholesale transport. Allegiance advertises wholesale transport services on its website: “Our Broadband-xSP, Enterprise and Government groups provide a wide range of telephony and Internet solutions for *service carriers*, including ISPs, local and international carriers, building centric access providers, Fortune 500 Companies, governmental and educational organizations.”¹³⁹ Indeed, Allegiance declares on its website that it offers carriers two “Dedicated DS1 Aggregation” products -- “DS3 Hub” and “DS3 Mux” – which allow other carriers to “sell T1-based services to [its] customers, nationwide, without building a point-of-presence in each geographic location” – all on a network that Allegiance “owns.”¹⁴⁰ Allegiance even has a “Carrier and Service Provider Solutions” brochure posted on its website,¹⁴¹ along with information on how to contact Allegiance’s “Wholesale” representatives and obtain Allegiance’s “Wholesale Service Level Agreement.”

¹³⁸ 47 C.F.R. § 51.319(d) (1)(ii)(B).

¹³⁹ VZ St. 1.2 (West/Peduto Reb.) at 62; Attachment 11.

¹⁴⁰ VZ St. 1.2 (West/Peduto Reb.) at 62; Attachment 12.

¹⁴¹ VZ St. 1.2 (West/Peduto Reb.) at 62; Attachment 13.

Second, as Allegiance readily admits, it filed an Access Tariff with the Commission in which it offers to provide DS1 and DS3 private line services to carriers, and that “tariff is still on file.”¹⁴² ” As a matter of law, Allegiance’s commitment in its tariff to provide DS1-level and DS3-level transport to other carriers is binding on Allegiance.¹⁴³

Third, Allegiance’s suggestion that its filed tariff does not reflect its actual business plans is belied by Allegiance’s 2001 and 2002 10-Ks, sworn to by its senior management, filed with the Securities and Exchange Commission, and subject to the full panoply of civil and criminal penalties. In its 2001 10-K, Allegiance stated that it presently provided its network facilities to other carriers:

In building a nationwide network to serve end user customers, we have fixed costs in many assets that are underutilized during those times of the day when our small to medium-sized business customers are not placing or receiving as many voice and data calls. We have taken advantage of this underutilization by providing network solutions to other service providers, primarily the leading national providers.¹⁴⁴

And then in its 2002 10-K, Allegiance restated its business plan of providing wholesale facilities:

“We also augment our core business strategy by selectively supplying wholesale services, including equipment collocation and facilities management services, *to other carriers*.”¹⁴⁵

The Commission therefore should find that – as stated on Allegiance’s website, in its 2001 and 2002 SEC filings, and in its binding, filed tariff -- Allegiance offers to provide DS1 and DS3 transport services to other carriers

¹⁴² Allegiance St. 1.0 (Anderson Dir.)at 8at 8 (“Our Pennsylvania Access Tariff does list dedicated transport. . . . [and] the tariff is still on file . . .”).

¹⁴³ See *Brockway Glass Co.*, 437 A.2d at 1170); *Kossmann v. Pa. PUC*, 694 A.2d 1147, 1151_(Pa. Commw. 1997).

¹⁴⁴ VZ Cross Ex. 11 (Allegiance 2001 Form 10-K) at 2.

¹⁴⁵ VZ Cross Ex. 12 (Allegiance 2002 Form 10-K) at 4.

AT&T. AT&T advertises wholesale DS1 and DS3 transport on its website,¹⁴⁶ identifies wholesale transport as a significant line of business in its 2002 10-K filing with the Securities and Exchange Commission,¹⁴⁷ and filed a tariff with the Commission declaring its willingness to provide DS1 and DS3 transport to other carriers.¹⁴⁸ AT&T does not dispute that its OC48 transport facilities are fully capable of providing DS1-level and DS3-level transport, nor has it pointed to a single DS1 or DS3 transport route identified by Verizon as being available at wholesale and claimed that the route is in fact not available. AT&T's challenge to Verizon's self-provisioning and wholesale triggers case with respect to AT&T's own network rests entirely on its incorrect claim, addressed below, that none of its extensive transport facilities in Pennsylvania (or elsewhere) meet the FCC's definition of dedicated transport.

Telcove. [BEGIN PROPRIETARY] [END PROPRIETARY] reported that it leases fiber from Telcove.¹⁴⁹ In response to Verizon's subpoena, Telcove, which indisputably offers its transport facilities to other carriers, reported providing DS1-level and DS3-level transport.¹⁵⁰

XO. XO has filed a tariff offering to provide wholesale transport at a range of capacities, including DS1 and DS3-level transport.¹⁵¹ Under Pennsylvania law "tariffs have the force of law and are binding on both the utility and the customer."¹⁵²

Thus, the record evidence demonstrates that Allegiance, AT&T, XO, and Telcove offer DS1 and DS3 transport facilities to other carriers. The Commission should therefore find that the

¹⁴⁶ VZ St. 1.2 (West-Peduto Reb.) at 70; Attachment 14.

¹⁴⁷ VZ Cross Ex. 4.

¹⁴⁸ VZ St. 1.0 (West/Peduto Dir.) Attachment 8.5 (PA PUC No. 17, Section 10).

¹⁴⁹ PCC Ex. 1 [BEGIN PROPRIETARY]
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¹⁵⁰ ALJ 1 (Exhibit 4).

¹⁵¹ VZ St. 1.0 (West/Peduto Dir.) at 55; Attachment 8.9; XO Pennsylvania Access Services Tariff, PA PUC No. 11.

FCC's wholesale trigger for DS1 and DS3-level transport has been met for the 772 routes identified on Verizon's Exhibit 2(C).

4. The Wholesale Trigger for Dark Fiber Transport

The combined and adjusted evidence shows 429 transport routes meet the FCC's wholesale trigger for dark fiber. *See* Exhibit 2(D). There are 3 transport routes meeting the wholesale dark fiber trigger in the Harrisburg LATA (LATA 226), 126 in the Philadelphia LATA (LATA 228), and 300 in the Pittsburgh LATA (LATA 234). In this pairing report, Verizon removed both Cavalier¹⁵³ and MCI¹⁵⁴ as providers of wholesale dark fiber.

As a result, Verizon is now seeking relief for 429 routes, 290 fewer than the 719 routes presented in Verizon's supplemental testimony.

With the elimination of Cavalier and MCI – the only specific objections to Verizon's identification of wholesale dark fiber providers -- the unrebutted record evidence shows that the carriers identified on Verizon's Exhibit 2(D) offer to provide dark fiber to other carriers. For example:

[BEGIN PROPRIETARY]

¹⁵² *See Brockway Glass Co.*, 437 A.2d at 1170; *Kossmann*, 694 A.2d at 1151.

¹⁵³ Cavalier's advertises on its website its readiness to provide dark fiber transport to other carriers. At the hearing, however, Cavalier witness Vermuelen's testified that Cavalier will not provide dark fiber to other carriers in Pennsylvania, and further explained how the information on Cavalier's website for Pennsylvania could be interpreted as consistent with this testimony. Verizon therefore removed Cavalier from the list of carriers offering wholesale dark fiber.

¹⁵⁴ After Verizon prepared its supplemental testimony, MCI responded to Verizon's discovery requests by stating – for the first time – that it does not wholesale dark fiber. Mr. Pelcovits, MCI's transport witness was unable to confirm or deny whether MCI offers dark fiber at wholesale in Pennsylvania. Nonetheless, comparing MCI's response to the publicly available information on MCI's wholesale activities, Verizon concluded that the weight of evidence favored removing MCI from the list of carriers offering dark fiber transport at wholesale.

[END PROPRIETARY]

Verizon therefore requests that the Commission find that the routes identified on Exhibit 2(D) meet the FCC's trigger for wholesale dark fiber.

D. The CLECs' Argument That *None Of Their Robust, Extensive Fiber Networks "Count" As Dedicated Transport Relies On Erroneous Interpretations Of The FCC's Rules*

AT&T, Allegiance, XO, and other CLECs in this proceeding indisputably own and operate extensive fiber facilities that provide connections between multiple Verizon central offices. For example, AT&T witness Kirchberger testified that AT&T "has OCn fiber facilities terminating in collocation arrangements," and that all AT&T fiber facilities meet at a "central point" – an AT&T switch.¹⁶⁰ AT&T admits that its "dozens" of fiber rings in Pennsylvania each connect two or more Verizon wire centers,¹⁶¹ and also admits that it built its network so that "traffic can flow to *all* parts of its network, as well as directly or indirectly to the networks of other carriers."¹⁶² Thus,

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¹⁶⁰ AT&T St. 1.0 (Kirchberger/Nurse Dir.) at 110-112.

¹⁶¹ Tr. at 474; Tr. 479 (AT&T has deployed "at least" dozens of fiber rings in Pennsylvania).

¹⁶² AT&T St. 1.0 (Kirchberger/Nurse Dir.) at 111.

AT&T admits that it has fiber facilities that provide connections that run from numerous Verizon central offices, through AT&T's switching facilities, to numerous other Verizon central offices.

AT&T, Allegiance, XO, and other CLECs nonetheless argue that *none* of their extensive, robust fiber facilities in Pennsylvania “count” as dedicated transport under the FCC’s rules, and therefore are irrelevant for purposes of applying the FCC’s triggers. The Commission should reject these arguments as flatly inconsistent with the plain meaning of the FCC’s rules, as well as with the policy decisions underlying those rules.

1. The Exclusion of “Backhaul” Facilities from the ILECs’ UNE Dedicated Transport Obligation Does Not Make CLEC Transport Facilities Irrelevant to the FCC’s Triggers

Many of the carriers in this proceeding, including AT&T and XO, erroneously claim that *none* of their transport facilities in Pennsylvania “count” under the FCC’s triggers because a portion of those facilities – the segment from the Verizon wire center where the call is picked up to the switching location -- are “backhaul facilities.” These carriers claim that “[t]he FCC has ruled that the facilities used by CLECs for backhaul are not ‘dedicated transport’ for purposes of access to UNEs.”¹⁶³ Tellingly, none of these carriers claims that the FCC actually intends that state commissions apply the UNE definition of dedicated transport to competitive facilities, let alone offers an explanation of why such a rule would make sense.

The argument that *no* CLEC transport facilities count as competitive facilities because *ILEC-provided* UNE “backhaul” facilities are no longer UNEs is directly contrary to the language of the *TRO* itself, and makes a mockery of the trigger analysis that the FCC has delegated to state commissions to perform. As AT&T witness Nurse concedes, if the Commission accepts this argument, *all* of AT&T’s fiber facilities in Pennsylvania are deemed irrelevant to the transport

¹⁶³ AT&T St. 1.0 (Kirchberger/Nurse Dir.) at 112.

trigger analysis by the FCC's *TRO*.¹⁶⁴ And because most if not all competitive networks use backhaul fiber facilities, as the FCC expressly found in its Order,¹⁶⁵ the effect of this argument is to render *all* CLEC fiber facilities in Pennsylvania irrelevant under the FCC's transport triggers. The CLECs ask the Commission to find that the FCC devised transport triggers under which *no* CLEC transport facilities could be counted. The absurdity of this argument is plain.

In its Order, the FCC describes competitive networks as being used for backhaul just as AT&T and the other CLECs claim, but then *expressly classifies that use as dedicated transport*. For example, in Paragraph 361 of the Order, the FCC states that “[c]ompeting carriers generally use interoffice transport as a means to aggregate end-user traffic . . . *by using dedicated transport* to carry traffic from their end users’ loops, often terminating at incumbent LEC central offices, through other central offices to a point of aggregation.”¹⁶⁶ The fact that the FCC decided to redefine the dedicated transport UNE (applicable only to ILECs) to exclude these facilities does not mean that CLEC fiber networks used for backhaul are to be excluded from the trigger analysis (applicable to competitive facilities), but just the opposite. The FCC’s decision to exclude ILEC-provided UNE backhaul facilities from the list of UNEs reflects the fact that this is the most competitive segment of the transport market -- exactly because there are so many CLEC facilities being used for backhaul.¹⁶⁷ The next segment of transport to be exempt are the connections between ILEC wire centers, and the express purpose of the transport triggers is for the state

¹⁶⁴ AT&T St. 1.0 (Kirchberger/Nurse Dir.) at 112 n. 150; *see also id.* at 100 & n.135; Tr. at 475 (Q: “Could you tell me what portions of AT&T’s facilities are not rendered irrelevant to the FCC’s transport triggers.” A: “I don’t really see that any of it would be relevant.”); Tr. at 477 (Q: Are you aware of any facilities that meet your definition? Are you aware of any facilities in Pennsylvania of AT&T that you consider to be relevant to the FCC’s trigger? A: “No.”).

¹⁶⁵ *TRO* ¶¶ 361, 370, 373.

¹⁶⁶ *TRO* ¶ 361 (emphasis added); *see also TRO* ¶ 370.

¹⁶⁷ *See TRO* ¶ 367 n.1222 (“Competing carriers agree that the most competitive type of transport is the link between an incumbent LEC wire center and a competitor’s network.”).

commission to determine where CLEC fiber can be used to make such connections, including CLEC fiber that is also used for backhaul.

The CLECs' argument confuses the FCC's definition of the "dedicated transport *UNE*" that ILECs such as Verizon are required to provide at TELRIC prices (but CLECs such as AT&T, XO, and Allegiance are not) with the CLEC transport facilities that are evaluated under the triggers. To be sure, the FCC re-defined the dedicated transport *UNE* so that it no longer includes backhaul facilities "from incumbent LEC networks to competitor LEC networks." (*TRO* ¶¶ 365-367). But that determination has nothing to do with the CLEC facilities that state commission are required to evaluate to determine whether ILEC dedicated transport between ILEC wire centers must still be made available in face of the array of alternative facilities (including those that might be used for backhaul) that can also carry traffic between ILEC wire centers.

The CLECs' argument that their backhaul facilities are not considered in the transport trigger analysis turns the FCC's analysis of competition in the *TRO* on its head. Under the approach advocated by the CLECs, the vast amounts of competitive transport fiber that has been deployed in Pennsylvania would be ignored simply because CLEC networks are not configured in the same way as Verizon's network. But the purpose of the trigger analysis is not for state commissions to identify CLEC networks that mirror ILEC networks, but to "identify[] specific point-to-point routes where carriers have the ability to use alternatives to the incumbent LEC's network."¹⁶⁸ The FCC recognizes that such alternatives include network configurations such as AT&T's, which rely on hub-and-spoke architectures with backhaul facilities, because this is the network configuration that is most efficient for CLECs to bypass the ILEC's network.¹⁶⁹ The

¹⁶⁸ *TRO* ¶ 360; *see id.* ¶ 400; *see also id.* ¶ 406 n. 1257 ("impairment analysis recognizes alternatives outside the incumbent LEC's network").

¹⁶⁹ *See id.* ¶¶ 361, 367, 370.

FCC also recognizes— as do CLECs here, and as they did in the FCC’s Triennial Review proceeding – that there are extensive competitive facilities of this sort.¹⁷⁰ In the *TRO*, the FCC concluded that, although there indisputably are extensive competitive facilities, “the record does not establish with route-specificity where such deployment has occurred,” and accordingly delegated to states commissions the authority to make that determination.¹⁷¹ The FCC obviously did not intend for state commissions to ignore all of this competitive fiber in its analysis, but rather to make it the very centerpiece of the trigger inquiry.

2. The FCC’s Rules Expressly Contemplate that, Under the Triggers, CLEC Dedicated Transport Can Be Routed Through CLEC Switches or Wire Centers

The CLECs also argued that *all* of their competitive fiber facilities must be ignored under the FCC’s rules because they are routed through switches. This is directly contrary to the FCC’s rules. The FCC’s definition of “dedicated transport” – which AT&T concedes applies to CLEC transport facilities, as well as ILEC facilities¹⁷² -- expressly contemplates that “[a] route between two points (e.g., wire center or switch ‘A’ and wire center or switch ‘Z’) may pass through one or more intermediate wire centers *or switches* (e.g., wire center or switch ‘X’).”¹⁷³ Thus, it is irrelevant that the transport facilities of AT&T and other CLECs may be routed through intermediate switching facilities, rather than running directly between two Verizon wire centers.

¹⁷⁰ See, e.g., *id.* ¶ 367 n.1122; *id.* ¶ 378 (describing extent of competitive fiber networks nationwide); *id.* ¶ 387 (“There is substantial evidence that carriers . . . self-deploy transport when multiple DS3 transport circuits are required to carry aggregated traffic along a route.”); *id.* ¶ 398 (“There is no disagreement among the parties that alternative transport facilities have been deployed and area available as alternatives to unbundled transport in some locations”).

¹⁷¹ *Id.* ¶ 387.

¹⁷² AT&T St. 1.0 (Kirchberger/Nurse Dir.) at 91 n.130, 112.

¹⁷³ 47 C.F.R. § 51.319(e) (emphasis added); see *TRO* ¶ 401.

The CLECs' argument is that "[a] switched route does not fit the definition of 'dedicated' transport, certainly not as the FCC defined it, nor as it commonly understood in the industry."¹⁷⁴ But this argument confuses the FCC's use of the term of "dedicated" in the definition of dedicated transport with a dedicated *circuit* or connection as telecommunications engineers understand that term. AT&T and the other CLECs assume – without citing any portion of the *TRO* in support – that the FCC's definition of dedicated transport is equivalent to what telecommunications engineers refer to as a dedicated circuit – a permanent, always-on, unswitched connection between two points. But the FCC in its Order nowhere says this, and in fact says the opposite. The FCC specifically defines dedicated transport as including routes that pass through one or more intermediate wire centers *or switches*.¹⁷⁵ The FCC specifically characterizes competing carriers' provision of transport by aggregating traffic through their switch as "dedicated transport." (*TRO* ¶ 361). And, more generally, the FCC recognizes that CLEC fiber transport networks that aggregate traffic through switches are to be considered in the trigger analysis. (*See TRO* ¶¶ 361, 367, 370).

The FCC also made it clear in its rules that *all networks capable* of providing DS1s and DS3s "count" toward the transport triggers. For example, the FCC requires state commissions to consider the networks of "intermodal providers of service" when applying the transport triggers.¹⁷⁶ In applying the transport triggers, the only issue is whether a carriers network is *capable* of providing DS1 and DS3 transport between ILEC wire centers. There can be no doubt that the networks deployed by the CLECs in Pennsylvania are capable of transporting traffic between Verizon wire centers.

¹⁷⁴ AT&T St. 1.0 (Kirchberger/Nurse Dir.) at 113-114; *see also id.* at 118.

¹⁷⁵ 47 C.F.R. § 51.319(e) (emphasis added); *see TRO* ¶¶ 361, 401.

¹⁷⁶ 47 C.F.R. § 51.319(e)(1)(ii), (2)(i)(A), (2)(i)(B) (wholesale triggers for DS1 and DS3 transport, and self-provisioning trigger for DS3 transport).

Therefore, contrary to the unsupported claims of AT&T and the other CLECs, the FCC does not narrowly define “dedicated transport” as transport that is provided over a circuit dedicated between two geographic points, but defines it broadly as transport that is “dedicated to a particular customer or carrier.”¹⁷⁷ It is irrelevant that a CLEC, for reasons of economic efficiency, may choose to route all of its fiber facilities through centralized switching facilities. The only relevant questions under the triggers are whether the CLEC’s competitive fiber facilities provide connections between Verizon’s central offices, and whether the CLEC’s network is operationally ready to provide dedicated bandwidth to particular customers or carriers. It is undisputed that AT&T, Allegiance, XO, and the other CLECs do in fact use their fiber network to provide dedicated bandwidth – including at the DS1 and DS3 level – to their customers.

The CLECs ask the Commission to ignore the plain language of the FCC’s rule. Indeed, AT&T witness Nurse characterizes the FCC’s regulation defining a dedicated transport route as “senseless.”¹⁷⁸ To the contrary, the FCC’s rule is entirely logical. The use of the term “dedicated” in the *TRO*’s definition of dedicated transport is very different from what telecommunications engineers sometimes refer to as a dedicated connection or circuit. In telecommunications engineering, a dedicated circuit or connection is one that is permanently established between two points and is always on. By contrast, the FCC’s use of the term “dedicated” in the definition of dedicated transport refers to a facility on which a certain amount of capacity is “dedicated to a particular customer or carrier.”¹⁷⁹ There is no requirement in the FCC’s rules or anywhere in the *TRO* that a dedicated transport facility be a dedicated circuit as

¹⁷⁷ 47 C.F.R. § 51.319(e)(2).

¹⁷⁸ Tr. at 496.

¹⁷⁹ 47 C.F.R. § 51.319(e)(2) (emphasis added); see *TRO* ¶ 261 (“Dedicated interoffice transmission facilities (transport) are facilities dedicated to a particular customer or competitive carrier that it uses for transmission among incumbent LEC central offices and tandem offices.”).

that term is understood in telecommunications engineering. The FCC clearly contemplates that dedicated transport includes transport routed through switching facilities because the transport is used to provide bandwidth dedicated to a particular customer or carrier.¹⁸⁰ And, in this case, there can be no question that the CLECs' transport facilities meet that test.

3. The FCC Does Not Require a Dedicated Circuit

The premise of AT&T and the other CLECs' arguments is that they are not operationally ready to provide dedicated transport using *dedicated circuits*. But the Commission does not need to evaluate what it would take for AT&T and other CLECs to provide dedicated circuits because the FCC does not require a dedicated circuit. The only questions the Commission must ask is whether AT&T and the other CLECs have facilities in place between the end points of a particular route, and whether those facilities are operationally ready to provide bandwidth dedicated to a particular customer or carrier (which is the FCC's definition of dedicated transport).

The unrebutted evidence here confirms that facilities of AT&T and the other CLECs meet this test. As AT&T witness Kirchberger notes, AT&T "has OCn fiber facilities terminating in collocation arrangements"; these fiber facilities meet at a "central point" – an AT&T switch; and these facilities permit "traffic to flow to *all* parts of their network, as well as directly or indirectly to the networks of other carriers."¹⁸¹

4. The CLECs Are Operationally Ready to Transmit Traffic Between Verizon Wire Centers on Dedicated Circuits

Even if the FCC required the CLECs to be operationally ready to provide *dedicated circuits* between Verizon wire centers (and it does not), the CLECs have not shown, and cannot

¹⁸⁰ The FCC specifically contemplates that dedicated transport can be routed through switch facilities. In addition to defining a "route" to include switches, in describing how "competing carriers generally use interoffice transport," the FCC notes that typically "the traffic is carried to the competitor's switch." *Id.*; *see id.* ¶ 370.

¹⁸¹ AT&T St. 1.0 (Kirchberger/Nurse Dir.) at 110-111.

show, that they are operationally incapable of establishing such dedicated circuits. As Verizon witness Peduto explained, the equipment required to establish a dedicated transport circuit is common place and available to every telecommunications carrier; and establishing a dedicated circuit is the sort-of everyday operation that the FCC refers to as routine network maintenance.¹⁸² Indeed, AT&T has effectively conceded that it is operationally ready, although it struggles mightily to hide this concession. First, in their filed testimony, AT&T witnesses Kirchberger and Nurse initially claimed that AT&T is not operationally ready to provide dedicated transport because AT&T routes all of its fiber facilities through a switch and it “*would require*” considerable investment and work for AT&T to convert these facilities into dedicated circuits.¹⁸³ At the hearing, however, AT&T *withdrew this testimony, crossed-out the laundry list of supposedly required investment*, and substituted testimony stating only that AT&T *might* not be operationally ready to transmit traffic between Verizon wire centers because it “*could require*” investment.¹⁸⁴

Second, at the hearing, AT&T conceded both that it presently has digital cross-connect equipment at its switching locations,¹⁸⁵ and that, as a technical matter, it can establish a dedicated circuit with digital cross-connect equipment: “we don’t dispute that it’s technically feasible to connect one ring to another at a digital cross-connect machine in the hub[.]”¹⁸⁶ Thus, AT&T

¹⁸² Tr. 536 (“I believe that AT&T does have the digital cross-connect systems, the ability to make cross-connects between fiber optic cables, the ability to de-multiplex and multiplex signals in their switching locations and in most of their collocations.”); at 537 (“what’s required for AT&T to actually create a route between A and B is within the confines of normal network modifications”).

¹⁸³ See AT&T St.1.0 (Kirchberger/Nurse Dir.) at 114, 119-20.

¹⁸⁴ AT&T Ex. 1.

¹⁸⁵ Tr at 438 (AT&T: “In the hub there is digital cross-connection machines, and so although it’s technically feasible, and we don’t dispute that it’s technically feasible to connect one ring to another at a digital cross-connect machine in the hub, which would technically feasibly let your route traffic from one to the other[.]”).

¹⁸⁶ Tr. at 448 (“If we had a Verizon Wire Center A to Verizon Wire Center Z and we had a fiber route that was digitally cross-connected at our switch at a Transport Hub X, yes, that would be a route from A to Z. It would be A to X to Z.”).

admits that, as a factual matter, *no* investment in digital cross-connect equipment is required at all, and that it can simply use the equipment it has presently in place to establish dedicated circuits.

These concessions are fatal to AT&T's argument: AT&T has offered no evidence on which the Commission could reasonably determine that *any* investment is required at *any* AT&T switching location or collocation arrangement at a Verizon wirecenter. To the contrary, AT&T now admits that it has digital cross-connect equipment at its switching locations.

AT&T undoubtedly changed its argument because it cannot in good faith argue that it does not have the every-day telecommunications equipment at its switching locations that could be used to establish a dedicated circuit between Verizon wire centers. As Verizon witness Peduto testified, it is simply *inconceivable* that a carrier with the sophistication of AT&T would not have digital cross connects and de-multiplexing equipment at its switching locations.¹⁸⁷ Moreover, the fact of the matter is that it is not a major or particularly costly undertaking to reconfigure a switched circuit as a dedicated circuit. It is a straightforward process to peel off one of these DS3 or DS1 facilities on one side of the switch and connect it to a DS3 or DS1 facility that has been peeled off on the other side of the switch through a digital cross connect.¹⁸⁸ The only requirement here is that AT&T have the spare capacity, and on that score there can be no dispute: AT&T argued repeatedly in the FCC's Triennial Review proceeding that its transport facilities were greatly underutilized.¹⁸⁹

Finally, AT&T misstates what the FCC's "operationally ready" standard requires. The requirement is intended to evaluate whether the facility is "capable of operation on that route,"

¹⁸⁷ Tr. at 533-46 (Peduto).

¹⁸⁸ *Id.*; VZ St. 1.2 (West/Peduto Reb.) at 84.

¹⁸⁹ VZ St. 1.2 (West/Peduto Rebuttal) at 85 (citing AT&T Comments in CC Docket No. 01-338 at 62 (FCC filed Apr. 5, 2002) ("AT&T's own local facilities are significantly underutilized.")).

not, as Mr. Kirchberger claims, “whether it actually does so.”¹⁹⁰ For the same reason, there is no merit to MCI’s claim that it is necessary to show that a competing carrier actually offers service over a particular transport route.¹⁹¹ Thus, to be counted as operationally ready, it is not necessary to demonstrate that a competing carrier has already taken every possible step to use its transport facilities in a particular manner. Rather, it is enough to demonstrate that the competing carrier has the facilities in place, and the facilities are capable of operation on that route, even if making that facility operational requires some extra steps. Indeed, the only specific content the FCC gave to the “operationally ready” requirement was that a carrier have transport facilities and fully provisioned collocation arrangements in place. (*See TRO* ¶ 406 & n.1256).

For all of these reasons, the Commission should reject the CLECs’ arguments that the FCC’s rules should be construed to exclude consideration of all of their extensive fiber facilities in Pennsylvania.

V. HIGH CAPACITY LOOPS

For the high-capacity loop triggers case, Verizon based its conclusions on facts provided by the intervening CLECs themselves in response to discovery, because Verizon does not have independent data about where other carriers have deployed their own high-capacity loop facilities. None of the carriers identified as a trigger candidate denies that it has loop facilities at the customer locations identified by Verizon, and Verizon’s conclusions regarding the satisfaction of the triggers are reasonable and well-supported. The loop case is therefore fairly straightforward,

¹⁹⁰ *TRO* ¶ 406 n.1256; *AT&T St. 1.0* (Kirchberger/Nurse Dir.) at 115; *id.* at 119-20.

¹⁹¹ *MCI St.1.0* (Pelcovits Dir.) at 88. In any event, MCI does not demonstrate (or even claim) that any of the competitive fiber routes identified by Verizon are in fact inactive. Nor is there a reasonable basis to make such an assumption given that CLECs deploy fiber precisely because they have signed up customers to serve with those facilities.

and the facts require the Commission to conclude that the self-provisioning and wholesale loop triggers are satisfied at the customer locations identified in Verizon's testimony.

A. The Triggers For High Capacity Loops

In the *TRO*, the FCC found that requesting carriers are impaired on a nationwide basis without access to unbundled dark fiber, DS1, and DS3 hi-cap loop facilities serving the enterprise market. (*TRO* ¶¶ 311-14, 320-27). The FCC recognized, however, that competing carriers often self-provision hi-cap loops or obtain them on a wholesale basis from carriers other than the ILEC. (*Id.* ¶¶ 328-39). Consequently, the FCC authorized state commissions to determine the specific customer locations¹⁹² that meet one of two objective triggers — which show that CLECs are already providing non-ILEC hi-cap loop facilities, either to themselves (self-provisioning trigger) or to other carriers (wholesale trigger). When a customer location meets one of the FCC's triggers, the state commission conducting the customer location-specific review must find that the FCC's national finding of impairment has been overcome for the relevant loop capacity at that location, and the ILEC will no longer be required to unbundle that loop capacity to that customer location. (*See* 47 C.F.R. §51.319(a)(4)-(6); *TRO* ¶ 328).

There are two triggers for loops. The first looks at whether competing carriers have *self-deployed* or *self-provisioned* dark fiber or DS3 capacity loop facilities, and in the case of DS3s, are using those facilities to serve end user customers. The self-provisioning trigger does not require self-providers to be operationally ready or have access to the entire customer location to which their facilities are deployed. (*See* 47 C.F.R. §§ 51.319(a)(5)(i) and (6)(i); *TRO* ¶¶ 332-333).

¹⁹² The FCC distinguishes between "customer locations" and individual units within that location. *See TRO* ¶ 337. This distinction indicates that a customer location is a building, not an individual unit or suite in a multi-unit building. Based on their discovery responses, the CLECs in Pennsylvania agree. Verizon specifically asked them to identify the "customer locations" to which they have deployed loop facilities, and in response, the CLECs provided the addresses of specific buildings.

Under the self-provisioning trigger for dark fiber, the Commission must find no impairment if *two or more* unaffiliated competing carriers have deployed to a particular customer location their own dark fiber facilities. (47 C.F.R. § 51.319(a)(6)(i)). Dark fiber purchased on an unbundled basis from an ILEC does not count as self-provisioned dark fiber. (*Id.*) However, dark fiber obtained under a long-term indefeasible right of use (“IRU”) is considered to be that carrier’s own fiber for purpose of applying the self-provisioning trigger. (*Id.*; *see also TRO ¶ 333 n. 981*).

Under the self-provisioning trigger for DS3 loop facilities, the Commission must find no impairment if *two or more* unaffiliated competing carriers have (i) deployed to a particular customer location their own DS3 facilities and are serving customers via those facilities at that location, or (ii) deployed DS3 facilities by attaching its own optronics to activate dark fiber facilities obtained under a long-term IRU and are serving customers via those facilities at that location. (47 C.F.R. § 51.319(a)(5)(i)(A)). The special access facilities of an ILEC do not count as a self-provisioned DS3. (*TRO ¶ 333*).

The second FCC trigger looks at whether DS1 or DS3 loop facilities are available from other carriers on a *wholesale* basis.¹⁹³ Under this test, competing carriers are not impaired without access to Verizon’s DS1 or DS3 facilities if there are *two* or more competing providers (including intermodal providers of service comparable in quality to the ILEC) not affiliated with each other or the ILEC, each of which (i) has deployed its own DS1 or DS3 facilities; (ii) offers a DS1 or

¹⁹³ There is no competitive wholesale trigger for dark fiber. As the FCC explained:

When applying the Self-Provisioning Trigger to eliminate an incumbent LEC’s requirement to unbundle dark fiber loops at a particular customer location, the mere existence of two unaffiliated competitive providers (in addition to the incumbent LEC) that have deployed fiber to that location, ***whether or not they are offering dark fiber to other carriers to serve end-user customers at that location***, will satisfy the Self-Provisioning Trigger for dark fiber loops and require a finding of no impairment at that location.

TRO ¶ 334 (emphasis in original). For that reason, the FCC did not apply the wholesale trigger to dark fiber. *Id.*; *see also* 47 C.F.R. §51.319(a)(6)(i). The relevant question for the Commission is whether a CLEC has deployed dark fiber to a customer location, not whether it leases that dark fiber to another CLEC.

DS3 loop over its own facilities on a widely available wholesale basis to other carriers desiring to serve customers at that location; and (iii) has access to the entire customer location (including each individual unit within that location).¹⁹⁴ (47 C.F.R. § 51.319(a)(4)(ii), 47 C.F.R. § 51.319(a)(5)(i)(B)). Dark fiber obtained on an unbundled, leased, or purchased basis from another carrier counts as the buying carrier's own DS1 or DS3 loop facility if that carrier attaches its own electronics and offers the activated fiber at wholesale. *Id.*

B. The CLECs' Own Evidence Satisfies the Triggers At Specific Pennsylvania Customer Locations

The record demonstrates that 66 customer locations meet one or both of the FCC's triggers. There are 6 customer locations that meet the DS1 wholesale trigger. With respect to DS3 loops, 61 customer locations meet the self-provisioning trigger, and 40 meet the wholesale trigger. Finally, there are 61 customer locations meeting the dark fiber self-provisioning trigger. Exhibit 3 to this Brief identifies each customer location meeting the triggers.¹⁹⁵ Significantly, none of the carriers identified as a trigger candidate denied that they satisfy the trigger at any of the customer locations identified by Verizon. The Commission should find no impairment for the relevant loop capacities at each customer location identified in Exhibit 3.

Verizon based its loop trigger case on the facts provided by the CLECs in discovery. Verizon does not have independent data about where other carriers have deployed loop facilities. Thus, Verizon—as well as the Commission—is dependent on data provided by the CLECs. Where the CLEC provided incomplete responses to discovery requests, Verizon drew reasonable conclusions from the data the CLECs did provide. Absent evidence from the CLECs to the

¹⁹⁴ Unlike the competitive wholesale trigger for transport, to count towards the wholesale loop trigger, the loop facility need not be operationally ready.

¹⁹⁵ The proprietary version of this attachment identifies the CLECs with loop facilities at each customer location. CLEC names are removed from the public version of Exhibit 3. This exhibit includes information that was not

contrary, Verizon’s conclusions are based on information provided by the CLECs, are reasonable and should be relied upon by the Commission. (VZ St. 1.2 (West/Peduto Reb.) at 88).

1. Identification of DS1 and DS3 Loop Facilities Deployed in Pennsylvania

Verizon identified the location and capacity of CLEC deployed hi-cap loop facilities by requesting information in discovery. Verizon Request 1 asked carriers to provide a list of the customer locations in Pennsylvania to which they have deployed their “own high-capacity loop facilities.” (VZ St. 1.2 (West/Peduto Reb.) at 92). Five carriers identified facilities in customer locations where at least one other carrier has deployed its own facilities.¹⁹⁶ (See VZ St. 1.2 (West/Peduto Reb.) Exs. 15, 17, and 18; VZ Cr. Ex. 9; VZ Cr. Ex. 14). Verizon Discovery Request 3 asked carriers to specify the capacity or capacities of the facilities self-deployed in Pennsylvania. **[BEGIN PROPRIETARY]**

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The remaining two carriers (AT&T and RCN) did not give a specific response providing the capacity separately for each customer location. (See VZ St. 1.2 (West/Peduto Reb.) Exs. 16 and 17). As a result of these general responses, Verizon had to draw reasonable conclusions about the capacity of facilities deployed at each location. Any fiber loop facility deployed by a carrier can be used to provide a DS1 or DS3 loop. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 23). Fiber optic loop facilities are capable of operating at various levels of capacity, and the capacity of the

available to Verizon until the hearings. As a result, it includes buildings and trigger candidates in addition to those identified in VZ Statement 1.1, Exhibit F (which are bolded).

¹⁹⁶ These carriers are **[BEGIN PROPRIETARY PROPRIETARY]**.

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fiber is almost entirely a function of the electronics that a carrier attaches to “light” the fiber, not something inherent in the fiber itself. (*See TRO* ¶ 311). Fiber optic cable is “channelized”— that is, larger capacity facilities are subdivided into smaller capacity facilities — by attaching the appropriate electronics at both ends of the fiber cable to provide these various capacities. Once the fiber is deployed, it is operated at a DS1, DS3, OC48 or higher level — or at all of these levels simultaneously — simply by changing the electronics. The electronics used to channelize the OCn system to DS1 and DS3 transport levels are commonly available. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 23).

In identifying AT&T and RCN’s customer locations meeting the FCC’s triggers, Verizon drew the reasonable conclusion that when these carriers deploy fiber and attach OCn electronics (*e.g.*, OC48 multiplexers), they then subdivide — *i.e.*, channelize — the OCn system into the lower transport levels required by their customers, including DS3s and DS1s. (*See VZ St. 1.2* (West/Peduto Reb.) at 94). This conclusion is consistent with standard industry practice. Few if any carriers deploy fiber loop facilities to accommodate *only* a DS1 or *only* a DS3. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 24). To the contrary, as the FCC found, carriers deploying fiber predominantly do so at the OCn level and channelize them to the DS1 or DS3 levels at which service is typically requested by end user customers. (*Id.*; *see also TRO* ¶ 298).

In response to Verizon Request 3, [BEGIN PROPRIETARY]

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2. Customer Locations Satisfying the Self-Provisioning Trigger

a. Dark Fiber

According to the FCC, to satisfy the self-provisioning trigger for dark fiber for loops at a particular location, “the mere existence of two unaffiliated competitive providers” is sufficient. (*TRO* ¶ 334). Verizon Request 4 asked each carrier to identify the number of fiber strands deployed at each location, specifying the number that are lit and the number that are dark. (*VZ St. 1.2 (West/Peduto Reb.)* at 95). [BEGIN PROPRIETARY]

[END PROPRIETARY] These CLEC responses are clear confirmation that evidence of lit fiber deployment is also evidence of dark fiber.

Dark fiber is simply fiber optic cable “that has not been activated through connections to optronics that light it, and thereby render it capable of carrying communications.” (*TRO* ¶ 311). Consequently, all fiber loop facilities, regardless of the capacities at which they now operate, once consisted entirely of dark fiber. Additionally, as a matter of standard industry network

engineering design and sound economics, the vast majority of self-provisioned fiber loop facilities will have spare dark fibers. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 25). As the FCC recognized, dark fiber exists in a carrier's network as unused fiber available because that carrier has deployed fiber in the first instance for the express purpose of lighting certain strands of it to serve a particular customer location. (*TRO* ¶ 312). The FCC explained,

When a fiber build decision is made, carriers take advantage of the fact that they are already incurring substantial fixed costs to obtain the rights-of-way, dig up streets, and trench cable, to lay more fiber than they immediately need. Once the significant fiber construction cost is incurred, the record reflects that it is relatively easy and inexpensive to install fiber strands in excess of current demand at that time to maximize the use of conduit and avoid the need to incur duplicate costs to retrench the same location in the future if demand for additional fiber facilities occurs. *Id.*

Thus, fiber facilities are always installed with extra fiber to meet projected demand growth. Furthermore, fiber cables are commonly manufactured and deployed in increments of 12 fiber strands (i.e., 12, 24, 48, etc., fibers per cable). (VZ St. 1.1 (West/Peduto Supp. Dir.) at 25).

In light of [BEGIN PROPRIETARY] [END PROPRIETARY] failure to identify dark fiber facilities in response to discovery—as well as their failure to deny the existence of dark fiber at those facilities—Verizon concluded (and the Commission should find) that those carriers have maintained dark fiber at each location to which it has deployed fiber loop facilities. (VZ St. 1.2 (West/Peduto Reb.) at 95).

Based on the identification of dark fiber through discovery responses, Verizon identified 61 customer locations to which two or more CLECs have deployed dark fiber.

b. DS3s

Verizon again identified whether CLEC deployed facilities are being used to serve their end user customers through discovery. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 28). [BEGIN PROPRIETARY]

[END PROPRIETARY]

In addition, Verizon Interrogatories Set I, Nos. 7-9 asked the CLECs to identify whether their deployed hi-cap loop facilities are connected to a switch. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 28). **[BEGIN PROPRIETARY]**

¹⁹⁸ **[END PROPRIETARY]**. Verizon concluded that any DS3 loop that is ultimately connected to a switch is serving an end-user customer. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 28). In such cases where a carrier has connected high capacity (OCn, DS3, DS1) loop facilities, through multiplexing equipment, to a switch, it is reasonable to assume that voice-grade equivalent (*i.e.*, DS0) traffic is being carried within the channels of the high capacity loop. (*Id.*) Operationally, in the circuit-switched network, there is no other valid reason to connect such a loop to a switch. *Id.* None of the carriers identified as a DS3 self-provisioner denied serving end user customers over their facilities.

3. The Competitive Wholesale Trigger

Verizon identified competitive wholesale providers of loop facilities primarily through discovery. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 26). **[BEGIN PROPRIETARY]**

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PROPRIETARY] Verizon also found evidence of CLEC wholesale providers from public sources. As with its transport evidence, Verizon identified carriers that hold themselves out as wholesale providers on their websites or through tariffs on file with the Commission. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 26). Specifically, MCI’s web page advertised its wholesale DS1 and DS3 services, which are governed by the terms and conditions contained in its products service guide on that web page. (*Id.* at 26 and Attachment 22). AT&T admitted in its March 31, 2003 10K report to the SEC that it sells wholesale “high-volume transmission capacity, conventional dedicated line services and dedicated switched services on a regional and national basis,” and that its “wholesale customers are primarily large tier-one ISPs, competitive local exchange carriers, regional phone companies, interexchange carriers, cable companies and systems integrators.” (*See* VZ Cr. Exhibit 4; Tr. 456). XO’s web page advertises “Wholesale Dial Up,” which allows CLECs “rapidly expand [their] nationwide dial capacity and increase [their] coverage area, without building or managing [their] own *nationwide* dial network,” and Carrier Private Line services that “provide high-speed, dedicated point-to-point connectivity for voice, data and video applications” that “[a]chieves 100% network availability with capacities from DS-1 to OC-n.” (*See* VZ St. 1.1 (West/Peduto Supp. Dir.) at 26-27 and Attachment 10; VZ Cr. Ex. 16). RCN’s Chief Strategy Officer indicates on its website that it is “seeking opportunities to wholesale the excess capacity of RCN’s fiber-optic Megaband Network, improving the company’s product offerings and adding to its bundles. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 27 and Attachment 9).

Finally, AT&T, Penn Telecom, RCN, and XO offer DS1s and DS3s through tariffs contained on the Commission's web page. (VZ St. 1.2 (West/Peduto Reb.) at 103; VZ Cr. Ex. 15).

Because these carriers publicly hold themselves out as wholesale providers—and do not limit their representations to particular locations—Verizon identified them as wholesale loop providers for the triggers. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 27-28). Similarly, because Verizon had evidence through discovery that a carrier is willing to offer loops at some customer locations, and because they place no restrictions on their offerings in this public information, Verizon reasonably concluded that it is willing to do so at all customer locations. (*Id.*) Finally, based their advertisement or tariff provisions, Verizon concluded that these carriers are willing to provide their fiber loop facilities to other carriers is providing (or is willing to provide) various levels of capacity at wholesale, including DS1, and DS3. *Id.* Confirming these conclusions, none of these carriers provided any particularized, location-specific evidence that they do not offer their loop facilities on a wholesale basis at a DS1 or DS3 capacity.

In response to Verizon's Interrogatory 1, **[BEGIN PROPRIETARY]** .

[END PROPRIETARY] identified specific customer locations where they do not have access to the entire building, and Verizon did not count them towards the wholesale trigger at these locations. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 28; VZ St. 1.2 (West/Peduto Reb.) at 100-101). **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** did not provide this information, but also did not deny that they had access to the entire customer location to which they were identified as wholesale providers. *Id.* Verizon concluded that these two carriers do have access to the entire customer location. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 28). Building owners restricting such access is generally the exception, not the rule. (VZ St. 1.2 (West/Peduto Reb.) at 100). Most, if not all, commercial properties designate a location, often

called the "Minimum Point of Entry" (MPOE) or "Meet Me Room" into which all carriers serving the building bring facilities and to/from which all customer premise equipment (*i.e.*, CPE) vendors serving occupants of the building arrange intra-building cabling to interface with these facilities. (VZ St. 1.1 (West/Peduto Supp. Dir.) at 28). Typically, fiber entrance facilities into commercial properties enter via this MPOE. (*Id.*) Therefore, absent an express denial by a CLEC that it has access to the entire building, Verizon reasonably concluded that it does and thus meets the triggers criteria for that building.

VI. TRANSITION FOR DEDICATED TRANSPORT AND LOOPS WHERE THE COMMISSION FINDS THE TRIGGERS HAVE BEEN MET

This Commission should not consider the transition issue in this proceeding, but rather should follow the FCC's guidance and allow the parties first to negotiate the details of the transition under established Section 252 negotiation procedures. Then, if the parties fail to reach a negotiated agreement, this Commission can determine the appropriate contractual provisions for transition in a separate arbitration proceeding regarding the terms for amendments to interconnection agreements in connection with the *TRO*.

AT&T and Allegiance argue that this Commission should establish a lengthy "transition" period for any routes (for transport) or customer locations (for loops) where the Commission finds that the triggers have been met.¹⁹⁹ While the details differ, both proposals seek a guarantee that transport and loops for which this Commission has found "no impairment" would still be available as UNEs at TELRIC prices for a year or much more. Apparently this blanket determination would supersede the provisions of individual interconnection agreements or whatever the parties might agree to contractually regarding the transition. The Commission should reject these proposals.

¹⁹⁹ AT&T St. 1.0 (Kirchberger/Nurse Dir.) at 152-152; Allegiance St. 1 (Anderson Dir.) at 9-10.

First, transition is not among the limited issues the FCC directed this Commission to consider within the mandatory 9-month deadline.²⁰⁰ Given the significant amount of work the Commission must complete in its nine-month triggers review, it should not add an issue that the *TRO* permits to be addressed through a different procedure.

Second, the *TRO* itself provides guidance on the form that any transition should take. The FCC declined to impose a specific transition period for transport and loops (such as the periods AT&T and Allegiance suggest here), but rather chose to defer to the existing Section 252 process where the parties would negotiate amendments to interconnection agreements and submit any disputes to the state commissions for arbitration.²⁰¹ The FCC explained that “[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and 252.” (*TRO* ¶ 701). Thus, “except as expressly provided above . . . we decline to establish . . . a transition period and find, instead, that contract arrangements should govern. We note, however, that the practical effect of this negotiation of new terms may be that parties are provided a transition period.” (*TRO* ¶ 701).

Consistent with the framework adopted in the *TRO*, on October 2, 2003, Verizon posted on its website a draft interconnection agreement amendment reflecting the new rules, and sent industry letters to CLECs notifying them that this draft *TRO* amendment was available.²⁰² The text of that proposed amendment, which is quoted in Verizon’s testimony, provides that upon the effective date of any Commission finding of non-impairment with respect to loop or transport

²⁰⁰ The FCC’s loop rules limit the nine-month state loop proceedings to the triggers review contained in rules 319(a)(4) – (6). 47 C.F.R. §51.319(a)(7). Likewise, the transport rules limit the nine-month transport proceedings to the triggers review contained in rules 319(e)(1) – (3). The trigger rules do not discuss adoption of a transition plan. 47 C.F.R §§ 51.319(a)(4) – (6) and (e)(1) – (3).

²⁰¹ *TRO* ¶ 700 (“Although some parties believe that the contract modification process requires Commission intervention in this instance, we believe that individual carriers should be allowed the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from differing interpretations of our rules.”)

facilities, Verizon would *not* simply stop providing loops or transport to CLECs. Instead, Verizon would provide Pennsylvania CLECs with 30 days' notice that it intends to discontinue provisioning, as a UNE, the applicable facility in the subject location(s), and upon the passage of the 30 day period, unless the CLEC submits LSRs/ASRs (as appropriate) to disconnect the subject facility, VZ *will continue provisioning the facility* as an access service (where an analogous access service exists).²⁰³

A number of carriers (including parties to this case) have submitted letters to Verizon commenting upon changes associated with the *TRO*, including Verizon's draft TRO amendment. However, thus far relatively few carriers have provided many substantive comments on that amendment.²⁰⁴ If the parties are unable to reach agreement on an amendment within 135 days after October 2, 2003, either party may request arbitration and the Commission can decide the appropriate contractual transition mechanisms in the context of a separate Section 251/252 arbitration proceeding. Imposing a blanket transition period or procedure now, as AT&T and Allegiance suggest, would be doing precisely what the FCC declined to do and would eliminate the parties' incentive to negotiate their own terms.

In sum, while the FCC does "expect" state commissions to "require an appropriate period for competitive LECs to transition" from any transport and loops that they find should not be unbundled (*TRO* ¶¶ 339 and 417), the Commission can (and should) follow the FCC's lead and address the transition period issue in a separate arbitration proceeding to determine the terms for amendments to interconnection agreements in connection with the *TRO*.

²⁰² VZ St. 1.2 (West/Peduto Reb.) at 105.

²⁰³ *Id.* at 105-107.

²⁰⁴ *Id.* at 107.

VII. SECTION 271 AND STATE LAW ISSUES

The PCC seeks to nullify the entire delegated triggers proceeding by arguing that -- even if this Commission finds the FCC's triggers to be satisfied and thereby finds "non-impairment for any element, route or geographic area" -- it should nonetheless require Verizon to unbundle the same elements under "state law" and "in conjunction with Section 271 of the Telecommunications Act."²⁰⁵ But the law is clear that neither section 271 nor the *Global Order* provides a basis for this Commission to require Verizon to continue to unbundle elements for which it has found "no impairment" under the *TRO*'s mandatory triggers analysis. The PCC is urging the Commission to impose requirements that directly conflict with federal law. The Commission should instead confine its determination here to the only issue properly before it -- whether the FCC's mandatory triggers have been satisfied and require a finding of no impairment.²⁰⁶

A. This Commission Has No Authority To Require Unbundling Under Section 271 Of The Telecommunications Act

The PCC's reliance on section 271 of the Telecommunications Act (47 U.S.C. § 271) to ask this Commission to impose independent and contrary unbundling obligations is misplaced. Section 271 is a *federal* statute that vests authority only in *the FCC*; it clearly does not provide *this Commission* with a legal basis to require Verizon to continue to unbundle parts of its network in the face of a "no impairment" finding. The authority provided under section 271 is clear,

²⁰⁵ PCC St. 1.0 (Schwencke, Malfara and Dulin Dir.) at 64.

²⁰⁶ The PCC makes no secret of the fact that its state law argument relies on the Commission's December 18, 2003 Order in the 90-day proceeding, and particularly the Commission's dicta discussing the requirements of the *Global Order* and Verizon's independent obligation to unbundle circuit switching under section 271 of the Act, in connection with the Commission's erroneous decision to "maintain[] the status quo" and require Verizon to continue to unbundle enterprise switching at current rates. Verizon filed a Petition for Reconsideration of this portion of the December 18 Order, and the Commission granted reconsideration for purposes of considering the merits of those arguments. Verizon's Petition for Reconsideration asked the Commission to eliminate the unnecessary dicta regarding continuing obligations, which conflicts with federal law. In any event, as discussed below, the law is clear that neither Section 271 nor state law provide a basis for this Commission to require unbundling once the triggers are met.

specific and limited. The FCC, and the FCC alone, is authorized to approve or deny a Bell Operating Company's ("BOC's") application to provide InterLATA long distance service under section 271, if *the FCC* determines that certain enumerated conditions have been met.²⁰⁷ The role of state commissions is limited to providing "consultation" to the FCC when a section 271 application is made.²⁰⁸

It is for this reason that when the FCC approved Verizon's section 271 application for Pennsylvania in 2001, this Commission itself did not determine whether Verizon had satisfied its section 271 obligations in the Commonwealth, but instead provided the FCC with a consultative report to aid the FCC in its determination of this point.²⁰⁹ After authority has been granted, section 271 provides that *only the FCC* "after notice and opportunity for a hearing" is empowered to determine whether a BOC has "ceased to meet" any of its 271 conditions and *only the FCC* may issue an order to "correct the deficiency," impose a penalty, or suspend or revoke approval.²¹⁰ As the FCC stated in the *TRO*, "[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."²¹¹

²⁰⁷ See 47 U.S.C. § 271(d)(3); see also, *Order Closing Investigation, Commonwealth of Massachusetts Department of Telecommunications and Energy, Proceeding by the Department on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops*, (D.T.E. 03-59) (November 25, 2003) ("*Massachusetts Enterprise Switching Order*") at 19 ("The Department . . . does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271.").

²⁰⁸ 47 U.S.C. § 271(d)(2)(B).

²⁰⁹ See *Consultative Report of the Pennsylvania Public Utility Commission, Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc, and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania* (CC Docket No. 01-138) (filed June 25, 2001).

²¹⁰ 47 U.S.C. § 271 (d)(6)(A).

²¹¹ *TRO* ¶ 665.

In its *TRO*, the FCC concluded that “BOC obligations under section 271 are not necessarily relieved based on any determination we [the FCC] make under the section 251 unbundling analysis.”²¹² However, it is for the FCC, not this Commission, to determine if there remains a section 271 obligation for any of the elements at issue here. Moreover, the *TRO* is clear that state commissions have *no* role in the pricing of a network element that must be unbundled solely by virtue of a 271 obligation, and that TELRIC pricing does not apply.²¹³

Finally, the PCC appears to argue that section 271 provides an independent basis to continue to require Verizon to provide the UNE platform, even where this Commission has found “no impairment” for the local switching portion of the platform. (PCC St. 1.0 at 65). Section 271, however, does not authorize combinations of UNEs such as the UNE platform, and the FCC has specifically “declin[ed] to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251.” *TRO* ¶ 655, n. 1990.²¹⁴

Therefore, even if this Commission had authority to impose requirements under section 271 – which it does not – section 271 could not provide a basis to require TELRIC pricing or to require combinations of UNEs such as the UNE platform.

²¹² *Id.* ¶ 655.

²¹³ Section 271 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* [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).” *TRO* ¶ 664. The FCC explicitly concluded that section 271 “*does not require TELRIC pricing.*” *TRO* ¶ 659 (emphasis added). *See also TRO* ¶ 656 (“Contrary to the claims of some commenters, TELRIC pricing for checklist network elements that have been removed from the list of section 251 UNEs is neither mandated by 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.*” For this reason, “section 271 requires these elements to be unbundled, *but not using the statutorily mandated rate under section 252.*”) (emphasis added).

²¹⁴ The plain statutory language of section 271 does not permit any conclusion other than the FCC’s correct finding that combinations such as the UNE platform are not required by section 271. As the FCC itself recognized, section 271, “[u]nlike section 251(c)(3)” contains “no mention of ‘combining’” and does not “refer back to the combination requirement set forth in section 251(c)(3).” *TRO* ¶ 655, note 1990.

B. This Commission Cannot Rely On The *Global Order* To Attempt To Require Unbundling Where The FCC’s Mandatory Triggers Have Been Satisfied

To the extent the PCC is relying on the *Global Order* as providing an independent state law basis beyond sections 251 and 271 of the Telecommunications Act to require continued unbundling – particularly with regard to the UNE platform – this argument must fail for several reasons.

1. Federal Law Would Preempt any Unbundling Requirement Where the Triggers Require a Finding of “No Impairment”

Even assuming this Commission had independent state unbundling authority – which as discussed below it does not – any attempt to order unbundling of elements where there is “no impairment” under the *TRO*’s mandatory trigger standards would directly conflict with and be preempted by federal law. The *TRO* specifically rejected arguments by some carriers that “states may impose any unbundling framework they deem proper under state law, without regard to the federal regime.”²¹⁵ 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.”²¹⁶ 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 requirements of section 251 and do not ‘substantially prevent’ the implementation of the federal regulatory regime.”²¹⁷

The FCC expressly rejected as contrary to “long-standing federal preemption principles” the argument that a state commission’s unbundling requirements are not preempted if they share a

²¹⁵ *Id.* ¶ 192. See also *id.* ¶ 187 (“states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations.”) 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.

²¹⁶ *TRO* ¶ 192.

²¹⁷ *Id.* ¶ 193.

common regulatory goal with the federal scheme, but differ from the FCC’s rules.²¹⁸ The U.S. Supreme Court has repeatedly held that state 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.”²¹⁹ 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.”²²⁰

Any attempt to conclude that state law requires unbundling even in cases where there is no CLEC “impairment” would be contrary to and would substantially prevent the implementation of federal law, and therefore would be preempted and subject to vacatur on federal-court review.²²¹ For that reason, if the Commission concludes – as it must on this record – that the mandatory triggers are met for certain elements, the Commission cannot rely on state law to support a conflicting requirement.

²¹⁸ *Id.* ¶ 193 and 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”).

²¹⁹ *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”).

²²⁰ *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 445 (7th Cir. August 12, 2003).

²²¹ According to the FCC, “[i]f 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).” *Id.* ¶ 195. 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.” *Id.*

2. There Is No Statute that Expressly Empowers this Commission To Order Unbundling Beyond that Required by Section 251 of the Federal Telecommunications Act

Implicit in the PCC's argument is the premise that the *Global Order* would continue to provide an independent state law basis to require Verizon to provide the UNE platform for "customers at or under \$80,000 TBR" regardless of whether the FCC's triggers for switching are satisfied. (PCC St. 1.0 at 64). Closer scrutiny of the *Global Order* shows that this is not true.

The Commission cannot endow itself with authority to require unbundling; if it exists at all, such power must have been expressly conferred by statute.²²² The only *statutory* sources of authority the Commission cited in the *Global Order* were section 251 of the federal Telecommunications Act and the state Chapter 30 statute.

To the extent the Commission was relying on authority delegated by the federal Telecommunications Act, it plainly cannot continue to require unbundling under that authority in the face of a mandatory "no impairment" finding under the triggers. The Commission is bound by the FCC's interpretation of the Act's requirements, including the FCC's view of what is required for the mandatory "necessary and impair" analysis.²²³ If this Commission has found the triggers to be satisfied, it has necessarily found that there is no "impairment" and that unbundling is not required under section 251. Thus, even if the Commission has unbundling authority under this federal statute, it cannot require unbundling under section 251 where there is no "impairment."²²⁴

To the extent the *Global Order* was relying on "Chapter 30" as a "source of state law for requiring the unbundling of network elements," it specifically referred to 66 Pa. C.S. § 3005(e)(1),

²²² *Process Gas Consumers Group v. PUC*, 511 Pa. 88, 96, 511 A.2d 1315, 1319 (1986) ("The power and authority to be exercised" by this Commission "must be conferred by legislative language clear and unmistakable. A doubtful power does not exist.").

²²³ See 47 U.S.C. § 251(d)(2) (describing the requirements of the necessary and impair analysis).

²²⁴ 47 U.S.C. § 251(d)(2); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

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...” *Global Order* at 67. Of course, this section by its own terms only applied to services that this Commission had declared “competitive” under Chapter 30 – which does not currently include basic residential or small business service. Even with regard to “competitive” services, however, basic service functions are defined as those components of the network “which are *necessary* to provide a telecommunications service . . .” Chapter 30 thus incorporates the same kind of limitation as the “necessary and impair” standard under the Act and should be interpreted consistently with the Act. More important, even if this power did exist at the time of the *Global Order*, ***the Chapter 30 statute has expired*** and cannot be relied upon now to continue to require unbundling. In any event, 66 Pa. C.S. § 3005(e)(1) does not authorize TELRIC pricing or combinations of elements such as the UNE-platform.

Moreover, even if there were any Chapter 30 unbundling authority, it still could not be used to require unbundling in a manner that is inconsistent with the federal regime regarding unbundling, or it would be preempted for the reasons discussed above.

Finally, even if the *Global Order* continued to have any basis to stand as an independent state law requirement to provide the UNE platform – which as discussed above it does not – the *Global Order* itself provided that its UNE platform requirement for customers with less than \$80,000 total billed revenue (“TBR”) would expire on December 31, 2003 if Verizon demonstrated that “the provision of service is not impaired.” *Global Order* at 90. If this Commission determines that the FCC’s mandatory triggers are satisfied with respect to mass market switching in any particular market, then it necessarily will have concluded on a detailed evidentiary record that CLECs are “not impaired” without access to switching in those areas.

Therefore, the Commission will have already conducted the impairment analysis referred to in the *Global Order* as the standard for eliminating the UNE platform. Indeed, this Commission could not conclude that there is “impairment” if it has found the FCC’s mandatory trigger standards to compel a finding of “no impairment,” so this Commission would have to conclude that any UNE platform requirement from the *Global Order* has expired.

In short, if this Commission finds that CLECs are not impaired without UNE access to unbundled mass market switching, transport or high capacity loops in this proceeding, then it is outside this Commission’s authority to attempt to impose the very same unbundling obligations it just eliminated through some “back door” reliance on section 271 or the *Global Order*.

VIII. CONCLUSION

The record developed before this Commission compels the conclusion that the FCC’s mandatory and objective “triggers” are satisfied for mass market switching, dedicated transport and high capacity loops in the areas described in Verizon’s testimony.



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February 17, 2004

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EXHIBITS 1 AND 2 ARE PROPRIETARY

Street Address	BLD CLLI	CLECs Counting Towards Triggers	Dark Fiber Trigger	DS-3 Self Provisioning Trigger	DS-3 Wholesale Trigger	DS-1 Wholesale Trigger
3 Bala Plz, Bala Cywyd, PA	BCYNPA02	003	X	X	X	
		026	X	X	X	
251 Saint Asaphs Rd, Bala Cywyd, PA	BCYNPAAE	003	X	X	X	
		026	X	X	X	
1 Belmont Ave, Bala Cywyd, PA	BCYNPAAI	003	X	X		
		026	X	X		
231 Saint Asaphs Rd, Bala Cywyd, PA	BCYNPAAN	003	X	X	X	
		026	X	X	X	
1 Bala Ave, Bala Cywyd, PA	BCYNPABO	003	X	X		
		026	X	X		
1205 Westlakes Dr, Berwyn, PA	BWYNPAAO	003	X	X	X	
		026	X	X	X	
747 Dresher Rd, Horsham, PA	HRHMPAAP	003	X	X	X	
		026	X	X	X	
1100 1st Ave, King of Prussia, PA	KGPRPA33	003	X	X		
		026	X	X		
150 S Warner Rd, King of Prussia, PA	KGPRPAAB	003	X	X		
		026	X	X		
1150 1st Ave, King of Prussia, PA	KGPRPAFA	003	X	X	X	
		026	X	X	X	
230 Mail Blvd, King of Prussia, PA	KGPRPAWH	003	X	X		
		026	X	X		
101 Lindenwood Dr, Malvern, PA	MLVRPAAL	003	X	X	X	
		026	X	X	X	
100 Vanguard Blvd, Malvern, PA	MLVRPABH	003	X	X		
		026	X	X		
1000 Forge Ave, Norristown, PA	NRTWPAFQ	026	X	X		
		053	X	X		
2400 Market St, Philadelphia, PA	PHLAPA03	026	X	X		
		053	X	X		
2005 Market St, Philadelphia, PA	PHLAPAAQ	003	X	X	X	
		026	X	X	X	
1900 Market St, Philadelphia, PA	PHLAPAAAT	003	X	X	X	
		026	X	X	X	
30 S 17th St, Philadelphia, PA	PHLAPABM	003		X	X	
		026		X	X	
60 Walnut St, Philadelphia, PA	PHLAPABP	003	X	X	X	
		026	X	X	X	
1500 Market St., Philadelphia, PA	PHLAPACS	003	X	X	X	
		026	X	X	X	
		053		X		
1835 Market St., Philadelphia, PA	PHLAPAEC	003	X	X	X	
		026	X	X	X	
1735 Market St., Philadelphia, PA	PHLAPAHK	003	X	X	X	
		026	X	X	X	
1515 Market St., Philadelphia, PA	PHLAPAHN	003	X	X	X	
		026	X	X	X	
1700 Market St., Philadelphia, PA	PHLAPAIN	003	X	X	X	
		026	X	X	X	
2001 Market St., Philadelphia, PA	PHLAPAJY	003		X	X	
		026		X	X	
701 Market St., Philadelphia, PA	PHLAPAKK	003	X	X		
		026	X	X		
1650 Market St., Philadelphia, PA	PHLAPALP	003	X	X	X	
		026	X	X	X	
2401 Locust St., Philadelphia, PA	PHLAPALU	053	X	X	X	X
		026	X	X	X	X
399 Market St., Philadelphia, PA	PHLAPAMR	003	X	X		
		026	X	X		
2301 Market St., Philadelphia, PA	PHLAPAPB	003	X			
		053	X			
1601 Market St., Philadelphia, PA	PHLAPASI	003	X	X	X	
		026	X	X	X	
500 S 27th St, Philadelphia, PA	PHLAPASL	053	X			X
		026	X			X

Pennsylvania Customer Locations Meeting FCC's Loop Triggers

Street Address	BLD CLLI	CLECs Counting Towards Triggers	Dark Fiber Trigger	DS-3 Self Provisioning Trigger	DS-3 Wholesale Trigger	DS-1 Wholesale Trigger
1600 Market St., Philadelphia, PA	PHLAPASM	003	X	X	X	
		026	X	X	X	
1617 John F. Kennedy Blvd., Philadelphia, PA	PHLAPASU	003	X	X	X	
		026	X	X	X	
1801 Market St., Philadelphia, PA	PHLAPATP	003	X	X		
		026	X	X		
1635 Market St., Philadelphia, PA	PHLBPAFD	003	X	X		
		053	X	X		
		026	X	X		
2300 Chestnut St., PA	PHLBPAFU	003	X	X		
		053	X	X		
		026	X	X		
401N. Broad St., Philadelphia, PA	PHLHPACP	053	X			
		026	X	X	X	X
		007	X	X	X	X
625 Liberty Ave., Pittsburgh, PA	PITBPACG	003	X	X	X	
		026	X	X	X	
717 Liberty Ave., Pittsburgh, PA	PITBPAQL	003	X	X	X	
		026	X	X	X	
1400 Penn Ave., Pittsburgh, PA	PITBPAFH	003	X	X		
		026	X	X		
60 Blvd. Of Allies, Pittsburgh, PA	PITBPAGF	003		X	X	
		026		X	X	
120 5th Ave., Pittsburgh PA	PITBPAIK	003	X	X	X	
		026	X	X	X	
1627 Penn Ave., Pittsburgh, PA	PITBPAIS	003	X	X		
		026	X	X		
436 7th Ave., Pittsburgh, PA	PITBPAKP	003	X	X	X	
		026	X	X	X	
3126 Liberty Ave., Pittsburgh, PA	PITBPALA	003	X	X	X	
		026	X	X	X	
1001 Liberty Ave., Pittsburgh, PA	PITBPALC	003	X	X		
		026	X	X		
1 Station Sq., Pittsburgh, PA	PITBPALM	003	X	X		
		026	X	X		
500 Grant St., Pittsburgh, PA	PITBPAMC	003	X	X	X	
		026	X	X	X	
535 Smithfield ST., Pittsburgh, PA	PITBPAOL	003	X	X	X	
		026	X	X	X	
210 6th AVE, Pittsburgh, PA	PITBPAOP	003	X	X	X	
		026	X	X	X	
6 PPG PL, PITTSBURGH, PA	PITBPARO	003		X	X	
		026	X	X	X	
		012	X	X	X	
600 Grant St., Pittsburgh, PA	PITBPAUS	003	X	X	X	
		026	X	X	X	
11 Starwix Al., Pittsburg, PA	PITBPAWH	003	X	X	X	
		026	X	X	X	
500 Rosa St., Pittsburgh, PA	PITDPA88	003	X	X		
		026	X	X		
525 William Penn Way, Pittsburgh, PA	PITEPA14	003	X	X		
		026	X	X		
249 5th Ave., Pittsburgh, PA	PITEPAJN	003		X		
		026		X		
3170 Sassafras Way, Pittsburgh, PA		021	X		X	X
		026	X		X	X
416 7th Ave., Pittsburgh, PA		026	X		X	X
		012	X		X	X
635 Grant St., Pittsburgh, PA		026	X		X	X
		012	X		X	X

Street Address	BLD CLLI	GLECa Counting Towards Triggers	Dark Fiber Trigger	DS-3 Self Provisioning Trigger	DS-3 Wholesale Trigger	DS-1 Wholesale Trigger
455 Devon Park Dr., Wayne PA	WAYNPA04	003	X	X		
		026	X	X		
190 S Warner Rd., Wayne, PA	WAYNPA18	003		X	X	
		026		X	X	
690 Lee Rd., Wayne, PA	WAYNPA38	003	X	X	X	
		026	X	X	X	
640 Lee Rd., Wayne, PA	WAYNPAAP	003	X	X		
		026	X	X		
170 S Warner Rd, Wayne, PA	WAYNPABC	003	X	X		
		026	X	X		
595 E Swedesford Road, Wayne, PA	WAYNPADA	003	X	X		
		026	X	X		

CERTIFICATE OF SERVICE

I, Suzan D. Paiva, hereby certify that I have this day served a copy of Verizon Pennsylvania Inc.'s and Verizon North Inc.'s Main Brief, Set III, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 17th day of February, 2004.

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